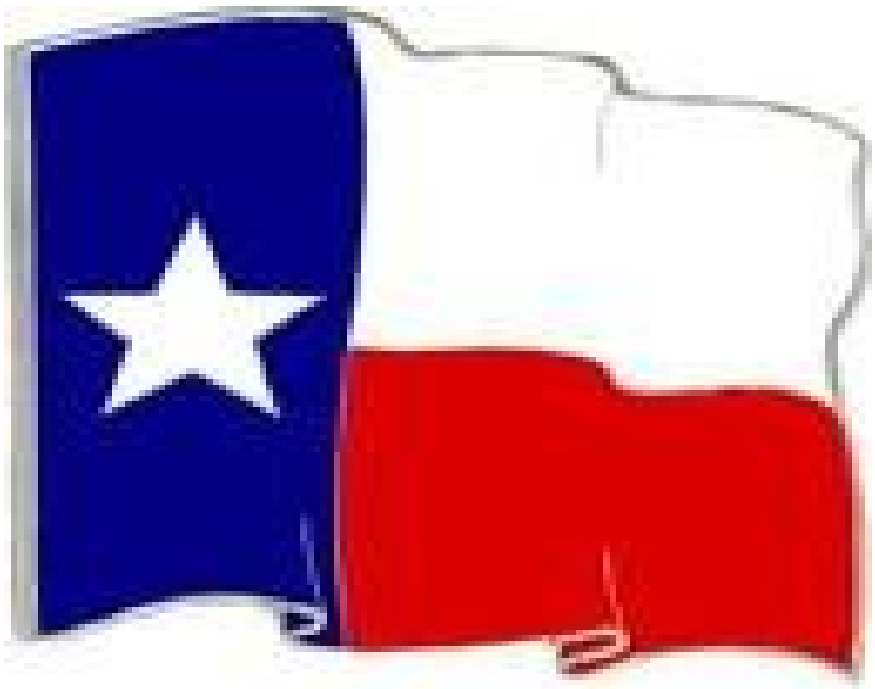

State of Texas

Contract Management Guide

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STATE OF TEXAS CONTRACT MANAGEMENT GUIDE VERSION HISTORY

Statewide Contracting is responsible for updating the Contract Management Guide (CMG) on behalf of TPASS as indicated in *Texas Government Code, Section 2262.051*. The CMG provides suggestions and best practices to improve statewide contracting practices. Statewide Contracting coordinates release and revisions of the guide with members of the state contracting community and the Contract Advisory Team.

Release / Revision Date	Contract Management Guide Version	Description
September 2009	1.7	**Version 1.7 CMG release.** Revisions reflect changes to CMG as submitted by the Contract Monitoring Office edited by the Contract Advisory Team (CAT). Additions to the CMG include: **Ch. 7**, Pgs. 61, 62, 65, 66, 68, 69, 70, 74, 75, 76, and 80. **Ch. 8**, Pgs. 81, 82.
September 2011	1.8	**Version 1.8 CMG release**. Revisions reflect changes to the entire CMG as revised by the Contract Advisory Team (CAT). The purpose of revisions to the entire CMG is to update information, provide additional information and guidance for contract management practices. Revisions made to **Introduction, Definitions, Chapter's 1 thru 8 and Appendixes. * Note: Chapter 8 has been eliminated and the information incorporated into Chapter 7.**
December 2011	1.9	**Pg. 12 Conflict of Interest.** Correction made to this section on page 13, the third (3rd) paragraph of section, first (1st) bullet. This statement was incorrectly written and has been revised with the correct information.
April 2013	1.10	**Pg. 93 of Chapter 7 Contract Administration**. The first paragraph of the section revised to add reporting to the Texas Procurement and Support Services division and the addition of the Vendor Performance Report. The second paragraph added to this section as a new paragraph addressing Vendor Performance.
September 2013	1.11	**Pg. 16 Chapter 1 Contract Advisory Team** has been revised to reflect changes to CAT as adopted during the 83rd Legislative session. **Pg. 118 Appendix 1 RFP Template, X. Indemnification** clause revised by the Contract Advisory Team. **Pg. 164 Appendix 9 Contract Terms, 9.26 Indemnification/Damage Claims** clause revised by the Contract Advisory Team, **Pg. 192 Essential Clauses, Confidential Information** clause revised to reflect additional wording as required by SB1368 where a contractor is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the state**. Pg. 201 Recommended Clauses, Proprietary Information** clause revised to reflect wording required by SB1368
March 2014	1.12	**Pg. 3 Introduction, Professional Certification.** Information has been revised to include detailed information related to the Certified Texas Contract Manager (CTCM) certifications and the Certified Texas Procurement Manager (CTPM) certification.

Release / Revision Date	Contract Management Guide Version	Description
September 2014	1.13	**Pg. 37 Chapter 3 Preparing the Solicitation, Use of Hyperlinks in a solicitation.** Added information regarding the use of hyperlinks in a solicitation addressing concerns about potential problems. **Pg. 118 of Appendix 1, X. Indemnification.** Revised to new version developed by the Contract Advisory Team (CAT). **Pg. 134 HUB Subcontracting Plan form.** Revised to new form created February 2012. **Pg. 161 of Appendix 9, Contract Terms, 9.9 Confidentiality and Public Information Act.** Second paragraph added requiring public information not otherwise exempt be made available in a format that is accessible by the public at no additional charge to the state. **Pg. 165 of Appendix 9, Contract Terms, 9.26 Indemnification.** Revised to new version developed by the Contract Advisory Team (CAT). **Pg. 171 Affirmation Clauses, Executive Order 13224.** Excluded Parties List System (EPLS) replaced with Federal General Services Administration's System for Award Management (SAM).
September 2015	1.14	**Pg. 9 Introduction, Contract Management Handbook TGC Section 2261.256(b)** Per SB 20 state agencies to develop a handbook for contract management practices, **Pg. 11Training, TGC 2155.078(a)(b),** Per SB 20 additional training requirements for contracting, **Pg. 21 Ethics Training TGC Section 2155.078(a),** Per SB 20 Ethics training required for contract management personnel, **Pg. 22 Certain Employment for Former State Officers or Employee Restricted, TGC Section 572.069,** Per SB 20 former state officers or employees restricted employment with former contractors, **Pg. 23 Disclosure of Potential Conflicts of Interest; Certain Contracts Prohibited, TGC Section 2261.252(a)(b)(c)(d),** Per SB 20 state employee or official shall disclose any potential conflict of interest in contracting activities, **Pg. 31 Accountability and Risk Analysis Procedure,** Per SB 20 state agencies shall develop and comply with a purchasing accountability and risk analysis procedure, **Pg. 41 Contracts with a Value Exceeding One Million Dollars**, Per SB 20 state agencies shall develop and implement contract reporting requirements, **Pg. 42 Contracts with a Value Exceeding Five Million Dollars,** Per SB 20 state agencies shall develop and implement contract reporting requirements, **Pg. 42 Procurement Lead Time,** Added definition of lead time, **Pg.47 Contracts for Certain Services**, Per SB 20 contract requirements related to DIR type items, **Pg. 47 Purchasing from DIR Cooperative Contracts**, Per SB 20 state agencies required to obtain pricing requests based on dollar values, **Pg. 48 Posting Certain Documents Relating to Contract Solicitations for DIR,** Per SB 20, DIR to post solicitations related to a contract to the CAPPS system, **50. 43 Use of Hyperlinks,** Addition of information related to use of hyperlinks in solicitation and contract documents, **Pg. 62 Verification of Use of Best Value Standard,** Per SB 20, state agency to verify used of best value standard/factors in solicitations, **Pg. 64 Enhanced Contract Performance Monitoring,** Per SB 20,state agencies required to establish a procedure identifying each contract requiring enhanced contract or performance monitoring (i.e., high risk, high dollar), Pg. **68 Required Posting of Certain Contracts,** Per SB 20, state agencies required to post each contract for goods or services from a private vendor to its Internet website, **Pg. 69 Barring Vendors from Participating in State Contracts**, Per SB 20, state agencies may bar vendors from state contracts due to substandard performance, repeated unfavorable performance reviews and repeated unfavorable classifications received by vendor, **Pg. 104 Enhanced Contracting and Performance Monitoring,** Per SB 20,state agencies required to establish a procedure identifying each contract requiring enhanced contract or performance monitoring (i.e., high risk, high dollar), **Pg. 111 Vendor Performance Reports**, Added Texas Government Code, Section

		2155.089(a)(b) to section on Vendor Performance Reports, **Pg. 119 State Agency Reporting of Contracting Information,** Per SB 20, State agencies required to report contract and purchasing information in the uniform manner as developed and required by the comptroller, , **Pg. 120 Retention of Contract and Related Documents by State Agencies,** Per SB 20, state agencies required to retain contract solicitation documents for seven (7) years now instead of four (4), **Pg. 122 Reporting Vendor Performance,** Requirements for reporting vendor performance of contracts for $25,000 or more and per SB 20 new comptroller evaluation and rating system for vendors on an A through F scale, **Pg. 173 12.37 Drug Free Work Place,** Revised to reflect updated information per general counsel, **Pg. 175 HUB Subcontracting Form,** Revised based on 10/2014 revisions, Pg. 206 9.45 Supporting Documents, Retention; Right to Audit; Independent Audits. Per SB 20 revised retention time from four (4) years to seven (7) years, and updated TGC 2262.003 to TGC 2262.154,**Pg.** 210, 231, **TGC 669.003,** Revised clause addressing TGC 669.003 per CAT Team, **Pg.237 Ownership/Intellectual Property, including Rights to Data, Documents and Computer Software,** Per SB 20 revised retention time from four (4) years to seven (7) years, and updated TGC 2262.003 to TGC 2262.154, Pg. 215 Right to Audit, Updated TGC 2262.003 to TGC 2262.154, **Pg. 241 Drug Free Work Place,** Revised to reflect updated information per general counsel, Added Appendix 16 Contract Management Guide Technology Addendum
March 1, 2016	1.15	**Pg. 21 CERTIFICATE OF INTERESTED PARTIES (FORM 1295)** Added information related to HB 1295 form required where a governmental entity or state agency may not enter into certain contracts with a business entity unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. The law applies only to a contract of a governmental entity or state agency that either (1) requires an action or vote by the governing body of the entity or agency before the contract may be signed or (2) has a value of at least $1 million. **Pg. 193 Appendix 7B Disclosure Statement for Purchasing Personnel,** Revised appendix document to correct dollar amount of major contract to $1 million where it currently reads, "*A major contract is a contract with a value of at least $10 million.* (Texas Government Code, Section 2262.001(4))" to read "*A major contract is a contract with a value of at least $1 million.* (Texas Government Code, Section 2262.001(4))." .

INTRODUCTION

Contract management is the coordination and management of four core processes:

• Planning;

• Procurement;

• Contract Formation/Rate/Price Establishment and other relevant terms and conditions; and

• Contract Administration.

Texas law governs certain aspects of contracting for state agencies. Various types of purchases and contracts may be subject to different statutory standards, practices, processes, and strategies for successful implementation. The suggestions, comments, techniques, examples and recommendations included in this Guide are **NOT** appropriate for every type of contract. The nature and level of risk associated with each of these elements vary depending on the nature of the business relationship.

PURPOSE

The purpose of the Contract Management Guide (CMG) is to offer state agency contract managers recommendations on improving existing contract management processes and practices. The Contract Management Guide (CMG) is not designed to relieve the state agencies and contractors of their responsibility to ensure compliance with laws, rules, and regulations related to their specific programs and funding sources. A Contract Manager is responsible for coordinating the processes required for effective contract management. Contract Management is about planning, forming, and administering contracts. Contract management may involve a variety of distinct disciplines and roles including:

1. Executive Management;

2. Organization Management;

3. Project Management;

4. Planning;

5. Program Staff (subject matter experts and monitors);

6. Contractor Management;

7. Purchasers;

8. Accounting/Budget;

9. Legal;

10. Audit; and

11. Quality Control/Assurance;

CONTRACT MANAGEMENT HANDBOOK

State agencies are required to prepare and publish a contract management handbook that establishes consistent contracting policies and practices to be followed by the agency. The agency's handbook must be consistent with the Comptroller's contract management guide. The agency's handbook may include standard contract provisions and formats for the agency to incorporate in its contracts. Texas Government Code, Section

2261.256(b). The agency's contract management handbook will be a guide for agency personnel involved in the development and management of contracts that commit the agency. It does not attempt to address all issues that may need to be considered in a particular circumstance. For complex or unusual contracts staff should see specific legal assistance as early as possible in the contracting process.

THIS GUIDE:

- Provides practical suggestions as well as best practices to improve agency contracting practices. Appendix 15 includes a best practices matrix designed to help agencies determine where a contract management program currently stands in relation to generally accepted contract management best practices. This matrix offers a number of best practices in several key contract management areas and is recommended for use to improve practices and to implement the best contract management program possible. The matrix is intended to assist agencies with organizing contract management programs and leveraging technology, metrics, training and lessons learned for the purpose of minimizing risks throughout the overall supply chain. The matrix also includes a reference section that points to the applicable areas of the Contract Management Guide (CMG) or Procurement Manual with respect to each contract management component. Since the needs of each agency and requirements of each contract are different, the information in the CMG is intended to be applied flexibly, not mechanically. However, the CMG provides a framework which agencies should use to make contracting decisions that are in the best interest of the State.

- Describes the duties of a contract manager, including how to develop and negotiate a contract, select a contractor, and monitor contractor and subcontractor performance.

- Supplements but does not replace existing statutory requirements and agency rules, policies and procedures. Each agency is independently responsible for developing sound business procedures in accordance with applicable federal and state laws, regulations, policies and procedures.

- Is not intended to be a manual on the law of contracts or constitute legal advice. General principles of law will be discussed, but these are only general principles which include many exceptions. A Legal Reference Section provided at the end of CMG will provide general information regarding contracting issues within the contract management process. ***ALWAYS CONSULT AN ATTORNEY FOR LEGAL ADVICE CONCERNING CONTRACTS.***

- Includes model contract provisions, distinguishing between essential, recommended and optional contract provisions.

- Addresses the maximum contract term, after which a new competitive solicitation must be issued.

- Recommends time frames for the solicitation, evaluation, negotiation and awarding of a major contract.

- Establishes the procedure through which state agencies must consult with the Contract Advisory Team before issuing a solicitation for a major contract.

- Establishes the procedure agencies must use in attempting to determine why a single response is submitted to an agency procurement solicitation.

How the CMG is Organized

The CMG is a companion to the State of Texas Procurement Manual (Procurement Manual) and both should be used to achieve maximum benefit. Where appropriate, links are provided to the Procurement Manual to provide detailed information not included in the CMG.

In addition, a Legal Reference Section is provided at the end of the CMG to provide assistance to agency purchasing departments and legal staff regarding applicable legal cites and case law. Where appropriate, links to the Legal Reference Section are provided throughout the CMG. The Legal Reference Section should not be used by purchasing department staff in lieu of consultation with legal staff.

Training

A keen understanding of the contracting process and the ability to effectively work within it is paramount to the success of all state agencies. Contracts are the vehicles through which essential goods and services are provided or performed. State agency contract management and purchasing personnel are required to receive the training outlined in Texas Government Code, Section 2262.053 and Section 2155.078 prior to performing any duties assigned to a contract manager or purchaser. To implement this requirement, the Comptroller of Public Accounts has established and administers a system of training, continuing education, and certification for state agency procurement and contract management personnel, including rules and guidelines related to monitoring a certified purchaser's compliance with the continuing education requirements as amended in Texas Government Code, Section 2155.078.

The training, continuing education, and certification required includes training on the selection of an appropriate procurement method by project type and training conducted by the Department of Information Resources on purchasing technologies. The training also includes required ethics training. All state agency purchasing personnel, including agencies exempted from the purchasing authority of the Comptroller, must receive the training and continuing education to the extent required by rule of the Comptroller's office.

A state agency employee who is required to receive the training may not participate in purchases by the employing agency unless the employee has received the required training or received equivalent training from a national association recognized by the Comptroller.

Professional Certification

All state agency contract management and purchasing personnel must be trained and certified to the extent required by state law and the administrative rules of the Texas Comptroller of Public Accounts (CPA). See Texas Government Code, Chapter 2262 Statewide Contract Management, Section 2262.053 Training and Texas Government Code, Chapter 2155 Purchasing; General Rules and Procedures, Section 2155.078 Training and Certification of State Agency Purchasing Personnel. The only exceptions are for institutions of higher education, to which Texas Education Code, Sections 51.9335 or 73.115 apply.

State agency contract management and purchasing personnel includes all state agency purchasing personnel including personnel employed at agencies exempted from the purchasing authority of the Comptroller of Public Accounts/Texas Procurement and Support Services (TPASS). It is not the intent of this definition to include (1)

an executive level manager authorized to bind the governmental entity or (2) an attorney performing traditional legal functions – such as legal review of a contract.

Contract Management (CTCM)

Pursuant to Texas Government Code §2262.053, the Texas Procurement and Support Services (TPASS) administers a system of training, certification and continuing education for state agency contract management personnel.

Each state agency shall ensure that the agency's contract managers complete the training and certification developed under this section. Per S.B 1681, 83rd Legislature, all members of the governing body of a state agency shall complete an abbreviated contract management course.

Purchasing (CTP/CTPM)

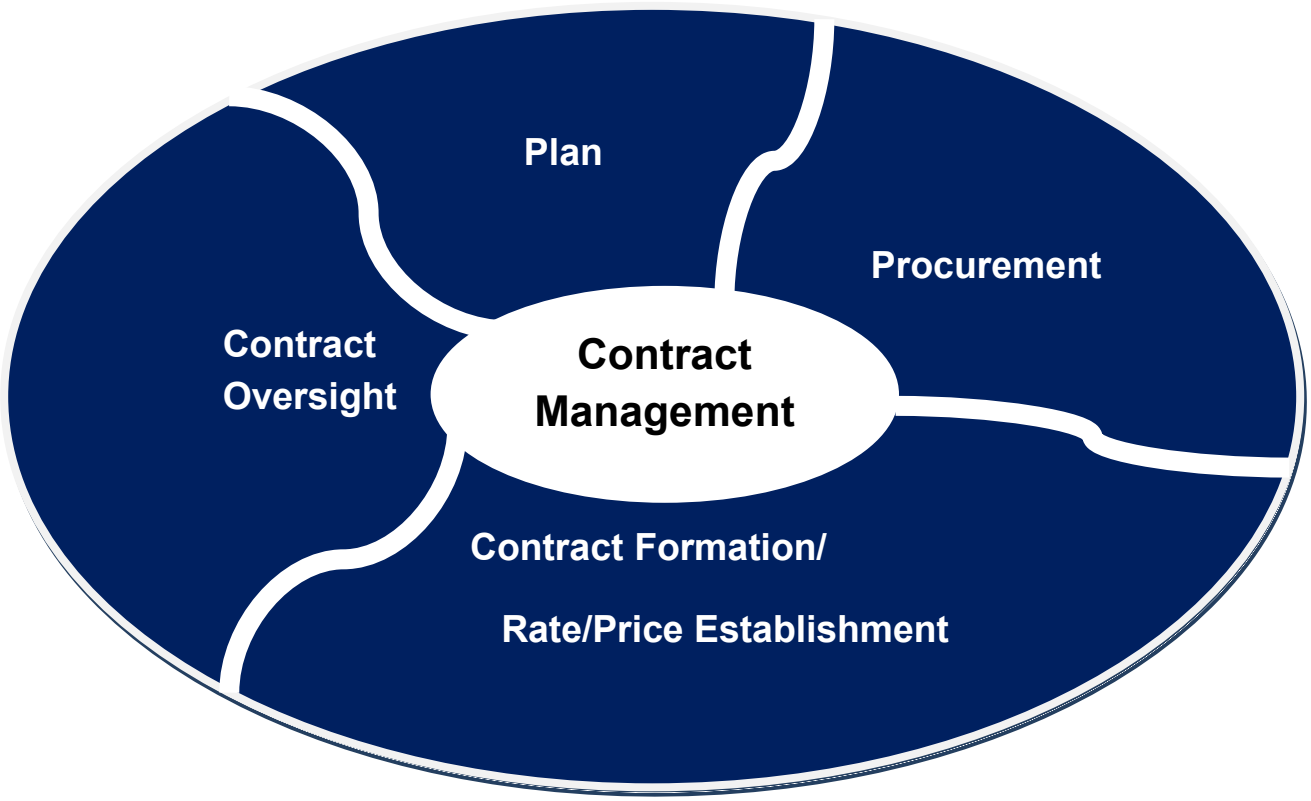
Pursuant to Texas Government Code §2155.078, the Texas Procurement and Support Services (TPASS) administers a system of training, certification and continuing education for state agency purchasing personnel.

Each state agency shall ensure that the agency's purchasing personnel complete the training and certification developed under this section. It is not the intent of this definition to include (1) an executive level manager authorized to bind the governmental entity or (2) an attorney performing traditional legal functions – such as legal review of a contract.

Additional information can be found at: http://www.window.state.tx.us/procurement/prog/training-cert/purchtrn_cert/

CONTRACT MANAGEMENT FRAMEWORK

Effective contract management is dependent on the interaction of the following elements:



Plan – Identify contracting objectives and contracting strategy.

Procurement – Fairly and objectively select the most qualified contractors.

Contract Formation/Rate/Price Establishment – Ensure the contract contains provisions that hold the contractor accountable for producing desired results, including all relevant terms and conditions as well as establish processes that are cost-effective and aligned with the cost of providing the goods and services.

Contract Oversight – Monitor and enforce the terms of the contract.

DEFINITIONS

Addendum: An addition, change, or supplement to a solicitation document issued prior to the opening date.

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

Agency: Any state department, office, institution, board or commission.

Amended: A status change to an RFP, IFB, RFO, RFI, RFQ or Contract that indicates a modification to that document.

Amendment: Written addition or change to a contract.

Appropriation: Legislative authorization to expend public funds for a specific purpose.

Assignment: Transfer of contractual rights from one party to another party.

Best Value: Factors to be considered in determining lowest overall cost and value in making certain purchases. Ref. Texas Government Code, Section 2155.074 (Non-Information Technology Related) and Texas Government Code, Section 2157.003 (Information Technology Related).

Bid: An offer to contract with the state, submitted in response to a bid invitation. Bids are usually non-negotiable.

Bid Deposit: A deposit required of bidders to protect the state in the event a low bidder attempts to withdraw its bid or otherwise fails to enter into a contract with the state. Acceptable forms of bid deposits are limited to: cashier's check, certified check, or irrevocable letter of credit issued by a financial institution subject to the laws of Texas and entered on the United States Department of the Treasury's listing of approved sureties; a surety or blanket bond from a company chartered or authorized to do business in Texas.

Bid Opening: The public opening of bids, in which the names of the bidders responding to a bid solicitation and prices of the bidders are publicly read and recorded. See Proposal Opening.

Bid Tabulation: The recording of bids and bid data submitted in response to a solicitation. The bid tabulation is used for comparison, analysis and record keeping.

Bidder: An individual or entity that submits a bid. The term includes anyone acting on behalf of the individual or other entity that submits a bid, such as agents, employees and representatives.

Bidders List: A list of potential contractors who have expressed an interest in doing business with the State of Texas. See Centralized Master Bidders List.

Biennium: The two (2) year period in which the Texas Legislature appropriates funds. The biennium begins on September 1st of odd numbered years.

Bond: Note or other form of evidence of obligation issued in temporary or definitive form, including a note issued in anticipation of the issuance of a bond and renewal note.

Change Order: A document which is used when it becomes necessary that amends, clarifies, changes, or cancels contract issues and/or provisions.

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Centralized Master Bidders List (CMBL): The CMBL is a list maintained by the Texas Comptroller of Public Accounts containing the names and addresses of prospective bidders and catalog information systems vendors.

Competitive Sealed Bidding: Process of advertising an invitation for bids (IFB), conducting a public bid opening and awarding of a purchase order/contract to the lowest responsive, responsible bidder in accordance with state law.

Competitive Sealed Proposals: Process of advertising a request for proposal (RFP), the evaluation of submitted proposals and awarding of the contract.

Consultant: A person that provides or proposes to provide a consulting service.

Consulting Services: Practice of studying and advising a state agency in a manner not involving the traditional employer/employee relationship per Texas Government Code, Section 2254.021 (See Major Consulting Services Contract).

Contract: A written agreement where a contractor provides goods or services and the agency pays for such goods and services in accordance with the established price, terms and conditions.

Contract Administration: This generally refers to the processes that occur after a contract is signed and is explained in detail in Chapter 7.

Contract Advisory Team (CAT): The team created to assist agencies in improving contract management practices. The team consists of six members, one from each of the following offices: 1) Comptroller of Public Accounts, 2) Department of Information Resources, and 3) Health and Human Services Commission, 4) Office of the Governor, 5) Texas Facilities Commission and 6) a small state agency per Texas Government Code, Section 2262.101.

Contract Management: This refers to the entire contracting process from planning through contract administration.

Contract Manager: A person who is: 1) employed by a state agency, 2) has significant contract management duties for the state agency as determined by the agency in consultation with the Texas Comptroller of Public Accounts referenced in Texas Government Code, Section 2155.078, and the Commission's rule 113.

Contractor: A business entity or individual that has a contract to provide goods or services to the State of Texas. Used interchangeably with the term "vendor".

Deliverable: A unit or increment of work required by the contract, including such items as goods, services, reports, or documents.

Electronic State Business Daily (ESBD): The electronic marketplace where State of Texas bid opportunities over $25,000 are posted. See Procurement Manual (http://www.window.state.tx.us/procurement/pub/manual/).

Emergency: A purchase made when unforeseen and/or a sudden unexpected occurrence creates a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.

Executive Sponsor: A high level individual with primary responsibility for implementation and operation of the project. In some instances, the executive sponsor may be the executive head of the agency. In other instances, the executive sponsor may be the division or program director with overall project responsibility.

Goods: A transportable article of trade or commerce that can be bartered or sold. Goods do not include services or real property.

Grant: The term "grant" is found in two distinct situations involving a state agency: where an agency provides grants to other entities and where an agency uses grant funds for procurements. In the first situation, a state agency is responsible for awarding grant funds to other entities such as other state agencies, local governments, non-profit organizations or private entities, with the state agency as the grantor agency; those other entities are the grant applicants. In the second situation, a state agency has received grant funds and is using those funds to make a procurement for that agency. The grants section at the end of each chapter in the guide is addressing the first situation – the state agency as grantor of funds. When an agency is using grant funds to make a procurement of goods or services (the second situation above), the agency shall comply with the procurement provisions of the guide. When a chapter "grants" section provides guidance on a particular matter, that guidance prevails over guidance addressing the same matter in the procurement sections of the Guide, including this Definitions Section of the Introduction to the Guide. As used in the first situation, the term "grant" refers to an award of financial assistance, including cooperative agreements, in the form of money, equipment, supplies, or other resources paid or furnished by the state or federal government to carry out a program in accordance with the terms of the grant award and all applicable state and federal laws, rules, and regulations.

Historically Underutilized Business: A minority or women-owned business as defined by Texas Government Code, Title 10, Subtitle D, Chapter 2161. (http://www.window.state.tx.us/procurement/prog/hub/).

Independent Contractor: A person working for an entity under contract and not an employee of the contracting entity. The contracting entity does not pay unemployment, disability, or worker's compensation insurance or withholding taxes from payments to the person. An independent contractor normally follows the contracting agency's direction on the results of the work but not on the means of accomplishing the work.

Invitation for Bids (IFB): Procurement process used when the requirements are clearly defined, negotiations are not necessary and price is the major determining factor for selection. The IFB uses the competitive sealed bid method.

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

Major Consulting Services Contract: A consulting services contract for which it is reasonably foreseeable that the value of the contract will exceed $15,000.

Negotiations: A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. In a contractual sense, negotiation means the "dealings conducted between two or more parties for the purpose of reaching an understanding." [i]

Opening Date: The day and time, after submission of proposals, when sealed bid responses are opened.

Payment Bond: A bond executed in connection with a contract which secures the payment requirements of the contractor.

Performance Bond: A surety bond which provides assurance of a bidder's performance of a certain contract. The amount for the performance bond shall be based on the bidder's annual level of potential monetary volume in the state purchasing program. Acceptable forms of bonds are those described in the definition for "bid deposit."

Posted Date: The date a procurement document is made available to the public.

Professional Services: Services directly related to professional practices as defined by the Professional Services Procurement Act (Government Code, Section 2254.002) or services authorized by rule by the Department of State Health Services pursuant to Health and Safety Code, Section 12.0121. These include services within the scope of the practice of: accounting; architecture; optometry; medicine; land surveying; and professional engineering. Services provided by professionals outside the scope of their profession, e.g., management consulting services provided by accounting firms, are not considered professional services.

Proposal: An executed offer submitted by a respondent in response to a Request for Proposals (RFP) and intended to be used as a basis to negotiate a contract award.

Proposal Opening: The public opening of proposals, in which the names of the respondents to a solicitation are publicly read and recorded. No prices are divulged at a proposal opening as these types of solicitations are subject to negotiation. See Bid Opening and the Procurement Manual.

Proprietary Purchase: A purchase request of a product that is proprietary to one vendor and does not permit an equivalent product to be supplied as defined in Texas Government Code, Section 2155.067.

Purchasing Department: The office designated to purchase goods and services for a state agency.

Renewal: When an existing contract is renewed for an additional time period in accordance with the terms and conditions of the original contract.

Request for Information (RFI): A general invitation to contractors requesting information for a potential future solicitation. The RFI is typically used as a research and information gathering tool for preparation of a solicitation.

Request for Offer (RFO): A solicitation for automated information systems (which may include a request for hardware, software and other information technology goods and services) requesting the submittal of an offer in response to the required scope of services, including a cost proposal. Negotiations are allowed between a proposer and the issuing agency.

Request for Proposal (RFP): A solicitation requesting submittal of a proposal in response to the required scope of services and usually includes some form of a cost proposal. The RFP process allows for negotiations between a proposer and the issuing agency.

Request for Qualifications (RFQ): A solicitation document requesting submittal of qualifications or specialized expertise in response to the scope of services required. No pricing is solicited with an RFQ.

Request for Quote (RFQ): An informal solicitation document requesting pricing on small dollar purchases.

Responsive: The respondent has complied with all material aspects of the solicitation document, including submission of all required documents.

Respondent: An entity submitting a proposal in response to a solicitation. (See Bidder)

Responsible: The respondent has the capability to fully perform and deliver in accordance with the contract requirements. The agency may include past performance, financial capabilities and business management as criteria for determining if a bidder or proposer is capable of satisfying the contract requirements.

Service: The furnishing of labor by a contractor which may not include the delivery of a tangible end product. In some cases, services and goods may be combined such as film processing. In these instances, agencies

determine whether labor or goods is the primary factor. In the case of film processing, the labor to process the film is the primary factor, therefore film processing is considered a service.

Solicitation: A document requesting submittal of bids or proposals for goods or services in accordance with the advertised specifications.

Solicitation Conference: A meeting chaired by state agency personnel which is designed to help potential bidders/respondents understand the requirements of a solicitation. Also known as a pre-bid or proposal conference.

Specification: Any description of the physical or functional characteristics or of the nature of supplies or service to be purchased. It may include a description of any requirements for inspecting, testing, or preparing supplies or services for delivery.

State: The State of Texas.

State Agency: An agency of the State of Texas as defined in Texas Government Code, Section 2056.001.[ii]

Statewide Contract: A legal and binding instrument between the state and a vendor(s) which is made available to multiple state agencies to purchase frequently used commodities and services. State agencies are required to use these contracts, which are competitively bid, awarded, and maintained by the appropriate procurement agency.

Statute: A law enacted by a legislature.

Strategic Sourcing: A concept of purchasing with the objective to purchase goods or services that will minimize costs, increase managerial effectiveness and improve operational efficiency.

Sub-recipient: A non-federal entity that expends federal awards received from a pass-through entity to carry out a federal program, but does not include an individual that is a beneficiary of such a program. A sub-recipient may also be a recipient of other federal awards directly from a federal awarding agency.

Surety: A person or entity providing a bond to a contractor to indemnify the State against all direct and consequential damages suffered by failure of the contractor to perform the contract and to pay all lawful claims of subcontractors, materials suppliers and laborers as applicable.

Term Contract: A Contract that addresses the estimated requirements for a number of agencies for supplies or services that are used repeatedly or in significant quantities over a period of time. Agencies place orders directly with term contract vendors for the quantity needed.

Vendor: A business entity or individual that has a contract to provide goods or services to the State of Texas. Used interchangeably with the term “contractor.”

Acronyms

CMG: Contract Management Guide

CO-OP: Cooperative Purchasing Program

CSB: Competitive Sealed Bid

CSP: Competitive Sealed Proposal

GSA: General Services Administration (Federal)

IFB: Invitation for Bid

NIGP: National Institute of Governmental Purchasing

REQ: Requisition

RFI: Request for Information

RFP: Request for Proposal

RFQ: Request for Qualifications

SOW: Statement of Work

Ethical Standards and Policies

General

State officials and employees are responsible for protecting the safety and welfare of public money. All state officials and employees should act in such a way as to avoid impropriety or the appearance of impropriety. This conduct is particularly important for state purchasing personnel and contract management personnel who are charged with the expenditure of state funds.

State purchasing personnel must adhere to the highest level of professionalism when performing their official duties. Purchasing processes and personnel must remain independent and free from the perception of impropriety. Any erosion of public trust or any shadow of impropriety is detrimental to the integrity of the purchasing process. Consequently, the credibility of a purchasing program requires that a state agency establish a clear set of guidelines and rules. Such guidelines are designed to prevent actual and potential vendors from influencing state officers or employees in discharging their official duties. Furthermore, these guidelines will help prevent state officials' and employees' independent judgment from being compromised.

Therefore, with these principles in mind and in accordance with state law, all state agency employees, contractors and potential contractors should comply with the following policies and procedures.

Ethics Training

The Comptroller of Public Accounts has established and administers a system of training, continuing education, and certification for state agency purchasing personnel.[1] The training and continuing education for state agency purchasing personnel includes ethics training.[2]

The comptroller may adopt rules to administer this section in statute, including rules relating to monitoring certified purchasing personnel's compliance with the continuing education requirements including ethics training.

State Ethics Policy

It is the policy of the State of Texas that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest per Texas Government Code, Section 572.001.[iii]

Certificate of Interested Parties (Form 1295)

In 2015, the Texas Legislature adopted House Bill 1295, which added section 2252.908 of the Government Code. The law states that a governmental entity or state agency may not enter into certain contracts with a business entity unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. The law applies only to a contract of a governmental entity or state agency that either (1) requires an action or vote by the governing body of the entity or agency before the contract may be signed or (2) has a value of at least $1 million. The disclosure requirement applies to a contract entered into on or after January 1, 2016.

The Texas Ethics Commission was required to adopt rules necessary to implement that law, prescribe the disclosure of interested parties form, and post a copy of the form on the commission's website. The commission adopted the Certificate of Interested Parties form (Form 1295) on October 5, 2015. The commission also adopted new rules (Chapter 46) on November 30, 2015, to implement the law. The commission does not have any additional authority to enforce or interpret House Bill 1295.

Filing Process

A business entity must use the application to enter the required information on Form 1295 and print a copy of the completed form, which will include a certification of filing that will contain a unique certification number. An authorized agent of the business entity must sign the printed copy of the form and have the form notarized. The completed Form 1295 with the certification of filing must be filed with the governmental body or state agency with which the business entity is entering into the contract. For more information please go to the Texas Ethics Commission website at: https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm

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[1] Texas Government Code § 2155.078(a)

[2] Act of May 31, 2015, 84th Leg. R.S., ch. 326 § 12 (to be codified at Texas Government Code § 2155.078(a))

STANDARDS OF CONDUCT

A state officer or employee should not:

1. Accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;

2. Accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;

3. Accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employees official duties;

4. Make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or

5. Intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.[iv]

Within two years after leaving state agency employment or service, a former state officer or employee may not accept employment with a vendor who was involved in a procurement or contract negotiation with the state agency if the former state officer or employee participated on behalf of the state agency for that procurement or contract negotiation.[3]

Additionally, pursuant to Texas Government Code, Section 2113.014, a state agency may not use appropriated money to compensate a state employee who violates a standard of conduct set out in Texas Government Code, Section 572.051.[v]

PROHIBITION OF ECONOMIC BENEFIT

In accordance with the Texas Constitution[vi] an officer or employee of the state may not, directly or indirectly, profit by or have a pecuniary interest in the preparation, printing, duplication, or sale of a publication or other printed material issued by a department or agency of the executive branch. A person who violates this section will be dismissed from state employment.[vii]

[3] Texas Government Code § 572.069

Conflict of Interest

General

Disclosures by Potential Contractors

To avoid conflicts of interest state agencies should require all potential contractors to disclose, in their responses to solicitations, any actual or potential conflicts of interest in their proposed provision of services or other performance under any contracts resulting from the solicitations. Specifically, state agencies must identify the principals of debarred vendors (such as an owner, proprietor, sole or majority shareholder, director, president, or managing partner) to ensure such vendors/principals are not awarded, extended or renewed any contract. Respondents should also be required to update that information throughout the terms of any contracts resulting from the solicitations.

Additionally under Texas Government Code Section 2252.901 agencies may not enter into employment contracts, professional services contracts under Chapter 2254, or consulting services contracts under Chapter 2254 with former or retired employees before the first anniversary of the last date on which the individual was employed by the agency if appropriated funds are used to make payments under the contract.

Disclosure by State Officials and Employees; Certain Contracts Prohibited

A state agency employee or official who is involved in procurement or in contract management for a state agency must disclose to the agency any potential conflict of interest specified by state law or agency policy that is known by the employee or official with respect to any contract with a private vendor or bid for the purchase of goods or services from a private vendor by the agency. State agencies should evaluate any disclosed potential conflict of interest when contracting for goods or services and eliminate or otherwise adequately address the effect of disclosed conflicts. See Texas Government Code, Section 2261.252.

A state agency may not enter into a contract for the purchase of goods or services with a private vendor with whom any of the following agency employees or officials have a financial interest: (1) a member of the agency's governing body; (2) the governing official, executive director, general counsel, chief procurement officer, or procurement director of the agency; (3) a family member related to an employee or official described above in (1) or (2) within the second degree by affinity or consanguinity.

A state agency employee or official has a financial interest in a person as described in Texas Government Code, Section 2262.252(c)(1)(2) if the employee or official (1) owns or controls, directly or indirectly, an ownership interest of at least one percent in the person, including the right to share in profits, proceeds, or capital gains; or (2) could reasonably foresee that a contract with the person could result in a financial benefit to the employee or official.

Agencies should also require respondents to:

- Represent and warrant that their provision of services or other performance under the agreement will not constitute an actual or potential conflict of interest and represent and warrant that it will not reasonably create even the appearance of impropriety.

- Disclose any current or former employees who are current or former employees of the state.

- Disclose any proposed personnel who are related to any current or former employees of the state.

- Represent and warrant that they have not given, nor intend to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to a public servant or employee or representative of the State of Texas in connection with the solicitation.

- The state agency will verify that an entity with which it plans to enter into a covered transaction and any of its principals are not debarred, suspended, or otherwise excluded.

Contractors should not be allowed to assign any portion of the contract or their performance, to others, for example, subcontractors, without the prior written consent of the agency. Contractors remain responsible for the performance of the contract notwithstanding any such assignment or subcontract. This ensures that the evaluated and selected entity will actually be responsible for performance and that proposed transactions may be reviewed for compliance with the conflict of interest and related party provisions.

Financial Advisors

When soliciting and contracting for the services of financial advisors, agencies should comply with Texas Government Code, Chapter 2263, regarding conflict of interest and related party provisions applicable to those financial advisors.

Financial advisors or service providers must disclose in writing to the administrative head of the state governmental entity and the State Auditor's Office (SAO) the following. For this purpose, "financial advisor or service provider" includes a person or business entity who acts as a financial advisor, financial consultant, money or investment manager, or broker.

(1) any relationship the financial advisor or service provider has with any party to a transaction with the state governmental entity, other than a relationship necessary to the investment or funds management services that the financial advisor or service provider performs for the state government entity, if a reasonable person could expect the relationship to diminish the financial advisor's or service provider's independence of judgment in the performance of the person's responsibilities to the state governmental entity; and

(2) all direct or indirect pecuniary interests the financial advisor or service provider has in any party to a transaction with the state governmental entity, if the transaction is connected with any financial device or service the financial advisor or service provider provides to the entity or member, in connection with the management or investment of state funds.

Texas law further provides that:

- Financial Advisor or Service Provider must disclose a relationship (described above), without regard to whether the relationship is a direct, indirect, personal, private, commercial, or business relationship;

- Financial Advisor or Service Provider must file an annual statement with the administrative head of the governmental entity and with State Auditor's Office ((SAO) disclosing the relationships outlined above;

- If no relationship existed during the disclosure period, annual statement must state this fact affirmatively;

- Annual statement must be filed no later than April 15th (for the previous calendar year period) on a form prescribed by the entity.

Special Provisions

In addition to the above, some state agencies have special conflict of interest provisions that apply to their employees. These laws, rules or policies should be reviewed and followed by agency staff. See the Procurement Manual for additional information on conflict of interest.
(http://www.window.state.tx.us/procurement/pub/manual/)
For example, under Texas Government Code, Section 2155.003, a CPA employee or other purchasing personnel using delegated authority 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. Any individual who interacts with public purchasers in any capacity is required to adhere to the guidelines established in Section 1.2 of the State of Texas Procurement Manual which outlines the ethical standards required of public purchasers, employees, and vendors who interact with public purchasers in the conduct of state business. Entities who are interested in seeking business opportunities with the State must be mindful of these restrictions when interacting with public purchasers of CPA or purchasers of other state agencies.

CHAPTER 1

CONTRACT ADVISORY TEAM

Pursuant to Texas Government Code, Section 2262.101, the Contract Advisory Team (CAT) is created to assist state agencies in improving contract management practices by reviewing and making recommendations on solicitation documents and contract documents for contracts that have a value of at least $10 million dollars during the full term of the contract, including any extension or renewal periods authorized under the contract. The CAT also:

- reviews findings or recommendations of the State Auditor regarding a state agency's compliance with this Contract Management Guide'
- provides recommendations to the Comptroller regarding the development of this Contract Management Guide and training of contract managers;
- provides recommendations and assistance to state agency personnel on the entire contract management process;
- coordinates and consults with the Quality Assurance Team (QAT) on all contracts relating to major information resources projects; and
- performs risk assessments to determine the appropriate level of management and oversight of contracts by state agencies.

Texas Government Code, Section 2262.102 of the Texas Government Code lists the following six members for the CAT:

- one member from the Comptroller of Public Accounts (CPA);
- one member from the Department of Information Resources (DIR); and
- one member from the Health and Human Services Commission (HHSC);
- one member from the Office of the Governor (OOG);
- one member from the Texas Facilities Commission (TFC);
- one member from a small state agency.

The Office of the Attorney General (OAG) shall provide legal assistance to the CAT. The Legislative Budget Board (LBB) and the State Auditor's Office (SAO) serve as technical advisors to the CAT.

CAT Review of Contracts of $10 Million or More

General

To facilitate the process of contract solicitation review by CAT, state agencies must submit their:

- Solicitation document(s) - A solicitation document can be but is not limited to a Request for Proposal (RFP), Invitation for Bid (IFB), Request for Application (RFA), Request for Offer (RFO), or Request for Qualifications (RFQ); and

- Any other documents that are related to the solicitation or incorporated by reference into or are part of the solicitation.

The CAT will review the solicitation document(s) from a contract management and best practices perspective. In the course of the review, the CAT provides recommendations, identifies risks and offers risk mitigations/strategies within ***20 business days*** of receipt. If the agency does not receive a response from the CAT within ***20 business days*** of initial receipt of the solicitation document(s), the agency may proceed with issuance of its solicitation.

Solicitation documents should be sent to the Contract Advisory Team (CAT) for review through the Comptroller of Public Accounts (CPA) web application Contract Advisory Team Review and Delegation (CATRAD) Portal at https://portal.cpa.state.tx.us/. In addition to sending the actual solicitation documents, agency personnel are required to fill out a brief submission form summarizing the contract solicitation. This form replaces the Major Contract Questionnaire that is no longer required for CAT reviews. Prior to your first use of CATRAD, state agency personnel must ensure that they: 1) are registered users of the CPA web application portal and 2) have been granted portal membership rights to CATRAD. In order to accomplish this, agency personnel must request access from an agency dedicated "Superuser" and/or security coordinator of the CPA web application portal. For a list of state agency superusers/security coordinators, go to: https://portal.cpa.state.tx.us/securitycoordinators.asp. For assistance in utilizing the CATRAD application, send your questions by e-mail to: 2262contractadvisoryteam@cpa.state.tx.us.

Upon receiving the major contract solicitation documents, the CAT will send the submitting agency an acknowledgement e-mail that confirms receipt of the solicitation and provides a web link to view the status of the review.

In order to avoid impeding the agency's procurement process, state agencies should submit their major contract solicitation document(s) after final agency approval or for some state agencies, after final executive -level approval (final executive-level approval may be necessary for some major contract solicitation documents, especially for IT-related solicitations).

Contract Advisory Team (CAT) Risk Assessment

The CAT will periodically perform a risk assessment to determine the appropriate level of management and oversight of contracts by state agencies. The risk assessment will include the following criteria:

- the amount of appropriations to the agency;
- total contract value as a percentage of appropriations to the agency;
- the impact of the functions and duties of the state agency on the health, safety, and well-being of residents; and
- any risk factors chosen by the CAT.

State Agency Recommendations

State agencies are required, under Texas Government Code, Section 2262.101(d), to:

- comply with the CAT's recommendations on solicitation and contract documents submitted for mandatory CAT review; or
- submit a written explanation to the CAT regarding why a specific CAT recommendation is not applicable to the contract under review.

Substantial Changes to Solicitations

If the initial major contract solicitation document submitted to the CAT changes substantially, agencies are required to resubmit their solicitation document(s) for CAT review. Changes in the major contract solicitation are considered substantial when:

- the solicitation change caused the estimated value for the original term of the contract, not including renewal periods, to increase by ***25 percent*** or more; or
- there are ***significant revisions, deletions and/or additions*** to the specifications, statement of work (SOW), set(s) of deliverables, performance measures, payment methodology, etc.

Scheduling Compliance

The CAT recommends Procurement, Contract Management, and Legal personnel incorporate the ***20 business day*** CAT review period into their procurement schedule to avoid potential delays to the agency's solicitation, evaluation, and award process.

Should the CAT request the initiating agency to submit a more complete major contract solicitation draft or require clarification, the ***20 business day*** turnaround timeframe restarts when the CAT receives all the information needed in order to conduct its review.

Exceptions to CAT Review

Per Texas Government Code, Section 2262.002, institutions of higher education as defined by Texas Education Code, Section 61.003 of the Education Code are exempt, as are contracts of the Texas Department of Transportation (TXDOT) that relate specifically to highway construction, highway engineering, or contracts subject to Texas Transportation Code, Section 201.112.

Determination of Contract Value

An agency should base its determination of the proposed length of and compensation during the full term and the renewal periods of the contract on best business practices, state fiscal standards and applicable law, procedures and regulations. Agencies should not artificially split any of these factors to avoid the $10 million dollar threshold during the original term of the contract and therefore submission of the solicitation to CAT for review.

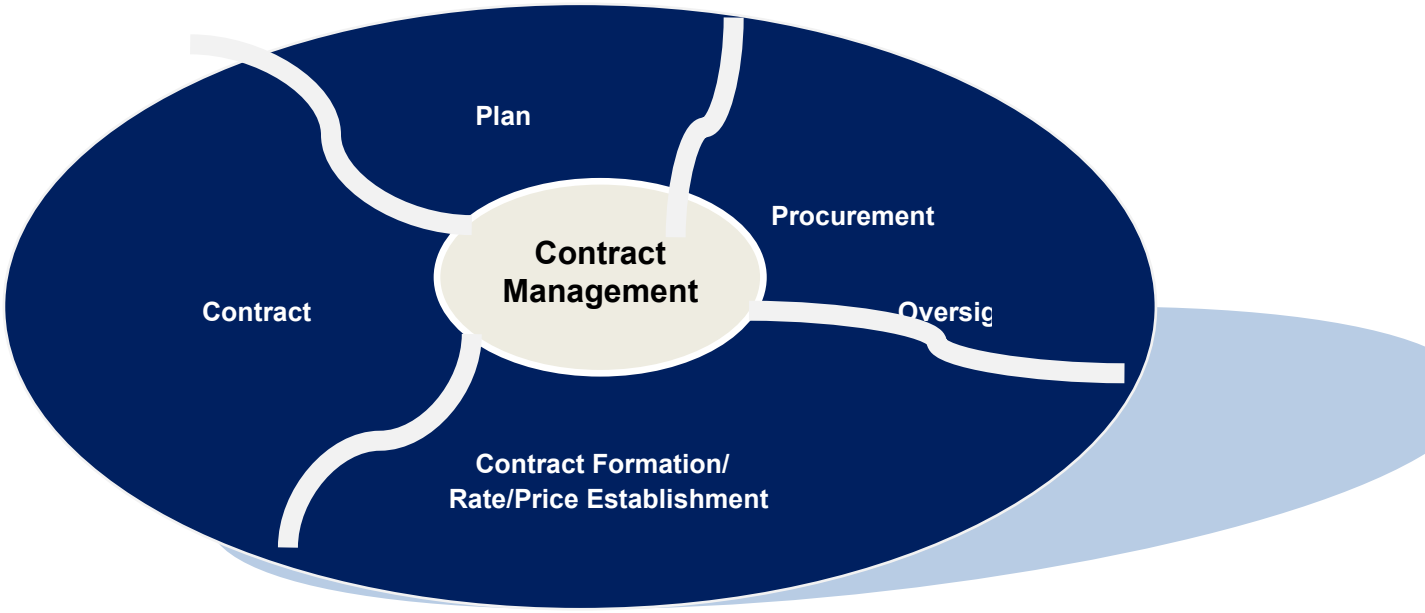
The method of payment and source of funds are not factors in determining the estimated total value of $10 million dollars or more. The soliciting agency shall make a good faith determination as to the estimated total value at the time the solicitation is submitted to CAT and shall advise CAT prior to issuance of any changes in this estimated amount that would impact CAT review.

CHAPTER 2

PLANNING

The first step in contract management is planning. Planning is crucial to the successful outcome of any procurement. With proper planning, agencies are more likely to successfully achieve their contracting objectives. Planning assists agencies in determining need, preparing the statement of work, choosing the appropriate procurement type, solicitation, negotiation, drafting the contract and contractor monitoring and oversight. These steps are complex and there are many instances where errors can be introduced into the process. Proper planning will reduce or eliminate the risk of error.

During the planning phase each of the following elements of contract management must be considered:



Plan – Identify contracting objectives and contracting strategy.

Procurement – Fairly and objectively select the most qualified contractors.

Contract Formation/Rate/Price Establishment – Ensure the contract contains provisions that hold the contractor accountable for producing desired results, including all relevant terms and conditions as well as establish processes that are cost-effective and aligned with the cost of providing the goods and services.

Contract Oversight – Monitor and enforce the terms of the contract.

The level of risk associated with each of these elements varies depending on the type of business relationship. For example, the nature and extent of contract monitoring will vary considerably between fee for service and cost reimbursement types of relationships.

General Planning

General Planning includes several areas which assist in getting the project started – such as development of the contract management team, assessing risk, developing a communication plan, determining the procurement method, planning for the content of the procurement, and determining a cost estimate.

Contract Management

Each contract management initiative should include an executive sponsor, a contract manager, purchasing department staff and program staff to assist in the contract management process. The extent and degree of executive sponsorship and participation should be directly related to the level of risk associated with the procurement. The contract manager should be experienced with the proposed type and size of procurement. Certified purchasers are not contract managers in all cases. However, certified purchasers should be familiar with this Guide. The purchasing department should review all contracts to ensure that purchasing statutes are followed and that the procurement is handled in a fair and competitive environment. The program staff will provide input as to the technical requirements and serve as the subject matter experts for the procurement.

There may be instances where an agency does not have the necessary technical expertise on staff for developing a solicitation. For example, a contract for building construction would need the expertise of a licensed architect and a licensed engineer when preparing plans and specifications for a building. In these instances, if the agency does not have a licensed architect and engineer on staff, they would contract out for that expertise.

Accountability and Risk Analysis Procedure

In ethics and governance, accountability is answerability, blameworthiness, liability, and the expectation of account giving. As an aspect of governance, accountability has been central to discussions related to problems in the public sector, nonprofit and private (corporate) worlds. In leadership roles, accountability is the acknowledgement and assumption of responsibility for actions, products, decisions, and policies including the administration, governance, and implementation within the scope of the role or employment position. And it encompasses the obligation to report, explain, and be answerable for resulting consequences.[1]

Risk analysis has been defined in many different ways, and much of the definition depends on how risk analysis relates to other concepts. Risk analysis can be broadly defined to include risk assessment, risk characterization, risk communication, risk management, and policy relating to risk. Risk can be analyzed in the context of risks to individuals, to public- and private-sector organizations, and to society at a local, regional, or national level. In business and project management, risk analysis is a process that involves "gathering data and synthesizing information to develop an understanding of the risk of a particular enterprise".[] The data analyzed will include "identifying assets and threats, prioritizing the related vulnerabilities, and identifying appropriate measures and protections". [2]

Each state agency must develop and comply with a purchasing accountability and risk analysis procedure. The procedure must provide for:

(1) assessing the risk of fraud, abuse, or waste in the contractor selection process, contract provisions, and payment and reimbursement rates and methods for the different types of goods and services for which the agency contracts;

(2) identifying contracts that require enhanced contract monitoring or the immediate attention of contract management staff; and

(3) establishing clear levels of purchasing accountability and staff responsibilities related to purchasing.

The agency shall post on the agency's Internet website the procedures described in paragraphs (2) and (3) above and submit to the Comptroller a link to the web page that includes the procedures. The Comptroller shall post on the Comptroller's Internet website the web page link submitted by each state agency. Texas Government Code, 2261.256.

Risk Assessment

Risks are inherent in all the stages of the procurement process. Limited resources require the use of risk assessment because there is not sufficient time to oversee all aspects of a contract. An effective risk assessment model will help focus monitoring resources on contractors with the highest risk of noncompliance. First, identify risk factors. 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;
- Factors from desk reviews, such as the variance between expected and actual performance;
- Significant problems with payment requests;
- Results of previous monitoring visits;
- Results of monitoring visits completed by other agencies or divisions within the same agency that contract with the same contractor;
- The length of time since the last monitoring visit; and
- How experienced the contractor is with the type of work to be performed.

Once the risk factors are identified, assign weights to each factor. Weights describe how significant each factor is in identifying the contractors who should be monitored. However, weights can also be designed to ensure statutory or policy requirements. For example, if the statute requires a site visit every three years, the assigned weight would be indicative of the period since the last site visit.

Next, rate each contractor on the risk elements. Consider using a three point scale, where 3 is high risk, 2 is medium risk and 1 is low risk.

Below is a sample risk assessment. The assumptions for this sample risk assessment include:

- The agency has contracts with many vendors for providing the same service. Only three contractors are rated in this example but there are many contractors involved.

- The three risk elements used are dollars, past performance, and experience.

  - Dollars: 40% of the contractors receive less than $100,000 from the agency per year. 50% receive between $100,000 and $250,000. 10% receive more than $250,000.

  - Experience:

    - High Risk – the vendor has never done this type of work before.

    - Medium Risk – the vendor has contracted with the state before but not for this type of work.

    - Low Risk – the vendor has previously contracted with the state for the same type of work.

  - Past Performance: If the contractor has at least one significant finding from a prior monitoring or three less significant findings the contractor is considered high risk. Agencies should define their own past performance risk factors and weights.

See Risk Assessment Analysis example next page

EXAMPLE – RISK ASSESSMENT ANALYSIS

Contractor	Dollars			Experience			Past Performance			Total Risk
	Amount	Risk	Risk x Weight (0.2)	Results	Risk	Risk x Weight (0.5)	Results	Risk	Risk x Weight (0.3)	
#1	$300K	3	.6	Held previous contract with state	1	.5	3 minor findings	2	.6	.6 + .5 + .6 = 1.7
#2	$75K	1	.2	New to type of work	3	1.5	New – no findings	1	.3	.2 + 1.5 + .3 = 2.0
#3	$125K	2	.4	Used before – but not for this type of work	2	1.0	Previous year finding regarding safety	3	.9	.4 + 1.0 + .9 = 2.3

In this example Contractor #3 has the highest risk, followed by Contractor #2 and #1, respectively. Typically, there will be many different risk elements. The above is a simple example shown for illustration purposes only.

Accordingly, the contractors with the highest risk level must be monitored more closely. In the above example, Contractor #3 has been used before and there was only one finding in regard to safety. This is the key area that requires close monitoring during the contract. The example can also be used for single contractors to focus on specific areas of risk within a contract and to assist agencies in determining which areas to monitor.

It is important to note that the risk assessment is a dynamic process that should be updated regularly to reflect the results of monitoring visits, reviews of payment vouchers, desk reviews, etc. For example, if a contractor has fallen significantly behind schedule in delivering services to the targeted population, the risk assessment should be updated to indicate the elevated risk and this impacts how the contract is monitored in the future. Likewise, if a contractor is well ahead of schedule in delivering services to the targeted population, the risk assessment should be updated to indicate the lower level of risk.

Contract Advisory Team (CAT) Risk Assessment

The Contract Advisory Team (CAT) pursuant to Texas Government Code, Section 2262.101(a)(6) will periodically perform a risk assessment to determine the appropriate level of management and oversight of contracts by state agencies. The risk assessment will include the following criteria: the amount of appropriations to the agency; total contract value as a percentage of appropriations to the agency; the impact of the functions and duties of the state agency on the health, safety, and well-being of residents; and any risk factors chosen by the CAT.

Risk Management

Risk management process includes: 1) risk identification, 2) risk analysis, 3) risk evaluation, 4) risk treatment and contingency plan and 5) risk monitoring. Contract management risks are as varied as are the types of contracts. Risk categories common to contract management include product risk, process risk, financial risk and schedule risk.

There is not an objective or mathematical formula that can be used to identify or quantify the risk imposed by a particular contract. Risk determination is based on subjective experience. Several factors that may be useful in identifying the level of risk may include:

- The complexity and subject matter of the procurement;
- The dollar amount of the procurement, and whether the procurement will result in a major contract;
- The anticipated payment methodology;
- The experience the agency staff have with the type of procurement;
- Whether the results of the procurement will impact the public or only impact the agency;
- Time constraints or the expected duration of the procurement; and
- The type, availability or experience of staff resources required to implement the objectives of the procurement.

The table below provides examples of the various degrees of risks associated within specific procurements:

CONTRACT FACTOR	LOW RISK	HIGH RISK
COMPLEXITY	Film Processing Services	Service contract for software development program.
DOLLAR AMOUNT	$500	$1,000,000
PAYMENT METHODOLOGY	Firm Fixed Price	Cost plus % of savings.
EXPERIENCE OF AGENCY STAFF	Office Supplies	Outsourcing of Information Technology Functions.
IMPACT TO PUBLIC OR AGENCY	Janitorial Services	Outsourcing of Foster Care Management Services.
TIME CONSTRAINTS OR CONTRACT DURATION	14 day delivery of paper	Implementation of new program to meet legislative mandate.

A preliminary risk assessment should be conducted to make an initial determination about the level, type and amount of management, oversight and resources required to plan and implement the contract from beginning to end. Simply put, as the risk associated with a particular procurement increases, the level and degree of executive management's sponsorship, participation and oversight should be increased by a corresponding level. A high risk contract such as a cost-plus percentage of profit arrangement, an outsourcing project or software development procurements should involve significant executive management sponsorship, participation and oversight. A low risk contract, such as routine purchases of goods or services does not typically require the participation or sponsorship of agency executive management.

Risk assessment is an ongoing process. Risk should be reviewed and re-evaluated by the contract manager on a continual basis until the contract is fully performed and final payment is made.

Communications Plan

Agencies should develop a plan to manage and control internal and external communication. After identifying internal and external stakeholders (executive management, oversight entities, etc.), determine the type, content and frequency for reporting status. Develop and report against a timetable with key decision points and milestones to communicate status. Determine who, what, when, where and how information will be communicated to the contractors regarding the potential procurement opportunity.

Determining the Procurement Method

At this point it is important to determine the procurement method as it will be a major factor in the planning process. For example, the procurement lead time for an Invitation for Bid and a Request for Proposal differ significantly.

Invitation for Bids (IFB) - The IFB uses the competitive sealed bid method. This method is used when the requirements are clearly defined, negotiations are not necessary and price is the major determining factor for selection. Best value considerations can also be used with the IFB method. Invitation for Bids is covered in the Procurement Manual.

Request for Information (RFI) - Requests for Information are used primarily as a planning tool. The RFI is an optional method that may be used to gather information in order to prepare a complete and accurate solicitation document when an agency does not have the necessary information to prepare a complete and accurate solicitation document. RFI's are used to identify industry standards, best practices, potential performance measures, and cost or price structures or to generally ascertain the level of interest of prospective respondents. A preliminary solicitation document which provides an initial description of the program objectives and specifications usually accompanies an RFI for review by potential respondents. Agencies may use the information derived from the responses to finalize their solicitation document. Agencies are not required to incorporate any or all of the comments or suggestions made by the contractor, but the hope is that the contractor will provide useful information in the RFP development process.

Request for Offer (RFO) – Generally used for IT Commodity Purchases exempt from the DIR IT Commodity Program. The process is generally the same as the RFP process. Request for Offer purchases include the purchase of automated information systems and are covered under Texas Administrative Code, Title 34, and Section 20.391.

Request for Proposal (RFP) – Used when competitive sealed bidding is not practicable or advantageous. Generally this is when factors other than price are to be considered or when objective criteria cannot be defined. One of the key differences between an IFB and an RFP is that negotiations are allowed in an RFP. Discussions are allowed with the respondents and best and final offers are solicited. Unless otherwise exempted, agencies must submit their RFPs to CPA for review prior to solicitation.

Request for Qualifications (RFQ) – Generally used for Professional Services wherein the respondents are evaluated based solely on their qualifications. Price is not considered until after selection is made by the agency based on qualifications. Professional Services are covered under Texas Government Code, Section 2254 at: http://tlo2.tlc.state.tx.us/statutes/gv.toc.htm

The following table is provided to assist in making the appropriate choice in selection of a procurement method. As a reminder, agencies should first refer to any applicable statutory requirements which may direct them to use a specific procurement method.

Procurement Methods

Procurement Method	Use When	Advantages	Disadvantages
Competitive Bids **(Invitation for Bids)**	Lots of competition exists. The product or service is available from more than one source.	Award process is simpler. Award is made to the lowest responsive, responsible bidder providing the best value to the State.	Defined specifications may be difficult to develop. Does not encourage innovative solutions.
Competitive Proposals **(Request for Proposals, Request for Offer)**	When factors other than price are evaluated. When negotiations are desired. Vendor is expected to provide innovative ideas.	Allows factors other than price to be considered. Allows for customized proposals suggesting different approaches to the same business need. Allows for negotiations in order to obtain the best value for the state.	Lead times for procurement are much greater. Evaluations are more complex and subjective.
Request for Information	There is insufficient information to write specifications for any procurement method.	Provides information to prepare a complete bid or proposal document. Allows the business community to have input into the agency's solicitation document based on current industry practices and market factors. Informs agency of any potential problems early in the procurement.	
Request for Qualifications [This method is usually required by statute (e.g. Professional Services)]	Selection is made solely on the skills and qualifications of the contractor. Price is not a factor until after a vendor is selected.	Emphasizes the competency of the proposed contractors.	Contractor is selected before price is negotiated.

Exemptions

Some purchases may be exempt from competitive bidding. Some examples are provided below. Additionally, agencies may be exempt from CPA authority based on their own enabling legislation. For example, the Texas Department of Transportation's enabling legislation exempts highway construction from CPA oversight.

Emergency purchases Emergencies occur as the result of unforeseeable circumstances and may require an immediate response to avert an actual or potential public threat. If a situation arises in which compliance with normal procurement practice is impracticable or contrary to the public interest an emergency purchase may be warranted to prevent a hazard to life, health, safety, welfare, property or to avoid undue additional cost to the state. Agencies may have specific rules or policies pertaining to emergency purchases. See the State of Texas Procurement Manual for more information on Emergency Purchases
http://www.comptroller.texas.gov/procurement/pub/manual/2-12.pdf

Proprietary Purchases Proprietary purchases are required to comply with Texas Government Code, Section 2155.083; Electronic State Business Daily which requires posting soliciations for procurements estimated to exceed $25,000 in value. Additionally, a product or service is proprietary if it has a distinctive feature or characteristic that is not shared or provided by competing companies or similar products or services. When the specification requirement limits consideration to one manufacturer, one product, or one service provider, a written justification must be provided and is subject to review by CPA. Proprietary purchases should be placed on CPA's *Electronic State Business Daily*; this provides transparency to the process and gives the entire vendor community the ability to view the specifications and provide de facto agreement to its proprietary nature by not responding. See the State of Texas Procurement Manual for more information on Proprietary Purchases
http://www.comptroller.texas.gov/procurement/pub/manual/2-15.pdf

Open Enrollment Contracts Potential contractors apply with an agency to contract through an open enrollment process. Vendor eligibility is usually based on previously determined criteria established by state or federal statute or agency rules. The enrollment process is open to new applicants throughout the contract term.

Planning for Contract Content

Clearly identifying general contracting objectives, assumptions, and constraints is an important step in the contracting process. This step may seem obvious, but when a contract fails, it often fails because the expectations were not met and there was not a true meeting of the minds. A clear understanding of the contracting objectives is essential to success. Typically a contract will be part of a larger organizational project. Agencies must carefully consider how the objectives, assumptions and constraints integrate into the larger organizational project. Identify and document potential integration risks so that a strategy for mitigating or managing those risks will be developed later.

Needs Assessment

The purpose of the needs assessment is to ensure the contracting team plans for the correct contracting objective. A clear definition of the contracting objectives and purpose to be accomplished by the contract is

intended to assist the team later in developing the statement of work, solicitation, negotiation and contracting documents, and in verifying the performance of a contractor. This assessment should incorporate the initial needs assessment conducted by the agency when the determination was made to contract out for the service instead of performing it in-house.

If the contracting purpose implements, changes or supports an agency's statutory duties, it is useful to identify existing statutory requirements, agency rules, policies and business processes that will be impacted by the contract. If business processes or practices are not documented, it is often useful to document the business processes. Once the legal requirements and business processes are clearly identified the agency can assess how these duties or processes will be changed or impacted. Document any concerns or risks identified by the assessment so that the changes and risks can be managed or mitigated in the contract document.

The success of many contracts is dependent upon how well business requirements are documented, communicated and understood by the contractor community. Do not assume that the contractor community understands the business of your agency. Detailed agency business practices are frequently incorporated into the statement of work in a contract, so agency staff input and cooperation is critical when planning and developing a statement of work and during acceptance testing.

Well Formed Contracting Objectives and Purpose

A well formed statement of the contracting objectives should provide a general understanding of what will be accomplished by a contractor. Well formed objectives will help guide and keep the contracting process focused and on track.

Technique

Defining the contracting objectives, assumptions, and constraints may sound simple and straightforward, but this definition process can be quite complex. Agencies may find that individuals on the contracting team hold different views as to the procurement's objectives. The following questions are intended to assist the team in clarifying and harmonizing potential divergent objectives and interests. Answering the following three questions will aid agencies in defining and refining the contracting objective:

1. What does your agency specifically need?

2. What will fulfilling this need do for your agency?

3. How will your agency know when the need has been met?

Each procurement is different; therefore the description of the objective, assumptions and constraints will vary. A good measure of the quality of the statement of work is whether the contracting objectives, assumptions and constraints make sense. Are the objectives, assumptions and constraints described too broadly or too narrowly? Could the reader answer the three questions?

Research

Contact and interview people within the agency and other agencies who have developed solicitations, drafted contracts and engaged in contractor oversight similar to the one being planned. Document the strengths, weaknesses, problems and the lessons learned in the interviews. Use the internet to search for copies of solicitation documents, contracts and oversight documents or products used by others. Review websites for useful information. Check with universities, trade associations and professional organizations to identify industry practices, methods, standards and rules that will deliver the goods or perform the services. Another approach to identifying information regarding the availability, features or measures for the purchase of goods or services is to publish a Request for Information (RFI). Potential contractors may respond to the RFI with information that will assist the agency during the contract management process.
While researching, agencies may wish to contact potential contractors to discuss the procurement. This is an acceptable practice as long as the agency solicits information from more than one contractor and advises the contractor up front that the agency's interest at this point is strictly for research purposes and that any formal requests for pricing or other information will be made through the formal competitive sealed bid or competitive sealed proposal process.

Business Model

A business model should represent a high level view of how the intended business transaction is expected to work. The business model may include plans relating to a contract strategy, contract management, and contractor performance monitoring approach, as well as financial assumptions and limitations.

Cost Estimates

During the planning stage of the procurement, it is necessary to develop an estimated cost of the procurement. The cost estimate should assist agencies in determining which type of procurement method to use. Even if limited by budget restraints, an estimated cost will provide an idea of the range of services that the agency can include in the statement of work.

It is recommended that agencies contact someone within the agency who has knowledge in the subject area to assist with the cost estimate. However, if unable to find anyone with knowledge in the subject area, agencies may choose to contact several contractors to obtain pricing information. If contractors are contacted, be sure to advise them that you are obtaining price estimates for information purposes only and that the estimate is not a formal solicitation. In obtaining price estimates from potential bidders, care should be taken to avoid giving a potential bidder a competitive advantage.

Contracts with a Value Exceeding One Million Dollars

A state agency may enter into a contract for the purchase of goods or services that has a value exceeding one million dollars only if the governing body of the state agency approves the contract and the approved contract is signed by the presiding officer of the governing body. If a state agency is not governed by a multimember governing body, the officer who governs the agency is required to approve and sign the contract. The approval and signature authority for contracts with a value exceeding one million dollars may be delegated by the

governing body or governing official of a state agency to the executive director of the agency. Texas Government Code, Section 2261.254.

Contracts with a Value Exceeding Five Million Dollars

An agency that develops a contract for the purchase of goods or services that has a value exceeding five million dollars is required to have its contract management office or procurement director verify in writing that the solicitation and purchasing methods and contractor selection process comply with state law and agency policy. Furthermore, information on any potential issue that may arise in the solicitation, purchasing, or contractor selection process must be submitted to the governing body of the agency or the governing official of the agency if the agency is not governed by a multimember governing body. Texas Government Code, Section 2261.255.

Procurement Lead Time

Procurement lead time is the interval between a decision to purchase an item and the delivery of the item at the designated location. It is the total of order preparation time, order release time, supplier lead time, shipping or transit time, and receiving, inspection and putting away time. It consists of two elements: 1) production lead time, which is the period between receipt of an order and until when it is available for packing or shipment; and 2) administrative lead time, the interval between initiation of procurement action and letting of a contract or placing of order.

In order to ensure that contracts are processed prior to their effective dates, the table below is provided to assist agencies in the planning process.

TASK	SUGGESTED LEAD TIME FROM CONTRACT START DATE	EXAMPLE
Begin Preparation of Solicitation Document – Program Staff works with agency Purchasing Department to develop scope of work and contract language.	180 days	March 1
Submit final solicitation with required approvals to the Purchasing Department and CPA (when required).	150 days	April 1
Advertise and Issue Solicitation.	120 days	May 1
Receipt of Responses.	90 days	June 1

Evaluation of Responses.	60 days	July 1
Contract Negotiation (if allowed) and Formation.	30 days	August 1
Contract Execution – All signatures are obtained.	15-60 days	August 15
Performance Begins (effective date).	0 days	September 1

The lead times above are suggestions only and may vary depending on the specific requirements of your agency and the complexity of the procurement. Less complex procurements may be accomplished in less time, while more complex procurements may require more time. Contact your agency Purchasing Department to ascertain their lead time requirements. Examples of tasks that may lessen or increase the lead time include, but are not limited to:

- Preparation of the solicitation document. This is where the planning and research discussed earlier pays off. Some program staff are more adept at writing scopes of work and proposal documents. This will reduce the time required to prepare the solicitation document. If possible, the Purchasing Department should provide program staff with templates to assist in preparation of solicitation documents. A sample RFP template is included in this Guide. However, agencies should modify the template to meet their own agency's needs and requirements.

- The time required for the Purchasing Department to finalize the solicitation document can vary depending on how well the scope of work is written by the program staff. The Purchasing Department is responsible for ensuring the document is complete, allows for competition, and follows all applicable statutes, rules, and procedures.

- A ***30 day*** solicitation period is typical for most RFPs. Formal IFB's 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 and/or complex pricing, additional time for the solicitation period should be allowed. In addition, if the scope of work is unusual or complex, there may be many questions – in which case an RFP is recommended.

- Evaluation of the proposals may take more or less time, depending on the size of the evaluation team and the complexity of the evaluation. The evaluation period could also increase if oral presentations, discussions or best and final offers are utilized.

- Contract Negotiation and Formation timeframes may vary depending on the complexity of the procurement.

- Contract Execution – This timeframe may also differ significantly between a purchase order and a contract. Depending on the signature requirements of the agency and the contractor, the contract execution lead time may need to be adjusted.

TECHNOLOGY CONTRACTS

The purpose of the Guide is to offer state agency contract managers recommendations on improving existing contract management processes and practices. Many of the major information resources (IR) projects initiated within state government involve procurement of technology-related goods and/or services. Technology-based procurement projects present a unique level of complexity that requires specific contract management practices, processes, and strategies.

TECHNOLOGY ADDENDUM RELATION TO THE GUIDE

The Technology Addendum supplements and aligns with the Guide. The Technology Addendum content, as developed and maintained by the Department of Information Resources (DIR), is included in the Guide to convey information specific to technology-based procurement projects. Therefore, all information included in the Guide as overarching practices, processes, and strategies for contract management apply to technology contracts. Definition of terminology, ethical standards, legal guidance, and use of the Texas Procurement Manual, also apply.

The major distinctions between information provided in the Guide and the Technology Addendum are:

(1) The Technology Addendum applies to all major IR projects as defined in Texas Government Code, Section 2054.003 (10):

> *any IR technology project identified in a state agency's biennial operating plan whose development costs exceed $1 million and that:*
>
> - *requires one year or longer to reach operations status;*
> - *involves more than one state agency; or*
> - *substantially alters work methods of state agency personnel or the delivery of services to clients; and any IR technology project designated by the legislature in the General Appropriations Act as a major IR project*

Contracts established for procurement of technology-related goods and/or services are included as part of thresholds for a major IR project.

(2) The Guide applies to and defines major contracts as contracts that have a value of at least one million dollars during the original term of the contract, not including any renewal periods. The Technology Addendum applies to certain major contracts as required by Texas Government Code, Section 2054.301(b), which include contracts that have a value of at least one million dollars under which a vendor will perform or manage an outsourced function or process. The term "outsourced function or process" relates to a contract for services where to perform the services, the vendor must develop or acquire IR technologies (as that term is defined in 2054.003 (8)) where the IR technologies will become a part of the agency's IR technologies or where the IR technologies are the principal deliverable(s) under the contract. The term “outsourced function or process”

excludes a contract where the IR technologies deliverable(s) will not become a part of the agency's IR technologies or where the IR technologies are not the principal deliverable(s) under the contract.

(3) The Guide offers, in general, recommendations on improving existing contract management processes and practices. The Technology Addendum conveys required processes and practices for development and management of solicitations and contracts for technology-based procurement projects.

(4) The Guide offers recommendations to state agency contract managers. The Technology Addendum conveys required processes and practices to contract managers, project managers, technology staff, purchasing staff, and all other staff impacted and involved with delivery of a technology-based procurement project.

Exclusions

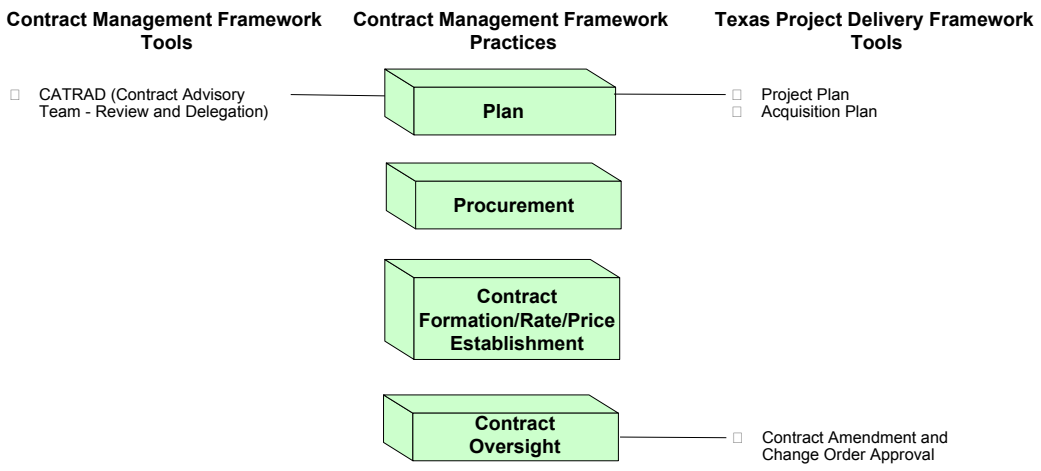
The Technology Addendum excludes addressing technology commodity item purchases available through the DIR Information and Communications Technology (ICT) Cooperative Contract Program. Each agency, excluding institutions of higher education, must purchase technology commodity items in accordance with a contract maintained by DIR. Refer to the DIR website for additional information regarding technology commodity item purchases.

The Technology Addendum excludes addressing telecommunications purchases available through DIR TEX-AN (TEXas Agency Network). TEX-AN is both the centralized telecommunications system for the state and a family of requirements contracts. Refer to the DIR website for additional information regarding TEX-AN contracts.

Texas Project Delivery Framework

The Texas Project Delivery Framework (Framework) establishes a consistent, statewide method for technology project selection, control, and evaluation based on alignment with business goals and objectives. The Framework is required for major IR projects as defined in item (1) above and for certain major contracts as described in item (2) above. If necessary, agencies may contact DIR by emailing projectdelivery@dir.texas.gov to request consultation on applicability of Framework requirements to a specific major contract. Refer to the DIR website for detailed information regarding Framework guidance and tools for technology-based procurement projects.

One of the Framework review gates is Solicitation and Contracting. The Solicitation and Contracting Review Gate includes development and management of technology-based solicitations and contracts. The Solicitation and Contracting Review Gate activities and the Project Planning Review Gate activities work in conjunction with the practices described in the Guide. Although use of other Framework tools applies to technology-based procurement projects, the following diagram specifically maps practices described in the Guide to Framework contract-related tools.



A Project Plan (Framework tool) must be finalized, approved at the agency level, and submitted to the Quality Assurance Team (QAT) prior to spending more than 10 percent of the funds allocated to a project and/or prior to issuance of a vendor solicitation for the project. Agencies must use the Project Plan to document planning, management, and control activities that support the project from start-up through closure.

The Acquisition Plan (Framework tool) information is a subset of the Project Plan information and describes the activities to acquire goods and/or services from outside the organization. The Acquisition Plan addresses activities for solicitation planning, solicitation development and posting, source selection, contract award, contract management, and contract closeout. As a subset of project management activities defined in the Project Plan, managing a technology-based procurement project relies on activities (e.g., risk management, change control, project monitoring, performance management) defined in the Project Planning Review Gate.

An Acquisition Plan must be finalized, approved at the agency level, and submitted to the QAT prior to issuance of a solicitation for the project. The agency head must approve contract amendment and change orders if the amendment or change order changes the contract amount above 10 percent or significantly changes the contract completion date as determined by the QAT. The Contract Amendment and Change Order Approval (Framework tool) is used to approve funding for contract amendment and change orders.

As described in the Guide, the CATRAD (Contract Advisory Team – Review and Delegation) tool must be used to submit specific information to CPA before issuance of a solicitation that is anticipated to result in a contract with a value of one million dollars or more.

Special Procurement Considerations for Major IR Projects

A state agency must comply with special procurement standards and rules when acquiring certain IR technologies that do not involve purchasing through the DIR ICT Cooperative Contract Program.

First, if a major IR project involves the purchase of certain IR technologies, then the state agency must obtain an exemption from use of the ICT Cooperative Contracts. Please refer to 1 TAC Chapter 212 for a description of that process.

Second, a major IR project may involve acquisition through any lawful means, including but not limited to, purchase, lease or seat management of some or all of the below listed commodity categories, for which special procurement standards and rules apply.

Once an exemption is obtained and /or a state agency is engaged in procuring IR technologies without use of the ICT Cooperative Contracts, the state agency must comply with the following specific procurement rules:

- For acquisition of any electronic and information resources, as defined in 1 TAC Chapter 213, state agencies are required to comply with the State of Texas Electronic and Information Resources (EIR) accessibility standards, 1 TAC Chapter 213.

- For acquisition of computer equipment, state agencies must comply with 1 TAC Sections 217.10 and 217.11 related to the computer recycling programs offered by Vendors.

- When through the ownership of hardware by a state agency or management of state agency data by a Vendor, the hardware may retain state agency data and information. Upon disposition of owned hardware by the state agency and at the end of managed services performed by a Vendor, state agencies must comply with the security standards related to the secure erasure of agency data from such hardware. 1 TAC Section 202.28 establishes the security requirements related to erasure of state agency data.

- For acquisition of network hardware and/or network software, state agencies must comply with 1 TAC Section 217.12 related to vendor certification about vulnerability testing of such hardware and software.

A contract management best practice would be to incorporate these standards and rules into project deliverables for the related major IR project to ensure the selected Vendor and the related major IR project complies with all relevant special procurement standards and rules. Examples of project deliverables include the Project Plan, Acquisition Plan, and solicitation document.

Contract Requirements for Certain Services

Purchasing from DIR Cooperative Contracts

A state agency is required to purchase technology “commodities” of up to $1million through DIR’s Cooperative Contracts program, subject to certain exemptions identified in DIR rule 1 TAC 212.10. It is important to note that the term “commodity” is defined in statute to mean commercial software, hardware, or technology *services*, other than telecommunications services, that are generally available to businesses or the public and for which the department determines that a reasonable demand exists in two or more state agencies. Texas Government Code, Section 2157.068(a). Through its Cooperative Contracts Program, DIR offers a streamlined cooperative purchasing program with Master Contracts (MCs) for technology products and services. MCs cover offerings for hardware, software, staffing services, maintenance, and other services—such as managed services and technology training. Local governments may also use the MCs for commodity purchases. A local government

that purchases a commodity through the Cooperative Contracts Program satisfies state law requiring competitive purchase of that item.

A state agency purchasing a commodity item uses the commodity list maintained by DIR pursuant to Texas Government Code, Section 2157.068(e). An agency contracting to purchase a commodity with a procurement value of $50,000 or less can directly award the contract to a vendor included on the list without submission of a request for pricing to other vendors on the list. If the state agency purchase has a value of more than $50,000 but not more than $150,000, the agency must submit a request for pricing to at least three vendors included on the list in the category to which the contract relates. If the purchase has a value of more than $150,000 but not more than $1 million, the agency must submit a request for pricing to at least six vendors included on the list in the category to which the contract relates or all vendors on the schedule if the category has fewer than six vendors.

For the purchase of services in the Cooperative Contracts Program that requires the purchasing state agency to develop and execute a "statement of work" (SOW) in order to initiate service under the contract, the state agency must consult with DIR before submitting the SOW to the vendor, request approval from DIR for the final SOW, and post the SOW on the purchasing agency's web site. Texas Government Code Section 2157.0685. For the purpose of this section, a "statement of work" means a document that states the requirements for a contract of more than $50,000, including deliverables, performance specifications, and other requirements, specific to the vendor under that contract that are not specified in DIR's cooperative contract.

A state agency may not enter into a contract to purchase a commodity item through the Cooperative Contracts Program if the value of the contract exceeds $1 million as determined by DIR.

Posting Certain Documents Relating to Contract Solicitations for DIR

As part of the State's transparency effort to share information with citizens, DIR is required to post all solicitation documents related to any DIR contract to the centralized accounting and payroll system (CAPPS) administered by the Comptroller of Public Accounts. The documents posted must include documents showing the criteria by which DIR evaluated each vendor responding to the contract solicitation and, if applicable, an explanation of why the vendor was selected by DIRTexas Government Code, Section 2157.068.

Planning in Relation to Grants

For agencies planning to use grant funds to procure a good or service, the agency is required to follow state purchasing guidelines. In addition, agencies planning on using grant funds for procurement purchases, must also comply with any applicable grant requirements or special conditions imposed by the underlying grant award that is going to be used to fund the procurement.

This chapter will be focusing on an agency's planning process prior to its grant announcement. Agencies planning on making grant awards to other entities (not the procurement of goods or services) must follow UGMS (Uniform Grant Management Standards) prepared by the Texas Comptroller of Public Accounts. In making the determination as to which situation is applicable, a state agency should consult with its legal counsel early in the planning process.

A state agency is often the recipient of a federal or other source of grant funds. In that instance, the state agency is the "grantee" of a grant. Likewise, a state agency, if given statutory authority to do so, may also be responsible for awarding grant funds to other entities such as other state agencies, local governments, non-profit organizations or private entities. In this situation, the state agency is the "grantor" and the other entities are the "grantees." Even in this situation, the state agency making the grant may, in the first instance, be a "grantee" in that the state agency itself has received a grant.

General Grant Announcement Planning

Prior to preparing a grant announcement, agencies making grant awards need to develop good internal control systems to ensure that grant funds are properly used and achieve intended results. These systems can serve as the basis for ensuring grants are awarded to eligible entities for intended purposes, and are managed appropriately. Internal control systems that are not adequately designed or followed make it difficult for the agency to determine whether funds are properly used.

Policies serve as guidelines for ensuring that a grant program includes provisions for holding the grantee accountable for properly using funds and achieving approved grant purposes within a defined grant scope.

Especially when new grant program is being developed, attention must be given to establishing grant goals, criteria applicants will need to satisfy, activities eligible for funding, and how funding decisions will be made.

The grant award may result from a competitive process or merely from the grantor agency making a pre-determined amount of funding available to grantees. If an agency is utilizing a competitive process, the mere denomination of its grant announcement as a Request for Proposals does not bring the competitive process within the procurement provisions of the Guide.

Grant Agreements

All grant agreements involve a contractual relationship. The form of the agreements for grants can be either a "contract" or other grant document such as "Statement of Grant Award", "Grantee's Acceptance Letter", and/or "Terms and Conditions". Each agency should confer with its legal counsel in developing its particular document.

1. Accountability - https://en.wikipedia.org/wiki/Accountability

2. Accountability http://webcache.googleusercontent.com/search?q=cache:G-dHFGFWcucJ:wikipedia.moesalih.com/Risk_analysis+&cd=1&hl=en&ct=clnk&gl=us

CHAPTER 3

PREPARING THE SOLICITATION

After an agency determines which statutory solicitation method is appropriate, the solicitation document is prepared. (Refer to Chapter 2 for the various procurement types). Keep in mind that except as otherwise provided by statute, a purchase of or contract for goods or services shall, whenever possible, be accomplished through competitive solicitation. In preparing the solicitation document, review the relevant statutes and rules to identify each of the statutory and regulatory requirements necessary to comply with the law before attempting to draft a solicitation document.[viii] Employees involved in preparing a solicitation should sign and submit a Non- Disclosure Statement (See **Appendix 7**) and conflict of interest statement prior to beginning work on a solicitation.

USE OF HYPERLINKS IN A SOLICITATION

Many organizations use of hyperlinks within solicitations as a means to employ electronic media to deliver information to potential respondents. One of the key benefits of electronic media is that information can be disseminated to potential respondents rapidly and in a cost-effective and expeditious manner. However, any determination to incorporate information through the use of hyperlinks should be carefully considered. While hyperlinks may provide an efficient means by which to transmit information, they also give rise to a number of potential problems. Some issues with the use of hyperlinks include, but are not limited to:

- information changes over time; thus, depending upon the nature of the information provided by way of hyperlink, the terms of a contract may inadvertently change over time if the linked information changes;

- internet addresses and web pages change over time; thus, information made available through a hyperlink when a solicitation is first posted may no longer be accessible at a later date although the contract may still be in existence (or, of possibly greater concern, in litigation); and

- templates are often used as a starting point when solicitations are drafted and, while hard copy content may be reviewed by the drafter, hyperlinks are sometimes overlooked and not verified for accuracy; thus, the original solicitation may convey information that is actually not consistent with the drafter's intent.

Again, if possible, best practice for most solicitations may well be to avoid the use of hyperlinks altogether. However, if hyperlinks are used, precautions should be taken to avoid unintended consequences such as those listed above. Furthermore, the solicitation documents should clarify if information provided by way of hyperlink is or is not subject to change during the contract term (i.e. terms and conditions are often intended remain constant absent a contract amendment, while requirements set forth in law are more often intended to change if and as the law changes). If hyperlinks are used, the information provided by way of hyperlink should be included in the contract file and properly retained in accordance with applicable records retention schedules. The use of hyperlinks within solicitations should be discussed with the agency legal department for guidance.

Preparing the Statement of Work

The Statement of Work is very important as it forms the basic framework for the resulting contract. The needs assessment discussed in Chapter 2 is the foundation for the Statement of Work. The Statement of Work is a detailed description of what is required of the contractor to satisfactorily perform the work. The success or failure of a contract can usually be linked to the adequacy of the planning, analysis and thoroughness of the statement of work. Time spent planning, analyzing, and drafting the statement of work will result in saving time, resources, money and will improve the quality of the goods or services provided. It is very important that the statement of work:

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

Specification Types

Specification Control

- the quality level of the product;
- the amount of completion;
- the suitability of the product or service for the job to be done; and

- the method of evaluation used in making an award and in determining the best value bid for the purchase.

Characteristics of an Effective Specification:

SIMPLE: Avoid unnecessary detail, but be complete enough to ensure that requirements will satisfy their intended purpose.

CLEAR: Use terminology that is understandable to the agency and bidders. Use correct spelling and appropriate sentence structure to eliminate confusion. Avoid legalese type language and jargon whenever possible.

ACCURATE: Use units of measure that are compatible with industry standards. All quantities and packing requirements should be clearly identified.

COMPETITIVE: Identify at least two commercially available brands, makes, or models (whenever possible) that will satisfy the intended purpose. Avoid unneeded "extras" that could reduce or eliminate competition and increase costs.

FLEXIBLE: Avoid totally inflexible specifications which prevent the acceptance of a bid that could offer greater performance for fewer dollars. Use approximate values such as dimensions, weight, speed, etc. (whenever possible) if they will satisfy the intended purpose. If approximate dimensions are used, it should be within a 10 percent rule of thumb unless otherwise stated in the IFB.

See Specifications (http://www.window.state.tx.us/procurement/pub/manual/2-23.pdf)

A specification is a description of a product or service a user seeks to procure, and is also a description of what a bidder must offer to be considered for an award. Specifications are the primary means of communication between an agency and a vendor.
This Guide will focus on two of the most common types: Performance Based Specifications and Design Specifications.

Performance Based Specifications vs. Design Specifications

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 produced. Conversely, design specifications outline exactly how the contractor must perform the service or how the product is made. Performance based specifications allow respondents to bring their own expertise, creativity and resources to the bid process without restricting them to predetermined methods or detailed processes. This allows the respondents to provide the product or service at less cost and shifts some of the risk to the contractors. For example, if a state agency utilizes a design specification for a unit of laboratory equipment and the equipment does not work correctly, then the results may be the fault of the specification. However, if the agency wrote a performance based specification, the unit must operate properly in order to meet the performance standards.

For example, consider the purchase of media and advertising services:

Performance Based Specification: Contractor shall provide media services for Texas Tourism which shall increase the tourist dollars by a minimum of 3 percent in the next fiscal year. Visits by out of state tourists shall increase a minimum of 10 percent. These figures will be measured as reported by the Texas Chamber of Commerce.

Design Specifications: Contractor shall conduct at least seven (7) media campaigns for Texas Tourism during the fiscal year. Three of these campaigns must be directed to out of state tourists.

Mixed Specifications: Contractor shall provide media services for Texas Tourism which shall include a minimum of seven media campaigns during the fiscal year. Media services shall provide for a minimum increase of 3 percent in the next fiscal year as measured and reported by the Texas Chamber of Commerce.

As you can see, the performance based specification focuses on results, whereas the design specification focuses on resources. With design specifications, the contractor may provide all seven campaigns, but the desired result of increased tourist dollars and visits may or may not occur.

As with all performance measures, agencies must ensure that performance specifications are reasonable and measurable. Note that the specification clearly outlines how the results will be measured. While performance based contracts are sometime preferable, when using this type of specification the planning, expertise and contract management may be different than design specifications.

Design specifications are appropriate for simple purchases of goods such as paper, pens, furniture, and services such as temporary staff. Usually these purchases are accomplished by defining specific quantities and specifications for the goods or services, price per unit, as well as requirements for the time, place and manner for delivery and acceptance.

Incentives: Many agencies now include incentives in their contract language. Incentives are used for outstanding performance which exceeds the goals contained in the contract. For example, if state tourism dollars increased by 5 percent, the contract language sets forth a pre-established monetary incentive for increases above the required 3 percent.

Performance based specifications are fashioned so that respondents are allowed maximum flexibility when satisfying the requirements of a solicitation whereas, design specifications limit flexibility. It is not always beneficial to use performance based specifications. Examples of when to use performance or design specifications are provided below:

- **New installation, entire system provided by one vendor**. A performance based specification should be used as it will allow the most economical solution to be applied since it is an entirely new system.

- **New installation, system provided by various suppliers.** In this case, the agency may need to use a design specification to ensure that all of the characteristics of the system will work together. For example, a project to bid out the HVAC controls, chillers, fire alarms, etc. will all need to work together.

- **Expansion of an existing installation.** A design specification would be required in this instance as the new equipment must connect and integrate with the existing system.

Organization of the Statement of Work

One way of organizing the statement of work is to divide each of the general contracting objectives into logical parts. Contracts, like projects, are often divided into phases, such as planning, development, implementation and operation or planning, equipment, installation, testing, operation and maintenance. The specific phases should support the subject matter and purpose of the contract. Phases can be further divided into small components of work (segments) and deliverables can be defined within each segment.

Elements of a Deliverable

Each deliverable in a solicitation should include the following elements:

1. A description of the work.
2. A standard for performance.
3. Test conditions, method or procedure to verify that the deliverable meets with the standard.
4. A method or process to monitor and/or ensure quality in the deliverable.
5. An acceptance process for each deliverable.
6. A compensation structure that is consistent with the type and value of work performed.
7. A contractual remedy, if appropriate.

The statement of work should provide a clear and thorough description of the goods or services to be provided. If appropriate, provide the relevant environment where the product/service will be used. In certain types of procurements, it may be critical to describe the existing business processes. If the existing business process will change as a result of the procurement, then also describe what the business process will be after the procurement objectives are completed. If agencies want the respondents to suggest new business processes, ensure that this information is included in the solicitation.

Contract Term

A reasonable contract term compliant with all applicable law must be established prior to solicitation and must be included in the solicitation document. All contracts must have a specific ending date. Indefinite contracts are generally prohibited. As a general policy, it's recommended that the maximum time for contracts without reissuing a competitive solicitation be 4 years. This includes any renewal or extension periods. Individual business needs may dictate a different period and agencies should consult their legal counsel for advice on this matter early in the planning process.

Contracts must include a "funding out" clause. The guide provides two forms:

Long version

All obligations of the [agency] and Customers are subject to the availability of legislative appropriations, and for Customers expending federal funds, to the availability of the federal funds applicable to the Contract. The respondent acknowledges that the ability of the [agency] and the Customers to make payments under the Contract is contingent upon the continued availability of funds. The Respondent further acknowledges that funds may not be specifically appropriated for the Contract and the [agency] or Customers continual ability to make payments under the Contract is contingent upon the funding levels appropriated to the agency or Customer. The [agency] and the Customers will use all reasonable efforts to ensure that such funds are available. The Respondent agrees that if future levels of funding for the [agency] or a Customer are not sufficient to continue operations without any operational reductions, the [agency] or the Customer, in its discretion, may terminate the Contract or a pending order under the Contract, either in whole or in part or that appropriate state officials eliminated to agency or agency Customers. In the event of such termination, the [agency] or the Customer will not be considered to be in default or breach under the Contract, not shall it be liable for any further payments ordinarily due under the Contract, nor shall it be liable for any damages or any other amounts which are caused by or associated with such termination. The [agency] and the Customer shall make best efforts to provide reasonable written advance notice to the Respondent of any such Contract or order termination. In the event of such a termination, the Respondent shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination, either on the particular order if an order is being terminated, or the Contract, if the Contract is being terminated. The [agency] or the Customer shall be liable for payments limited only to the portion of work the [agency] or the Customer authorized in writing and which the Respondent has completed, delivered to the [agency] or Customer, and which has been accepted by the [agency] or Customer. All such work shall have been completed, per the Contract requirements, prior to the effective date of termination.

Short version

This contract is contingent upon the continued availability of funding. If funds become unavailable through lack of appropriations, legislative or executive budget cuts, amendment of the Appropriations Act, state agency consolidations, or any other disruptions of current appropriations, provisions of the Termination Article shall apply.

In addition, state agencies are prohibited from incurring obligations in excess of amounts lawfully appropriated by the Texas Legislature over the course of a biennium. See Excess Obligations. (http://www.window.state.tx.us/procurement/pub/manual/2-24.pdf)

Additional information regarding contract terms are discussed in Chapter 6 – Contract Formation.

Historically Underutilized Business (HUB) Requirements

Agencies are required to make a good faith effort to utilize HUBs in state contracts in accordance with the goals specified in the 1996 State of Texas disparity study. These goals can be achieved through contracting directly with HUBs or indirectly through subcontracting opportunities in accordance with Texas Government Code, Chapter 2161, Subchapter F and Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B.

For all contracts over $100,000, HUB subcontracting forms must be completed and returned with the bid or proposal or the proposal will be considered non-responsive as addressed in Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B, Rule Section 20.12(28). A sample form is included on **Appendix 1,** Exhibit A to RFP No. of this guide. Specific HUB procedures are detailed in the Texas Comptroller of Public Account's (CPA) Procurement Manual at http://www.window.state.tx.us/procurement/pub/manual/.

Payment Types

The method of payment has a direct impact on how the statement of work is written and how the contract is managed. Agencies must measure or verify that the work is complete and how much and how often the agency will pay the contractor. As with specification types, there are also various payment types. The payments should be consistent with the type of product or service delivered. Payments should be structured to fairly compensate the contractor and encourage timely and complete performance of work. As a general rule, payment should be approximately equal to the value of the completed work.

The following table illustrates the various common types of payments and how each applies to various types of contracts.

COMMON TYPES OF PAYMENT

Payment Type	Commonly used for:	Payment based on:
Cost Reimbursement	Client services contracts, usually associated with state and federal grants. **Example**: Contracts for services in remote areas.	Reimbursement of allowable costs in accordance with the approved budget. See the Uniform Grants Management Standards published by the Governor's Office. (www.governor.state.tx.us/ division/stategrants/guidelines/view) *See Note1*
Cost Plus Incentives	Materials contracts wherein the materials are unknown at the time of contract award. **Example**: Construction contracts.	Contractor's cost plus a percentage of cost or cost plus a fixed fee. This type of payment is usually discouraged as there is no incentive for the contractor to minimize the cost to the State.
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.	A specific fee for a unit of service. Payments are made for each unit of service completed.
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.	A firm fixed price at the time the contract is awarded. Contractor carries all risk as the payment does not change, regardless of how much it costs the contractor to provide the goods or services.
Firm Fixed Price with Escalator	Same as above and for longer term contracts and 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.	Same as above except includes a provision for price escalation. Escalators are typically based on the Consumer Price Index.
Progress (not allowed in client services contracts)	Construction contracts or contracts that are completed in phases or stages. Example: Building, Construction, Consulting Services.	Payment is based on pre-established deliverables. Deliverables must be measurable. See Note2
Time and Material	Labor contracts wherein the amount of labor or material required for the work cannot be forecast. Recommend other payment types if 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.	Payment is based on the number of hours worked for a specific scope of work, i.e. install a 120 power outlet.

Note 1: Agencies may reference the State of Texas Travel Allowance Guide published by the Comptroller of Public Accounts when including travel costs as an allowable expense within a contract. (https://fmx.cpa.state.tx.us/fm/pubs/travallow/index.php)

Note 2: For example, a contractor has a contract to conduct an analysis of a specific business process and prepare a report with recommendations for improvement. A method of payment might be that the contractor is paid 30% of the contract amount upon completion of the analysis. The agency must specify what documentation will be required to indicate proof of this deliverable, such as a copy of the analysis. The remaining 70 percent is paid upon receipt and acceptance by the agency of the final report. It is important to note that with this payment type, agencies must be careful not to shift the financial risk to the State by paying the contractor for more than the amount of work the contractor has completed. Agencies must also consider the importance of the deliverable. In the above example; the agency may agree to pay the contractor 80 percent of the contract amount upon completion of the analysis since the analysis takes a significant amount of labor. This change shifts the financial risk to the State because the agency has paid for 80 percent of the service, but will have nothing to show for the dollars spent if the contractor fails to complete and submit the report and recommendations.

Good business practice suggests that each payment should reflect the value of the work performed. Agencies can control the payment process by dividing the overall contract payments into smaller amounts that each reflect a small increment of work or deliverable. This is an effective technique for managing financial risk. If there is a dispute, by using the deliverable elements, the scope of the dispute can be contained to a discrete deliverable rather than the entire contract. Likewise, the amount of money associated with the deliverable is also known and limited. In slightly different ways, each of the deliverable elements either lessens risk or shifts risk from the State to the contractor.

Chapter 6 - Contract Formation contains a detailed explanation of the required elements of a contract.

Define the Agency's Role

Clearly define the role the agency will play in the work to be performed and any specific contributions, resources or tasks the agency will provide. Detail any background data or work already accomplished that the anticipated contract will build on and make it available during the solicitation phase of the procurement. Specify whether the contractor should rely on the accuracy of any such background data or work or whether the data or work is provided for information purposes only. If provided for informational purposes only, advise if the contractor is responsible for verifying the accuracy of the information to the extent necessary to perform the contract. Define the roles of the agency staff that will administer the contract and monitor the contractor's progress.

Quantity

The solicitation document must quantify the amount, frequency and/or location required to meet performance.

Quality

The solicitation document must identify the level of quality required for acceptable performance. For example: *All dusting shall be done so as to ensure cleanliness of surfaces, as determined through inspection by the contract administrator.*

Established Standards

If established standards (international, national, state, local) are available, they can be used to assist in defining the contract performance requirements. Examples of national and international standards include American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM) and International Organization for Standardization (ISO). Using established standards provides consistency in measuring acceptability, quality or accuracy of the performance of one or more parties to a contract.[ix]

Contracts will often incorporate by reference "standards" maintained by entities representing particular industries such as Generally Accepted Accounting Principles (GAAP), Institute of Electrical and Electronic Engineers (IEEE) or ISO. If a standard is incorporated by reference, identify any industry, state or agency standards of performance that relate to each activity, task, work product or deliverable. Merely referring to "industry standards" is usually inadequate. If an industry standard is used, specifically identify the standard by number.

Warranty as a Standard

A warranty is a type of standard that can describe performance.[x] Consider including warranty language as a contractual standard of performance. An express warranty and an implied warranty are technically different. However, each standard works to describe a type of contractually based performance.[xi]

Unless excluded or modified by the language in the contract, warranties or standards may be implied or imposed into a contract by a statute or case law. For example, in the sale or lease of some types of personal property or goods there may be statutory warranties implied into a contract, such as: a warranty of title,[xii] a warranty that the goods shall be merchantable,[xiii] or a warranty that goods are fit for a particular purpose.[xiv]

The best practice is to include clear standards for the contractual performance or an express warranty describing the objective expectation of performance rather than relying on an implied warranty. Generally, it is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty. However, a mere affirmation of the value of the goods or a statement merely purporting to be the seller's opinion or commendation of the goods does not create a warranty.

Contractor Qualifications

The statement of work should specify the minimum qualifications required of the contractor. Typically in an RFP, the contractor qualifications are less stringent than in an IFB because the contractor qualifications are part of the evaluation criteria. At a minimum, the statement of work should require that the contractor have a specified level of experience in the type of work to be performed.

Bonding Requirements

The three most common forms of bonding are bid bonds (deposits), performance bonds and payment bonds. Agencies must advise the respondents in a solicitation if a bond is required and what forms are acceptable (e.g., irrevocable letter of credit or cashier's check). When considering whether or not to use a bond, remember that the cost of the bond is typically passed on to the agency by the contractor. Some bonds are required by statute

for specific types of procurements. Please consult with your attorney if you have any questions about bonding requirements.

Evaluation Criteria

The solicitation document must advise the respondents how a proposal will be evaluated. The evaluation criteria must reflect the essential qualities or performance requirements necessary to achieve the objectives of the contract. The criteria should allow the evaluation team to fairly evaluate the proposals. The evaluation criteria may take a variety of sources of information into consideration such as the written response, the oral presentation, documented past performance of the respondents and references relevant to the contract. Specific portions of the required response should directly relate to the evaluation criteria.

To ensure fairness in evaluation, the evaluation criteria should reflect only those requirements specified in the solicitation document. The language within the solicitation will determine the scope of the evaluation criteria and the flexibility the evaluation team will have when evaluating proposals, so the evaluation criteria should not be unduly restrictive. Respondents must have notice in the solicitation of all requirements. The solicitation should clearly state the consequence of failing to meet these requirements such as reduction in evaluation score or disqualification. Consider carefully any requirements that may disqualify a proposal. For example, the HUB Subcontracting Plan is required by state statute; therefore, agencies have no choice but to disqualify the respondent if they do not submit the plan. However, if the respondent fails to submit a copy of a license, is that really a valid reason for disqualification?

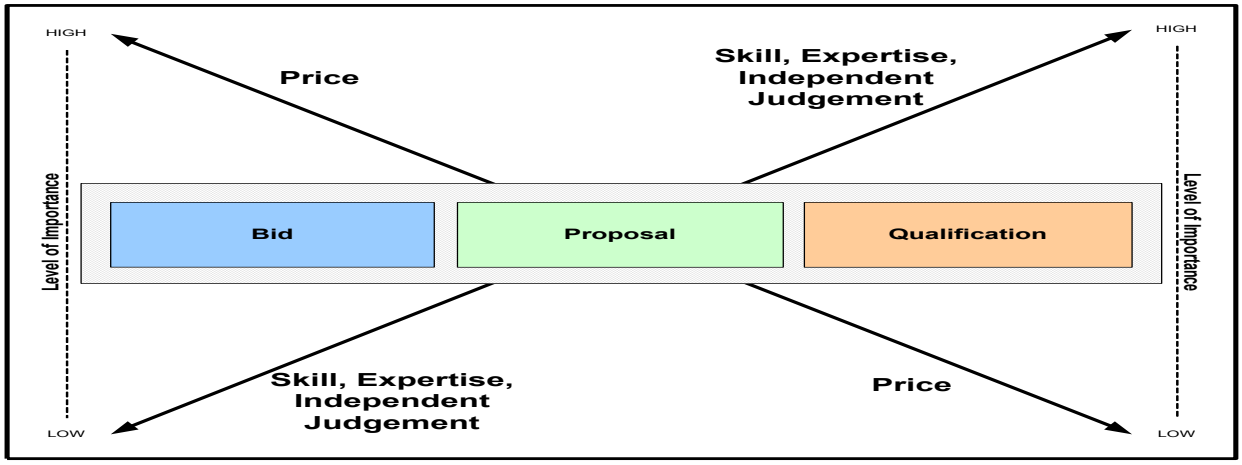
Criteria that was not included in the solicitation may not be used in the selection or ranking of a proposal. For example, if respondents receive additional points for possessing a national accreditation, or meeting the unique needs of the customers, these criteria must be included in the solicitation so that the respondents know there is an opportunity to score higher by providing these options. Likewise, if this information is not requested in the solicitation, respondents who fail to offer these options cannot be penalized.

There are several schools of thought on how much information is provided to the respondents regarding the evaluation criteria. At a minimum, the criteria must include the weight assigned to each criterion. Some agencies prefer to give more detailed information as to how each criterion is broken down into smaller units or they include a copy of the evaluation scoring sheets with the solicitation. Either approach is acceptable.

When determining the evaluation criteria, also consider the proposal submission requirements associated with each criteria. In the sample criteria listed below, methodology is a criterion on which the respondents will be evaluated. What information needs to be included in the response in order to effectively evaluate a respondent's methodology – did they copy a project management technique straight from a training manual, or did they tailor this technique specifically to meet the needs of the solicitation? Another example is experience, skills and qualifications of company and staff. What information is required for the evaluation team to score this criterion – years in business, years of staff experience, certified or licensed employees, performing similar size projects, etc? The table below indicates sample evaluation criteria:

SAMPLE EVALUATION CRITERIA	SAMPLE WEIGHT
Cost	***60%***
Proposed services, including work plan and methodology.	***20%***
Experience, skills and qualifications of company & staff.	***20%***

Cost is typically the most significant evaluation factor. However, there are procurements in which the skills and experience of the contractor or other factors may be more important than cost. For example, if a trainer has to have a specific set of skills, the agency may be willing to pay more for these skills. When establishing the criteria weight, consider the importance of the criteria to the overall project. The criteria deemed most important by the agency should be weighted higher than the other criteria. The following diagram demonstrates the relationship of the evaluation criteria and the level of importance.



Source: Office of the Attorney General

BEST VALUE CONSIDERATIONS

Best value considerations should also be included in the statement of work. The lowest cost is not necessarily the best value for all procurements. For example, a commodity or service of higher quality, such as a longer life span, may be a better value and investment for the State of Texas, even if the initial cost is more. Agencies need to think strategically when considering their procurement needs. Do not make the mistake of obtaining only what is necessary to meet the immediate needs of the agency. Ask “What is the desired outcome of the procurement” and “What is the best way to achieve this outcome?”

For example, consider the purchase of a heating and air conditioning unit. Agencies should consider the total cost of ownership when purchasing these units. Average life span of the unit, electricity consumption,

maintenance record of the unit and parts availability are just a few considerations when looking at the total cost of ownership. In addition, agencies might consider the qualifications and availability of the service technicians and the vendor's performance history. The Comptroller of Public Accounts (CPA) administers a vendor performance program for use by all ordering entities per Texas Government Code, Title 10, Subtitle D, section 2155.077. (See CPA Vendor Performance Tracking System) (http://www.window.state.tx.us/procurement/pub/manual/2-50.pdf)

Several statutes refer to the use of best value in procurements.[xv] Refer to these statutes before including best value considerations in your solicitations. Some items which may typically be considered under best value include:

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

Verification of use of Best Value Standard

The best value selection of a contractor is based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance. (2)

For each contract for which the agency is required to purchase goods or services using the best value standard, the contract manager or procurement director of each state agency must:

- approve the contract;

- ensure that the agency has documented the best value standard utilized for the contract; and
- acknowledge in writing that the agency complied with the agency's and Comptroller's contract management guide in the purchase.

After any contract is completed or otherwise terminated, the state agency is required to review the vendor's performance by filing a report through the Vendor Performance Tracking System maintained by the Comptroller of Public Accounts. Texas Government Code, Section 2155.089. For each purchase of goods or services for which a state agency is required to use the best value standard, the Comptroller shall ensure that the Vendor Performance Tracking System will include information on whether the vendor satisfied the best value standard.

Proposal Submission Requirements

The solicitation document should include one section listing all of the required information that respondents must submit with their response. This will assist respondents in ensuring required documentation is submitted with the proposal. Additionally, recommended or required proposal formats should be specified in this section, such as page number limitations, size of paper, number of copies, etc. As stated previously, ensure that the solicitation document requests information on those items to be evaluated. For example:

Evaluation Criteria	Solicitation Requirement	Submission Requirement
Contractor Qualifications	Licensed Architect.	Copy of License.
Contractor Experience	Minimum of five (5) projects of similar size and scope.	Detailed information regarding building size, dollar amount and scope of project for each individual project and any additional information necessary to evaluate contractor experience.
Financial Capability	Financially capable of handling a project of this size and scope.	Copy of latest financial statements, including balance sheets, Dunn and Bradstreet report, etc.
Proposed Services	Business Plan for how proposed services will be performed.	Business plan should include, the number of staff resources and experience level, implementation strategy, reporting requirements, response times, etc.

Monitoring

The methods used to monitor contractor performance should be clearly stated in the solicitation. Forcing a contractor, without prior knowledge, to produce time-consuming reports or maintain stringent testing requirements outside normal industry parameters is grounds for legal challenge. It is important that agencies develop and include a monitoring strategy in the solicitation.

The amount of monitoring should be balanced and adequate to meet the need, but limited in type, scope and frequency sufficient to achieve the desired result without unnecessarily increasing costs. Overly restrictive oversight can interfere with the contractor's ability to accomplish the work and may unnecessarily and inadvertently increase the cost of the work.

The statement of work should set specific deadlines for completion of tasks and a schedule for submittal of deliverables, required meetings, presentations or other activities. The contract manager must consider monitoring methods to ensure the contractor performs as specified in the statement of work.

Additionally, different funding sources such as federal grants may have specific requirements for contract monitoring. The contract manager must be familiar with these requirements and include them in the statement of work.

Enhanced Contract and Performance Monitoring

Monitoring the performance of suppliers is a key aspect of contract management and one that requires close attention. The level and frequency of performance monitoring is dependent on the value and criticality of the contract to the state and is essential for effective contract management. As such, each state agency by rule is required to establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the agency's governing body. If the agency is not governed by a multimember governing body, the contract monitoring information must be submitted to the officer who governs the agency. The agency's contract management office or procurement director shall immediately notify the agency's governing body or governing official, as appropriate, of any serious issue or risk that is identified with respect to a contract monitored. Texas Government Code, Section 2261.253(c).

Further discussion on contract monitoring is covered in Chapter 7 – Contract Administration.

Reporting

Status reporting, performance and activity reporting are terms used to describe information that a contractor must provide to show the status of a contract. These terms must be defined in the statement of work and the definition of each should include content, frequency and audience for each report.

A status report describes the level of completion of the work and/or the cost of the contract. Percent complete is often used to describe status. For the report to be useful, a baseline should be established for timelines and budgeting.

If deliverables are specified, include the format of the deliverable and the number of copies required. For example, if a deliverable is a final project report, state how many copies of the report are needed and specify the

format of the electronic copy. State all items that must be included in the report. These requirements are usually addressed in the statement of work within the solicitation document.

If vendor provided information is anticipated to be reported as part of the agency's performance measures, ensure that there are requirements that allow for data verification and that the data corresponds with the data required for the performance measures.

If possible, include in the solicitation document the desired format or a sample of any required reports.

A state agency shall develop and implement contract reporting requirements for each contract for the purchase of goods or services that has a value exceeding one million dollars. The agency must prepare information on:

- compliance with financial provisions and delivery schedules under the contract;
- corrective action plans required under the contract and the status of any active corrective action plan; and
- . Any liquidated damages assessed or collected under the contract must also be reported.

The state agency must verify that accuracy of any information reported about the contract if the information is based on information provided by a contractor. An agency shall verify the delivery time of goods or services scheduled under a contract as well . Texas Government Code, Section 2261.254.

Inspection and Testing

The statement of work should provide for inspection and testing. The agency should include inspection and testing of goods and services purchased under the contract to ensure compliance with the specifications of the solicitation and the contract.

Test should be performed on samples submitted with the proposal and samples taken from regular shipments. All costs of inspection and testing should be borne by the contractor. In the event the goods tested fail to meet or exceed all conditions and requirements of the solicitation and contract, the goods should be rejected in whole or in part at the contractor's expense. Latent defects can result in cancellation of a contract at no expense to the state. Agencies should contact legal counsel regarding latent defects.

Final Acceptance

The statement of work should clearly define how the agency will determine that the contract has been satisfactorily completed. The statement of work sets a standard for acceptance of the deliverable and establishes a procedure to receive or reject the deliverable based on specific factors.
Tracking the status of several phases, segments and deliverables, where each deliverable may have multiple tasks, activities, and products, can be challenging. A formal acceptance process for each step in a contract allows a contract manager and the contractor to know the conditions of contract performances.[xvi]

Additional Issues to Consider

Listed below are additional issues which agencies should consider when writing the statement of work. These items may affect pricing, so it is important that respondents are aware of these requirements. The statement of work answers – who, what, when, where, why and how. If these questions are answered, it is a reasonable assumption that the statement of work is complete.

- Licenses or permits required;
- Use of state agency equipment;
- Storage space for contractor materials/supplies;
- Intellectual property/copyright issues;
- Subcontractor requirements;
- Insurance requirements; and
- Conflict of interests/organizational restrictions;

Preparing the Grant Announcement

This section of this Chapter prevails over guidance addressing the same matter in the procurement sections of the Guide. In addition to the Uniform Grant Management Standards published by the Comptroller of Public Accounts, agencies should follow any applicable federal or state grant funding source laws or regulations.

With regard to a grant announcement, UGMS requires a grantor to be responsible for the "efficient and effective administration of federal and state awards through the application of sound management practices" and they [the grantor] are "responsible for assuming responsibility for administering federal and state funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the federal and state award." Therefore, a grant announcement should refer to the underlying federal or state program funding requirements that will be required to be incorporated into the grant award. In addition, a grant announcement should refer to the "State Assurances" which are required by UGMS to be included in any grant award.

The grant announcement must be developed to include the additional requirements.

1. **Best Value Contracting,** http://www.kmlcarpenters.org/documents/BESTVALUECONTRACTING.swf
2. **Best Value Procurements, http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-135.9.html**

CHAPTER 4

ADVERTISING THE SOLICITATION

When marketing a solicitation, consideration must be given to the type of procurement method used. For example, the advertising requirements of goods and services are different from those of building construction or client service contracts. Agencies should refer to the appropriate statute to ensure the proper advertising procedures are followed. Below is a table to assist in determining the appropriate advertising procedure.

Advertising Methods

Type of Procurement	Applicable Statute*	Advertising Method(s)
Common Goods and Services, including Catalog Information Systems.	Texas Government Code, Sections 2155 & 2166.	Centralized Master Bidder's List. Electronic State Business Daily.
Professional and Consulting Services.	Texas Government Code, Section 2254.	Texas Register. Electronic State Business Daily.
Building Construction.	Texas Government Code, Section 2166.	Texas Register. Newspaper. Electronic State Business Daily.

*If not covered by one of these statutes, some agencies may have their own enabling legislation regarding procurement authority. Agencies should review their enabling legislation in addition to the statutes referenced above.

The Centralized Master Bidders List (CMBL) (http://www.window.state.tx.us/procurement/pub/manual/2-33.pdf) is an electronic mail list administered by CPA which is a database of vendors registered by commodity codes who have provided contact information, commodity codes, and goods/services they offer. Texas Government Code, Title 10, Subtitle D, Subchapter E, Section 2155.263 requires the Comptroller of Public Accounts (CPA) to maintain the CMBL. Agencies shall solicit bids or proposals exceeding $25,000 from all eligible vendors on the CMBL. Unless exempted by law, the CMBL must be used for all procurements subject to CPA's procurement authority. See the website for specific requirements on when to use the CMBL.

The Electronic State Business Daily (ESBD) (http://www.window.state.tx.us/procurement/pub/manual/2-33.pdfl) is an internet based website for posting state bid opportunities. It is also administered by CPA. In accordance with Texas Government Code, Title D, Subtitle D, Section 2155.083 and the Texas Administrative Code, Title 34, Part 1, Chapter 20, Subchapter C, 20.212, the requirement to advertise solicitations using the ESBD applies to all purchases exceeding $25,000 regardless of source of funds used for the procurement, (including delegated purchases), emergency, construction projects, professional or consulting services, proprietary or purchases exempt from CPA's purchasing authority. Verification of the ESBD advertisement is required in the purchase file. The ESBD is available on the internet at http://esbd.cpa.state.tx.us/ Agencies must be familiar with the requirements of the ESBD as failure to properly post a bid opportunity will void any resulting contract.

The Texas Register is used to advertise various types of procurements, such as some professional and consulting contracts and some building construction contracts. Refer to each agency's enabling legislation or the Procurement Manual to determine if Texas Register publication is required. The *Texas Register* is administered by the Secretary of State's Office. (http://www.sos.state.tx.us./texreg/index.shtml)

Advertising bid opportunities in local newspapers is required for some types of procurements, such as certain types of building construction projects. Refer to the applicable statutes to see if newspaper advertisement is required for a particular procurement.

Required Posting of Certain Contracts

In 2015, the legislature enacted legislation which requires state agencies to post certain contracts for the public to view. For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website

- each contract the agency enters into until the contract expires or is completed, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor;
- for contracts that are not competitively bid or are entered into without compliance with competitive bidding procedures, the statutory or other authority under which the contract was awarded and executed;
- for contracts that were the subject of competitive procurement, the request for proposals or bids until the contract expires or is completed.

A state agency monthly may post contracts described by Texas Government Code, Section 2261.253, Subsection (a) that are valued at less than $15,000. .

Barring Vendors from Participating in State Contracts

The Comptroller may bar a vendor from participating in state contracts, including any contracts where the purchasing authority is delegated to a state agency, for substandard performance under a contract with the state or a state agency. If there are material misrepresentations by a vendor in a bid or proposal to the state or a state agency or during the course of performing a contract with the state or a state agency, the Comptroller may bar the vendor from participation. In addition, a vendor may be barred due to fraud or breach of a contract with the state or a state agency.

Another reason the comptroller may bar a vendor from participating in state contracts would be repeated unfavorable performance reviews under Texas Government Code, Section 2155.089 or repeated unfavorable classifications received by the vendor under Texas Government Code, Section 2262.055 after considering the following factors: the severity of the substandard performance by the vendor; the impact to the state of the substandard performance; any recommendations by a contracting state agency that provides an unfavorable performance review; whether debarment of the vendor is in the best interest of the state; and any other factor the comptroller considers relevant, as specified by comptroller rule.

The comptroller may also bar a vendor from participating in state contracts if more than two contracts between the vendor and the state have been terminated by the state for unsatisfactory vendor performance during the preceding three years.

If a vendor is barred from participating in state contracts as outlined above, the comptroller shall determine the period of debarment. The period for debarment must be commensurate with the seriousness of the vendor's action and the damage to the state's interests. Texas Government Code, Section 2155.077.

Solicitation Announcements / Developing the Bid List

Announcements are an efficient way to reduce mailing costs when publishing large solicitations. If agencies are required to use the CMBL, agencies must send a copy of the solicitation to all vendors on the CMBL bid list for the advertised commodity code. (http://www2.cpa.state.tx.us/com_book/index.html) There may be several hundred names associated with a particular commodity code. An announcement is a one page document sent to all vendors on the CMBL advising them of the upcoming bid opportunity. The vendor is requested to complete the document and fax it back to the agency if they are interested in receiving a copy of the specific opportunity. An example of an announcement can be found in Appendix 2. When the solicitation is mailed, it is only mailed to the vendors who responded to the announcement.

Pre-Solicitation Conferences

Agencies may conduct mandatory or non-mandatory pre-solicitation conferences. Agencies should carefully consider the use of a mandatory conference and confer with legal counsel as this may limit competition. Conferences should be mandatory only if an on-site visit is required to have a full understanding of the procurement or if the solicitation is so complex that agency staff believes attendance is critical for potential

respondents to fully understand the procurement. Pre-solicitation conferences provide a forum for agency staff to respond to questions regarding a solicitation. The benefits derived from conducting pre-solicitation conferences include:

- The conferences allow potential respondents to address specific questions or concerns with the solicitation. If any issues are identified at the conference, the agency will publish an addendum to the solicitation.

- Conferences are important when there is a need for on-site visits by contractors prior to submitting their response. In some cases, it may be sufficient to take digital pictures of the sites and provide this information in a slide presentation at the conference in lieu of the conference attendees traveling to the various sites. A copy of the slide presentation can be provided to the conference attendees and is posted on the ESBD, if required.

- Conferences provide a forum for agencies to provide additional information, schematics, plans, reports, or other data that is not easily transferable or distributed through hard copy.

- All potential respondents receive the same information.

- Subcontracting relationships may develop through the contacts established at the conferences.

The solicitation document must indicate the date, time and location of the conference. The conference is usually held approximately ten days after the solicitations have been published. All conferences attendees must be documented through a sign-in sheet. This is especially important if the conference is mandatory because the sign-in sheet is the document used by the agency to verify respondent attendance at the conference.

The Purchasing Department should conduct the conference, in coordination with the program staff. The Purchasing Department should facilitate the meeting and answer procurement related questions, while the program staff responds to the technical questions. It may not be possible to answer all questions at the conference. In these circumstances, the answers are followed up in writing. It is recommended that the Purchasing Department record minutes of the pre- solicitation conference.

All changes to solicitations must be made through an addendum issued by the agency. The addendum is provided to all potential respondents, usually by posting to the ESBD. When issuing an addendum, consider the amount of time remaining until the opening date of the solicitation. It may be necessary to extend the bid opening or proposal deadline – which can also be done through the addendum process.

Conferences should be audio or recorded for future reference. Below is a typical agenda for a pre-solicitation conference:

- Opening – Purchaser introduces agency representatives and explains their roles in the procurement.

- Introduction – Attendees introduce themselves and identify the company they are representing.

- Solicitation Overview/Review – This is the main focus of the conference. The document is reviewed page by page or section by section. It is not necessary or recommended to read the entire document, but the entire document should be addressed. Questions should be answered as the pages or sections are discussed.

- Closing Summary – Summarize the changes that were agreed to be made through the issuance of an addendum. Review any unanswered questions to be addressed at a later date. Remind attendees that no oral changes are binding; the changes must be in the form of a written addendum.

- See **Appendix 3** for Pre-Solicitation Conference Guidelines.

Communication with Respondents

All communication with potential respondents should be made only through the Purchasing Department or other designated staff. The program staff should not have contact with potential respondents outside of pre-solicitation conferences. Likewise, a respondent that contacts someone other than authorized staff in regards to a solicitation may be disqualified. While the Purchasing Staff or other designated staff may not be able to answer all of the technical questions asked by potential respondents, they will ensure that the information is provided to all potential respondents.

The solicitation document should only provide a purchasing point of contact with all applicable forms of communication such as telephone, email, etc. Should a potential respondent contact program staff, program staff must politely decline to discuss the procurement and forward the inquiry to the appropriate purchaser.

Written Questions

The solicitation document may invite respondents to submit written questions concerning a solicitation. This option may be in addition to or in lieu of a pre-solicitation conference. The date and time for submission of written questions should be specified in the solicitation document, if applicable. Written questions may be submitted by mail, facsimile, email or hand delivery.

If the solicitation is posted on the ESBD, the questions and answers should be posted with the solicitation document as they become available.

Solicitation Submission and Opening

The solicitation documents must indicate the date, time and location if a public opening is held by the agency. Respondent's Proposals may be evaluated on a variety of factors in addition to price. At the sole discretion of each agency and as indicated in their solicitation documentation, they may choose to not conduct a public reading of respondent names or pricing tabulations prior to award of Contract(s). Respondent(s) should be made aware that such information cannot and will not be provided prior to award of Contract(s).

The procurement manual covers the procedures for receipt (http://www.window.state.tx.us/procurement/pub/manual/2-36.pdf) and opening (http://www.window.state.tx.us/procurement/pub/manual/2-37.pdf) of solicitations.

CONSULTING SERVICES

NOTICE OF INTENT: MAJOR CONSULTING SERVICES. "Consulting service" means the service of studying or advising a state agency under a contract that does not involve the traditional relationship of employer and employee. "Major consulting services contract" means a consulting services contract for which it is reasonably foreseeable that the value of the contract will exceed $15,000, or $25,000 for an institution of higher education other than a public junior college. ***Prior to entering into a major consulting services contract, a state agency is required to notify the Legislative Budget Board and Governor's Office of Budget, Planning, and Policy of its intent to contract with a consultant. The agency shall give information to the Legislative Budget Board and the governor's Budget and Planning Office to demonstrate the agency has complied or will comply with Texas Government Code, Sections 2254.027 and obtain a "finding of fact" from the governor's Budget and Planning Office that the consulting services are necessary.*** Solicitations for consulting services contracts of $10 million or more must be submitted to the Contract Advisory Team (CAT) for review. (Ref. Texas Government Code, Section 2254)

Texas Government Code, Chapter 2254, Subchapter B, establishes six (6) oversight requirements for state agencies using private consultants. Because different state entities oversee these requirements, the distinctions between them may not be obvious. The statutory guideline for each requirement is:

Requirement	Statutory Reference Government Code, Chapter 2254,Subchapter B	Contact Agency
Notification	Section 2254.028	Governor's Office of Budget Planning and Policy Legislative Budget Board.
30-Day RFP Publication	Section 2254.029	Secretary of State.
Finding of Fact	Section 2254.028	Governor's Office of Budget, Planning and Policy.
20-Day Selection Publication	Section 2254.030	Secretary of State.
Archives	Section 2254.036	Texas State Library.

Source: Governor's Office of Budget, Planning and Policy

Consulting Services are services that involve studying or advising a state agency under a contract that does not involve the traditional relationship of employer and employee. Major Consulting Services Contracts ($15,000 or greater) require a "finding of fact" from the Governor's Office of Budget, Planning and Policy and publication in the Texas Register prior to contract execution. Consulting services have

defined procedures for advertisement and award. These procedures are established by the Governor's Office and are located on the Governor's Office Website at (http://www.governor.state.tx.us/divisions/bpp/guidelines). Agencies should be familiar with these rules before considering the use of consulting services. A contract entered into in violation of Sections 2254.029 through 2254.031 is void. A contract entered into with a private consultant who did not comply with Section 2254.033 is void.

A state agency may contract with a consultant only if: (1) there is a substantial need for the consulting services [xvii;] and (2) the agency cannot adequately perform the services with its own personnel or obtain the consulting services through a contract with a state governmental entity.[xviii]
(Ref. Texas Government Code, Section 2254.026)

The governor may grant a state agency a limited waiver from the requirements of the consulting statute because of an unforeseen emergency. (Ref. Texas Government Code, Section 2254.026) An "unforeseen emergency" means a situation that suddenly and unexpectedly causes the agency to need the services of a consultant and there is insufficient time to comply with the statute's requirements, e.g., the issuance of a court order, new legislation, or a natural disaster.[xix] The Comptroller of Public Accounts has adopted rules that impact contracting for consulting services.[xx]
http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=5&rl=54.

Other agencies may also have rules or requirements that impact a specific agency's contracts for consulting services. See also the Comptroller's Purchase Policies Guide: http://www.window.state.tx.us/fm/pubs/purchase/

PROFESSIONAL SERVICES

Contracts for professional services are exempt from complying with the provisions of Government Code, Chapter 2254, Subchapter B:[xxi]

"Professional services" means services, within the scope of the practice, as defined by state law, of:

- accounting ;
- architecture;
- landscape architecture;
- land surveying;
- medicine;
- optometry;
- professional engineering;

- real estate appraising;
- professional nursing; or

provided in connection with the professional employment or practice of a person who is licensed or registered as:

- a certified public accountant;
- an architect;
- a landscape architect;
- a physician, including a surgeon;
- an optometrist;
- a professional engineer;
- a state certified or state licensed real estate appraiser; or
- a registered nurse.

Contracted services provided by the above professionals that fall outside their scope of practice may be governed by other procurement requirements. For instance, management consulting services provided by a certified public accountant would not be exempt as a professional service. In order to contract for such services, an agency would follow the consulting services contract requirements.

Some state agencies have statutory authority to acquire professional services not listed above. An example is the Department of State Health Services which is authorized by Section 12.0121, Health and Safety Code to adopt a rule expanding the scope of professional services.

Mixed Services

When a contract involves both consulting services and one or more other services, an agency must comply with the consulting services requirements when the primary objective of the contract is the purchase of consulting services. For instance, if a contractor proposes to analyze an agency's information systems needs and develop and implement an automated information system, the primary objective of the contract is not the analysis provided. It is the delivery of a data information system. This contract is not a consulting contract; therefore, the requirements for consulting contracts do not apply. However, the agency must comply with the purchasing procedures under Chapters 2151-2158, Texas Government Code, administered by CPA.

Governmental agencies are prohibited from using competitive bidding to purchase or award a contract for "professional services".[xxii] The selection of a vendor or award of a contract for "professional services" must be based on two criteria:

1. The demonstrated competence and qualifications to perform the services; and

2. A fair and reasonable price. The professional fees under the contract:

a. Must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations; and

b. May not exceed any maximum provided by law.

Architectural, Engineering or Land Surveying Services

When procuring professional architectural, engineering or land surveying services, agencies must follow special procedures. Agencies must:

1. Select the most highly qualified provider of those services on the sole basis of demonstrated competence and qualifications – no consideration of price at this point; and *then*

2. Attempt to negotiate with that chosen provider a contract at a fair and reasonable price.

If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering or land surveying services, the agency must:

a. Formally end negotiations with that provider;

b. Select the next most highly qualified provider;

c. Attempt to negotiate a contract with that provider at a fair and reasonable price.[xxiii]

Advertising a Grant Announcement

This section of this Chapter prevails over guidance addressing the same matter in the procurement sections of the Guide. In addition to the Uniform Grant Management Standards published by the Governor's Office, agencies should follow any applicable federal or state grant-funding source laws or regulations.
Grant opportunities should be open and accessible to the public. Competitive grants opportunities should be should be posted on TexasOnline, the eGrants system established under Texas Government Code, Chapter

2055, if required. In addition to eGrants, agencies may also wish to announce grant opportunities in the Texas Register. It is also common for agencies to develop their own distribution list of interested parties, such as existing or previous grantees that they use to provide notice of grant opportunities in addition to the more global announcements.

Agencies generally use an “Application Kit” which includes the request for grant application, an instructions document, and other documents, such as certifications or assurances that need to be completed and returned with the grant application.

Agencies may wish to schedule conferences for potential grant applicants to provide basic information regarding eligibility, scope of grant award, and general requirements of the grant. Likewise, agencies may wish to provide a “Grant Toolkit” or similar written materials to provide information to potential grant applicants. Web-based resources, such as explanatory brochures or videos can be very helpful. Webinars may also be useful.

All communications with potential grant applicants should be channeled through designated staff. While an existing grantee may wish to discuss an upcoming grant opportunity with other agency staff assigned as a “grant project manager” or “grant program staff”, such contact should be discouraged and the questions related to the upcoming grant opportunity should be directed to the designated individual within the agency.

Potential applicants should be directed to a designated staff member to submit written questions regarding the grant opportunity. Written questions and the answers provided by the agency should be posted on the agency’s website, as they are developed or on e-grants, if appropriate.

The request for grant application must state the date, time, place and method of submission for grant applications. Care should be taken to document the delivery of the grant application.

Chapter 5

Evaluation and Award

Introduction

State agencies have discretion in conducting evaluations and awards, subject only to certain statutory limits and principles of law. Agencies must conduct evaluations in a fair and impartial manner consistent with Texas law. The following topics are included as the generally accepted tools that may be employed to conduct fair and impartial evaluations. An agency should always consult with legal counsel to ensure the use of the proper tools for each procurement.

As previously discussed (Ref. Chapter 3), the solicitation document should include a general description of the evaluation process and the evaluation criteria or categories and the relative weights to be assigned to each evaluation criterion or category.

Prior to receipt of the responses to a solicitation, the agency should develop and have finally approved, an evaluation guide, which shall set forth all the details about number of evaluation teams, the detailed scoring matrix and the decision making apparatus for the evaluation of the responses and award of any resulting contracts. With a well developed evaluation guide, the agency merely follows what is in the guide to ensure a smooth process.

For complex solicitations using the Request for Proposal (RFP) or Request for Offer (RFO) process, the following tools may be beneficial to use for a fair and impartial evaluation process.

Evaluation Teams

The evaluation team should be comprised of individuals who are stakeholders in the final product or service and/or individuals who have the necessary technical or program expertise. The Purchasing Department representative is usually the team leader for the evaluation team, and serves as a non-voting member. The evaluation team members are typically selected by program staff, with appropriate review and approval be Executive Management. It is important to select members of the team who understand the needs of the organization and understand the desired outcome of the procurement. The evaluation team should bring

together as much knowledge as possible to ensure the best qualified vendor is selected. Evaluation team members may have input into the solicitation document, especially the evaluation criteria and assigned weights, if the agency so chooses. The team members should fully understand the requirements of the solicitation and must be able to critically read and evaluate responses and to document their judgments concisely and clearly in accordance with the evaluation.

The recommended size of an evaluation team is three to five members. However, some projects may require additional members or additional teams due to the nature of the procurement. Coordination and management of the evaluation process becomes more difficult as the size and number of teams increase. To avoid potential individual bias, the team should not be less than three members.

Scoring Matrix

The scoring matrix, which should be a part of a well developed evaluation guide, is used by the evaluation team members to score the individual responses based on the evaluation criteria defined in the solicitation document. The evaluation team scoring matrix should be completed prior to publishing the solicitation document because, when developing the scoring matrix, agencies may see that additions or revisions are needed to the solicitation document. If time does not permit the scoring matrix to be completed prior to publication**,** the scoring matrix must be completed prior to the opening and review of the solicitation responses. See **Appendix 12** for a sample scoring methodology.

Responsive Proposals

After all proposals are opened and recorded, the Purchasing Department determines if the proposals submitted are responsive. This is sometimes referred to as an administrative review. At a minimum, this includes the signed Execution of Offer, Invitation for Bid or similar document, HUB Subcontracting Plan and any other required documents such as bid bonds. In addition, the Purchasing Department will review the proposals to ensure that minimum qualifications are met. Consultation with legal counsel is sometimes necessary to determine a proposal's responsiveness.

An administrative review checklist is a good tool for ensuring the proposals are responsive. A sample checklist is provided in **Appendix 4.** The evaluation team will only be provided with those proposals deemed responsive.

Evaluation Team(s) Training

In advance of receiving responses for evaluation, the evaluation team leader provides a training for the evaluation team to outline the team's duties and responsibilities, in accordance with the material contained in a well developed evaluation guide. This may be a separate meeting, but often times is held in conjunction with and just prior to the evaluation. Team members should be instructed on their responsibilities including the critical nature of confidentiality to the integrity of the evaluation process. Each evaluation team member should submit a signed Non-Disclosure Statement (See **Appendix 7**) to the Purchasing Department prior to engaging in any discussion about, or having access to proposal documents.

The team leader will review all evaluation criteria with the team members and explain how the evaluation process will be conducted. Communication between team members during the evaluation must be limited to asking questions of the team leader and if allowed, obtaining information from technical experts to better understand the proposal contents and requirements. Each proposal must be evaluated individually against the requirements of the solicitation document. Each solicitation document response is considered independently, of all other solicitations.

A sample agenda for team training is provided in **Appendix 6**.

Single Responses

To determine why an agency receives only one response to a competitive solicitation, the Purchasing Department or other appropriate employee of the agency should do the following:

- Re-review the solicitation for any unduly restrictive requirements.
- Contact some potential respondents to determine why they did not submit a response.

If it is determined that there were unduly restrictive requirements in the solicitation document, the agency may decide to re-advertise the solicitation. Otherwise, the agency should consider the reasons that other responses were not received and determine if it is in the best interest of the state to make an award, to re-advertise with a revised solicitation, or to determine if a proprietary or single source purchasing justification is required.

Proposal Evaluation

Once the proposals have been reviewed and deemed responsive by the Purchasing Department, the evaluation team shall be provided with the qualified responses. Most evaluations are conducted in the same room evaluating the proposals at the same time. This will facilitate questions by team members to the purchasing staff or the technical experts. However, it is possible to have evaluation members working from their respective workspaces. Purchasing staff and technical experts need to be available to answer technical questions regarding responses. For example, if a proposal recommends the use of a software product one of the team members is not familiar with, the team member should discuss the pros/cons of this software with a technical expert if the evaluation member is allowed to do so by the evaluation guide; otherwise, if not allowed to conduct independent conversations, all questions must be presented to the team leader, who may seek out the answers to such questions. Evaluation team members should only ask questions in the areas related to the evaluation criteria presented in the solicitation document or the evaluation guide.

Once the evaluations are complete, the team leader will collect all of the evaluation score sheets and responses. The team leader totals the score sheets and verifies the accuracy of calculations for input into the final evaluation formula.

If it is apparent that one or more team members' evaluations differ significantly from the majority, the team leader should conduct a meeting with all team members to discuss the situation to ensure the criteria was clear to all team members and that information was not overlooked or misunderstood. If after this discussion, a team member feels that he/she did not understand the criteria, the requirement, or missed information that was

included in the response, the evaluator, at his own discretion, may revise his evaluation score. Under no circumstances should any team member attempt to pressure other members to change evaluation scores.

It is recommended that the cost or price information be scored by the Purchasing Department as cost/price is an objective criteria that should be calculated through predetermined formulas outlined in a spreadsheet. A sample of an evaluation score sheet is included in **Appendix 12.**

References

The evaluation team may verify any references included in the proposal and conduct any other reference or credit check deemed appropriate. This activity may also be accomplished through the Purchasing Department that would contact all references and attempt to receive answers to questions developed by the evaluation team. The evaluation team may also use the Vendor Performance System in evaluating past vendor performance. http://www.window.state.tx.us/procurement/prog/vendor_performance/

All reference checks must be documented in writing. The same script or format of questions must be used when conducting reference checks so that the results are consistent and fair to all respondents. A sample reference check form is provided in **Appendix 8**.

Sometimes it is difficult to obtain information from the references provided, either because the references have a policy of not providing reference information or because they cannot be reached in a timely manner. Depending on the importance of the procurement, agencies may want to consider using the following statement in the solicitation document in lieu of checking references for all respondents.

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

By using this clause, agencies are not required to check references but may choose to do so. Whether or not to check references as part of the evaluation criteria is at the discretion of the agency based on the individual procurement.

Oral Presentations/Discussions

Oral presentations or discussions are conducted at the option of the agency. If conducted, the solicitation document must state when oral presentations or discussions will occur. Oral presentations and discussions provide an opportunity for respondents to highlight the strengths and unique aspects of their response and to provide answers to questions the agency may have regarding the response. Demonstrations of product functionality are recommended when appropriate, such as information technology procurements or solution based procurements.

Oral presentations and demonstrations can be scheduled for all respondents or limited to the top ranked vendors in the competitive range. An example of how to determine competitive range is demonstrated below:

Evaluation Scores - Scenario 1	Evaluation Scores - Scenario 2	Evaluation Scores - Scenario 3
97	97	97
93	93	96
90	82	90
89	81	89
88	79	88
65	68	85

In the first scenario, the top five respondents are in the competitive range. In scenario 2, the competitive range could include the top two respondents or the top five respondents. In scenario 3, there is a six point difference between the 2nd and 3rd score, with the remaining scores close behind. Therefore, the best option is to include all six respondents. Agencies should look for a “natural break” in the scores that will determine the competitive range. The competitive range should consist of those responses determined to be reasonably considered for award selection.

Oral presentations and demonstrations should be fair to all parties. The time allowed and the format should be the same for all presenters. A prepared script will ensure consistency. Since some presenters believe there is an advantage to the order in which they present, it is best to draw names for the presentation order. This will ensure impartiality of the process.

BEST AND FINAL OFFERS

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

NEGOTIATIONS

State agencies may negotiate terms and conditions in some solicitations and not in others. For example, the competitive sealed bid method does not allow negotiations, while the competitive sealed proposal and Request for Offer methods do allow negotiations. Unless specifically authorized by statute, state agencies may not negotiate the price, specifications, terms or conditions when using a competitive bid process. Competitive proposal and qualification processes generally contemplate and allow a certain amount of negotiation. The best practice is to read the requirements of the applicable procurement procedure to verify that negotiation is permissible.

Note: A request for a respondent to clarify an offer is not the same as negotiation of the specifications or terms and conditions so long as the request to clarify does not afford one respondent an advantage over another.

Negotiations are not authorized to use technical leveling and/or technical transfusion techniques. Technical leveling is helping a respondent to bring their proposal up to the level of other proposals through successive rounds of discussion, usually by pointing out proposal weaknesses. Technical transfusion is the disclosing of technical information or approaches from one response to other competitors in the course of discussion. A practice which is prohibited by statute.
Prohibited disclosures include:

1) disclosing competing respondents' cost/prices (even if the disclosure is made without identifying the vendor by name); and

2) advising a respondent of its price standing relative to other respondents.

Even in competitive proposal or qualification processes, care should be taken to avoid inadvertently changing the stated contracting objectives. If the contracting objectives are changed through the negotiation process, the members of the pool of contractors who may have been interested in submitting an offer will no longer be on an equal level. Additional pool members may have competed, had the changed objectives been in the original solicitation. Whenever it appears that contracting objectives may have been changed, legal counsel must be consulted before proceeding further.

Similarly, care should be taken when determining negotiation strategy whether to include, as a part of that strategy, giving the vendors a cost or price that must be met to obtain further consideration. Suggesting a cost or price could deprive the competitive process from generating the cost or price that is the best value to the state. Also, be mindful that the above prohibitions still apply, i.e., disclosing competing respondents' costs or prices is not allowed, even if done without tying the cost or price to the specific vendor; and respondent cannot be told its price standing relative to other respondents. Negotiation strategy should be tailored to suit the particular facts and circumstances of the specific competition. In all events, agencies may continue with negotiations until the best interest of the state is achieved and an award to one or more respondents is made.

Negotiation Strategies

Negotiation is based on the willingness of each party to compromise. In any agreement, there are usually terms or conditions that each party may be willing to relinquish. Agencies must identify those terms or conditions that are essential, desirable, subject to negotiation or relinquishment.

Like other parts of the contract management process, planning is essential to conducting a successful negotiation. Planning allows the agency to know which terms and conditions are essential and which are negotiable. The best practice is to meet with members of the contracting team and divide the terms and conditions into groups. Identify the terms and conditions that are essential to the agreement. These are the terms or conditions upon which the agency is either unable or unwilling to compromise. Then identify and prioritize the terms and conditions that are desirable, but not essential to the agreement and which the agency is willing to compromise or relinquish.

Negotiation Techniques

There is not a single approach to negotiation and the following discussion is just one method to facilitate a successful negotiation effort.

Designate a lead negotiator to establish an organized and controlled negotiating environment that ensures the contract management team's effort is efficient, coordinated and unified. The lead negotiator should control the meeting and ensure everyone is hearing and discussing the same issue. Side discussions are distracting and may inadvertently provide information to the contractor to the disadvantage of the entire contract management team. If available, provide a private side room for the negotiation team to use for private conversations or to "caucus" during negotiations.

Do not provide the list of essential or other prioritized issues to the respondent because the list will offer a negotiating advantage. On the other hand, before meeting with the respondent, if objections to terms and conditions were not a part of a complete response, request a list of the respondent's objections to any contract terms and conditions that explains why the respondent is objecting to each term or condition.

Be prepared to explain why a particular term or condition is essential or objectionable and place the burden on the respondent to identify an alternative solution that meets agency needs. Do not feel pressured to agree or disagree to a single term or condition without considering the impact of the entire group of negotiated terms and conditions within the context of a final agreement. When the entire group of negotiated terms and conditions is completed, consider any new risks, costs or benefits. Take frequent breaks to discuss suggestions, options or alternatives outside of the presence of the respondent. Write down or use a laptop to record the exact language of any proposed or alternative terms and conditions, so that the team evaluates the exact language that will be included in the contract.

Negotiations can reach an impasse over conflicting terms thought to be essential to each party. The three question approach used to assist an agency in identifying the contracting objectives may be useful to assist the parties in clarifying and harmonizing potentially divergent objectives and interests. The three questions are:

1. What does your agency want, *specifically*?

2. What will having what your agency wants, *specifically,* do for your agency?

3. How will your agency know, *specifically*, when your agency has received what it wants?

The second question, "What will have what your agency wants, *specifically,* do for your agency?" may provide common ground to explore options to meet the needs of both parties. If an agreement is not reached consider beginning negotiations with the next respondent or re-soliciting the opportunity.

AWARD

A state agency shall award a contract for the purchase of goods and services that provide the best value for the state. Upon award of a contract the agency shall make any notifications required by law as well as any notice to the Electronic State Business Daily (ESBD) required to announce the award.

The Comptroller of Public Accounts/Texas Procurement and Support Services Division (TPASS) will produce and post each day in electronic format information about each state agency procurement exceeding $25,000 in values as required under Texas Government Code, Section 2155.083. State agencies that will award procurements estimated to exceed $25,000 shall provide TPASS the information required for posting to the ESBD and a notice when the procurement contract has been awarded.

A state agency <u>shall</u> use the vendor performance tracking system to determine whether to award a contract to a vendor reviewed in the tracking system. The comptroller by rule shall establish the manner in which the rating scale established under Subsection (b) affects a vendor's eligibility for state contracts and the grades on the scale that disqualify a vendor from state contracting. Per Texas Government Code, 2262.005(d).

EVALUATION AND AWARD OF GRANTS

This section of this Chapter prevails over guidance addressing the same matter in the procurement sections of the Guide. In addition to the Uniform Grant Management Standards published by the Governor's Office, agencies should follow any applicable federal or state grant-funding source laws or regulations.

Agencies awarding grants must impose strict requirements to be followed regarding the time, place and manner of filing a grant application. An initial review must occur to ensure that the application is timely filed.

A pre-screening should occur to ensure that any eligibility requirements for specific grantees or types of projects have been met. Also, pre-screening should review if the application, as filed, contains all required documents or attachments.

Grant applications should be scored using a scoring matrix to evaluate the grant applications. The scoring criteria may look to the ability of the grantee to accomplish the grant purpose and grantee capacity, ability of grantee to meet the requested targets, outputs and outcomes, and other performance measures. Other scoring criteria may be used such as past performance, financial stability or other items and may be initially scored on a pass/fail basis.

Formula grants may also be scored, if desired on criteria such as population, reported statistics, or other relevant criteria.

The scoring matrix should be developed at the same time the grant announcement and grant application are developed to ensure consistency. When the scoring process starts, a team leader should review the scoring matrix with the scorers and provide training to the scorers to ensure consistent review. Scorers should consult with the team leader if questions arise during the scoring process.

Each grant application should be evaluated individually; however, it is preferred that more than one scorer score each application. Recommendations for grant funding must be documented and based on the scoring results. Any deviation from the established processes should be documented.

Chapter 6

Contract Formation

The information in this chapter is not intended to provide legal advice to agencies. This chapter includes general rules regarding contract formation. However, there are also many variations and exceptions to these general rules, so consult your agency legal office for the applicable rules of law for each procurement.

Texas courts define a contract as a promise or a set of promises to which the law attaches legal obligation.[xxiv] The law regards the performance of these promises as a duty and provides a remedy for the breach of this duty.[xxv] Contracts that deviate substantially from requirements defined in the solicitation document are open to challenge from unsuccessful respondents.

Approach to Contract Formation

Fundamentally, the purpose of any written contract to serve as a reference document that records the terms of an agreement to prevent misunderstanding and conflict as to those terms at a later date, and creates a legal, binding and enforceable obligation. Most often, conflicts over contracts arise well into a contract period – when memories prove to be unreliable. With this in mind, clarity of the terms and completeness of the issues addressed are of primary importance. The person who drafts the contract must know the subject matter and concerns of the parties thoroughly enough to anticipate potential areas of disagreement and specifically address them in the contract.

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

Creating contracts for the state is an exercise in balancing potential conflicting interests. These interests include the state's requirements, fiscal constraints, statutory requirements and the contractor's requirements. The

primary concern should always be the benefit of the contract to the state as a whole, or more specifically, the taxpayers of the state.

The best contract for the state does not necessarily mean taking excessive advantage of the contractor. While onerous and unnecessarily harsh provisions may be legal, they usually have negative future consequences that outweigh the initial gains. Contractors who feel they have been aggrieved by the state are less likely to provide good service and are more apt to engage in legal action. Or these contractors may decide to never contract with the state again thus limiting future competition on state contracts. In addition, contractors who are informed by other contractors of bad experiences with the state may demand more money on future contracts to do the same work to offset the perceived risk.

Legal Elements of a Contract

The essential elements necessary to form a binding contract are usually described as:[xxvi]

- An Offer;
- An Acceptance in strict compliance with the terms of the offer;
- Legal Purpose/Objective;
- Mutuality of Obligation – also known as the "meeting of the minds";
- Consideration;
- Competent Parties.[xxvii]

Offer

An offer is defined as the manifestation of the "willingness to enter into a bargain so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." [xxviii]

Acceptance

Acceptance of an offer can occur in several ways: Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.[xxix] An acceptance must not change the terms of an offer. If it does, the offer is rejected.[xxxi] A material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party.[xxx]

Legal Purpose

The objective of the contract must be for a legal purpose. For example, a contract for illegal distribution of drugs is not a binding contract because the purpose for which it exists is not legal.

Mutuality of Obligation

This element is also known as the "meeting of the minds". Mutuality of obligation refers to the parties' mutual understanding and assent to the expression of their agreement.[xxxii] The parties must agree to the same thing, in the same sense, at the same time. The determination of a meeting of their minds, and thus offer and

acceptance, is based on the objective standard of what the parties said and did and not their subjective state of mind. Unexpressed subjective intent is irrelevant. In determining whether mutual assent is present, the court looks to the communications between the parties and to the facts and circumstances surrounding these communications.[xxxiii] The offer must be clear and definite just as there must be a clear and definite acceptance of all terms contained in the offer.[xxxiii] Where a meeting of the minds is contested, the determination of the existence of a contract is a question of fact.[xxxiv] If the fact finder determines that one party reasonably drew the inference of a promise from the other party's conduct, that promise will be given effect in law.[xxxv]

To be enforceable, the parties must have agreed on the essential terms of the contract.[lix] However, parties may agree upon some contractual terms, understanding them to be an agreement and leave other contract terms to be made later.lx Full agreement on all contractual terms is the best practice and should be the norm. It is only when an essential term is left open for future negotiation that there is nothing more than an unenforceable agreement to agree.[xxxvi] Such an agreement is void as a contract.[xxxvii]

Any contract or mutual understanding between parties that differs materially from the original offer is open to legal challenge. Should any component of a negotiation tend toward a final result where a contract or agreement differs materially from the offer, that component of the negotiation should cease. If the component in question is critical to the provision of a service or goods, the issuance of another offer that incorporates that component should be considered.

Certainty of Subject Matter

In general, a contract is legally binding only if its terms are sufficiently defined to enable a court to understand the parties' obligations.[lxiii] The rules regarding indefiniteness of material terms of a contract are based on the concept that a party cannot accept an offer so as to form a contract unless the terms of that contract are reasonably certain.[xxxviii] Thus, the material terms of a contract must be agreed upon before a court can enforce the contract.lxv Each contract should be considered separately to determine its material terms.

As a general rule, an agreement simply to enter into negotiations for a contract later also does not create an enforceable contract. Parties may agree on some of the terms of a contract and understand them to be an agreement, and yet leave other portions of the agreement to be made later.[xxxix]

Sometimes terms are omitted from contracts and assuming the omitted term is not an essential term, the courts have implied terms to preserve the enforceability of the contract should a legal challenge arise. A court may uphold an agreement by supplying missing terms.[xl] Historically, Texas courts prefer to validate transactions rather than void them, but courts may not create a contract where none exists and they generally may not insert or eliminate essential terms. Whether or not a court will imply or supply missing contract terms will depend on the specific facts of the transaction. An example of terms that have been implied or supplied are time and place of performance.[xli]

Consideration

Consideration is an essential element of any valid contract.[xlii] Consideration consists of either a benefit to the promisor or a detriment to the promisee.[xliii] It is a present exchange bargained for in return for a promise. It may consist of some right, interest, profit, or benefit that accrues to one party, or alternatively, of some forbearance,

loss or responsibility that is undertaken or incurred by the other party.[xliv] It is not necessary for a contract to be supported by a monetary consideration.[xlv]

Competent Parties

Parties to a contract must be competent and authorized to enter into a contract.

Drafting the Contract

Contracts usually include a variety of terms and conditions often referred to as 'boilerplate' or 'standard' terms and conditions. While many contracts produced by agencies include similar terms and conditions, historically there have been no generally accepted terms and conditions for use by all state agencies. This chapter of the Guide provides generally accepted terms and conditions for use by all state agencies. Agencies should keep in mind that these are recommended terms and conditions and unless otherwise specified, may be modified to meet the agency's need.

A particular business entity or agency that repetitively contracts for the same or similar goods or services may develop a contract with terms that are standard for a specific transaction. These standard terms are usually the product of years of experience and are typically designed to favor the party drafting the contract.

Except for contract terms that are contrary to public policy that may be void, voidable or severable from a contract, the types of contract terms that may be included in a contract are only limited by the creativity of the drafter. The appropriate terms to include in a contract are the terms that fully describe the actual agreement of the parties. There are types of provisions that are typically included in contracts, including but not limited to:

1. Administrative provisions;
2. Financial provisions;
3. Provisions that allocate risk;
4. The statement of work;
5. Provisions relating to the contract term, termination and dispute resolution; and
6. Provisions that relate to rights and ownership of work product and intellectual property.

Planning for the Contract

Just like other contract management processes, an agency should plan for drafting the contract. A common practice is to include a draft of the standard agency contract in the solicitation document. This allows a potential contractor to make an offer with knowledge of the proposed contractual terms and conditions. As a practical

manner, during the RFP process, it may be difficult to prepare a draft contract with a detailed statement of work due to the potential for negotiation. Be sure to plan for adequate time to prepare the final contract.

The planning effort could begin by collecting and reviewing similar contracts used by other agencies. Do not automatically adopt terms and conditions from another contract without a thorough and independent review of how the terms and condition relate to the current procurement. Studying risks, contracting objectives, assumptions and constraints in other contracts may be helpful. Another method to plan for a contract is to prepare an outline containing headings for the major terms, conditions and provisions. This makes it easier to group related terms and conditions. An outline will also illustrate gaps in the structure of the contract. Finally, allow adequate time for an attorney to address potential legal issues.

Form of the Contract

Evidence of an agreement or a contract can be documented in different formats, including but not limited to a "four-corner contract", a purchase order, or an exchange of correspondence. The term "four-corner" contract is used to describe a single document that includes all of the terms and conditions within the four-corners of a single document. Purchase orders can also be considered a contract. The contractor delivers an offer, in a form requested by the agency, and the agency indicates acceptance of the offer by issuing a purchase order. The documents that comprise the offer and acceptance are the evidence of the agreement.

Each of the forms of contracts described herein has advantages and disadvantages. The determination of which format is appropriate should be based on an assessment of the risks involving contract construction or interpretation.

A 'four-corner' contract offers the greatest opportunity to avoid conflicting provisions, because all of the provisions are contained in one document. Contract management is sometimes easier when all of the provisions regarding the duties, obligations and responsibilities of each party can be logically organized and easily found. On the other hand, 'four-corner' contracts require more time to plan and prepare. Notwithstanding the additional time requirement in a major or complex transaction, a 'four-corner' contract is the best format to clearly document an agreement.

A purchase order uses a layered approach, i.e., the purchase order usually relies on a number of documents that in combination, comprise the contract. An agency may publish a solicitation document that includes product specifications, contractor qualifications and other terms and conditions. The contractor's response may condition the offer on terms and conditions that are different from or in conflict with the solicitation document. When the agency uses a purchase order, the contractor's terms and conditions should not become the basis of the agreement.[xlvi]

Despite the potential for conflicting or additional terms, when used properly, a purchase order is quick, efficient and rarely has problems. When using a purchase order as evidence of a contract, an agency should insure the inclusion of terms the agency wants rather than blindly accepting terms the contractor proposes. All final terms and conditions that vary from either the offer or the acceptance must be contained in a written document signed by both parties.

Contract Terms

During the development of the formal contract, devote careful attention to the details. There are certain clauses that are essential and some that should be included in all contracts. See **Appendix 9** for examples of contract terms. Please consult with your agency's legal counsel regarding any questions related to the applicability of contract terms because some agencies have additional statutory requirements regarding contracting.

Essential Clauses and provisions:

- ☐ **Introduction**
- ☐ **Scope of Work**
- ☐ **Indemnification/Damage Claims**
- ☐ **Price**
- ☐ **Specifications**
- ☐ **Funding Out Clause**
- ☐ **Antitrust**
- ☐ **Payment**
- ☐ **Affirmation Clauses**
- ☐ **Technology Access Clause**
- ☐ **Dispute Resolution**
- ☐ **Term of Contract**
- ☐ **Confidential Information**
- ☐ **Abandonment or Default**
- ☐ **Right to Audit**
- ☐ **Force Majeure**
- ☐ **Ownership/Intellectual Property, including Rights to Data, Documents and Computer Software**
- ☐ **Independent Contractor**
- ☐ **Termination**
- ☐ **Buy Texas**

Other clauses are recommended for contract inclusion depending on contract specifics.

Recommended Clauses include:

- ☐ **Notice**
- ☐ **Order Precedence**
- ☐ **Assignment**
- ☐ **Propriety Information**
- ☐ **Taxes**
- ☐ **Security/Parking Access**
- ☐ **Drug Free Workplace Policy**
- ☐ **Patents and Copyrights**
- ☐ **Insurance**
- ☐ **Substitutions**
- ☐ **Public Disclosure**
- ☐ **Smoking Policy**

State Contracting Standards/Oversight

Texas Government Code, Chapter 2261, titled *State Contracting Standards and Oversight,* offers state agencies guidance in four areas related to contracting: contractor selection, contract provisions, payment and reimbursement methods, and contractor oversight.

Applicability

This statute is **not** applicable to:

Type of Contract/Purchase Method	Texas Government Code
Purchases made by CPA.	2261.001(a)
Authority delegated to agencies by CPA.	2261.001(a)
Purchases made pursuant to the Education Code, Section 51.9335 or §73.115.	2261.001(a)
Purchases made pursuant to Government Code, Sections 2155.131, 2155.132, or 2155.133.	2261.001(a)
Purchases or contracts by the Texas Department of Transportation.	2261.001(d)
Consulting or Professional Service contracts pursuant to Government Code 2254.	2261.001(e)
Grants to School Districts.	2261.002(a)
Grants for 'other' academic purposes.	2261.002(a)
Open Market purchases if agency is authorized to make open market purchases.	2261.003
Procurement paid for by local or institutional funds of an institution of higher education.	2261.001(d)

Authority to Contract

Only persons having actual authority to act on behalf of the State can bind the State in a contract.[xlvii] The powers of all state officers are set by law. All persons dealing with state officers must know the limits of their authority and determine if the contemplated contract is within their statutory authority. One should not indulge in presumptions or rely on the implied authority of an officer or agency of the state to contract.[xlviii] Therefore, a threshold issue in government contracting is whether a state agency has statutory authority to contract.

The legislature established through the Government Code a comprehensive regime for state purchasing, which requires state agencies to make purchases through CPA unless an exception applies.[xlix]

This broad grant of purchasing authority to CPA has limitations. For example, the definition of 'services' applicable to CPA's authority includes skilled or unskilled labor or professional work, but does not include a:

professional service subject to Texas. Government Code, Subchapter A, Chapter 2254; services of a state agency employee; consulting services or services of a consultant as defined by Texas, Government Code, Subchapter B, Chapter 2254; or the services of a public utility.

Specific statutory exemptions may also remove a particular purchase from the purview of CPA. Examples of statutory exceptions and/or exemptions from CPA authority include but are not limited to:

- Group Purchasing Programs[l]
- Purchases from Higher Education Research Funds[li]
- Purchases of Certain Medical Equipment by Medical or Dental Unit[lii]
- Exemption of Goods or Services of Blind or Visually Impaired Persons[liii]
- Exemption for Certain Libraries and Health Facilities[liv]
- Purchase From Gift or Grant Not Within Commission's Purchasing Authority[lv]
- Certain Other Purchases Not Within Commission's Purchasing Authority[lvi]
- Purchases by Veteran's Land Board[lvii]
- Purchase of Care and Treatment Services by Texas Youth Commission[lviii]
- Procurements by Health and Human Services Agencies (does not include common goods and services)[lix]
- Health Care Purchasing[lx]
- Certain Purchases by Employees Retirement System of Texas[lxi]
- Mental Health and Mental Retardation Community Centers; Assistance Organizations[lxii]
- Purchases by Legislature and Legislative Agencies[lxiii]
- Local Government Purchasing Program[lxiv]

Council on Competitive Government

In May 2010, the Council on Competitive Government (CCProG) in coordination with the state print shops, TCI and the Texas Procurement and Support Services (TPASS) Division within the Comptroller's office, rolled out a new procurement process for state printing.

It substantially streamlines and improves the state printing process for agencies through the deployment of a universal online **print shop job request form**, enabling agencies to submit a job request *once* and receive bid responses from all seven state and TCI print shops. Additionally, CCG has established overarching contracts with each print shop that eliminate the need for agencies to enter into individual interagency agreement contracts (IACs) with the print shops.

Procurement Process for State Printing

The new procurement process for state printing offers a fresh look opportunity for all agency customers. What you'll see is a new **online job request process** that achieves several goals in a single submission process:

- Statutory compliance;
- Communication of needs to multiple shops simultaneously;
- Improve competition among the print shops;
- One point for checking availability and receiving bids from shops;
- One overarching Inter-agency Contracts (IAC) between CCG and the shops vs. one IAC per shop per agency; and
- Ability for agencies to identify best value while still meeting quality requirements.

Even if a statute creates an exception to CPA's authority to make purchases, the authority to purchase goods or services must be found in another statute before an agency is authorized to purchase.[lxv] One of the statutory sources for a state agency's contracting authority is a statutory delegation.

Binding Signatures

Original signatures by those in authority to contract are the usually accepted norm through which a contract becomes binding. There may be instances where time considerations dictate the need to accept a faxed signature as evidence a respondent accepts the terms of a contract. Additionally, it is possible that an email or a chain of emails that make it clear a party accepts the terms of a contract can be enforceable. Faxed signatures or emails should always be followed up with original signatures.

Delegated Purchases

By statute, agencies are authorized to purchase goods and services if the cost does not exceed $15,000. (Ref. Texas Government Code, Sec. 2155.132) Additionally, CPA is authorized to delegate additional purchasing authority (Ref. Texas Government Code, Sec. 2155.131) CPA by rule may delegate to a state agency the authority to purchase goods and services if the purchase exceeds $15,000. In delegating purchasing, CPA shall consider factors relevant to a state agency's ability to perform purchasing functions, including:

1. The capabilities of the agency's purchasing staff and the existence of automated purchasing tools at the agency;

2. The certification levels held by the agency's purchasing personnel;

3. The results of the commission's procurement review audits of an agency's purchasing practices; and

4. Whether the agency has adopted and published protest procedures consistent with those of CPA as part of its purchasing rules.

The delegated authority of a state agency to bind the State in contract is primarily defined by dollar amount and subject matter. See Bidding Requirements and Dollar Limits or Thresholds (http://www.window.state.tx.us/procurement/pub/manual/2.11.pdf.)

An agency may not use its delegated purchasing authority to purchase (Ref. Texas Government Code, Section 2155.132(f)(1):

1. Items provided by a CPA state contract (unless the quantity to be purchased is less than the minimum quantity specified in the CPA contract);

2. Items that are required by statute to be purchased from a particular source; or

3. Items that constitute 'scheduled items' designated for purchase by the CPA.[lxvi]

Individual state agencies may have statutory purchasing authority that is independent of the authority delegated by CPA; therefore, a thorough examination of each state agency's statutory purchasing authority is necessary to identify an agency's purchasing or contracting authority.

Federally Funded Contracts

Federal grants have specific contract requirements which are outlined in the Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments, (OMB Circular 102). Agencies are encouraged to ask federal agencies administering the particular grant programs to identify essential and mandatory clauses

used in the State's sub-recipient agreements. Also see the Uniform Grant Management Standards published by the Governor's Office. http://www.governor.state.tx.us/divisions/stategrants/guidelines/view

This Circular establishes consistency and uniformity among Federal agencies in the management of grants and cooperative agreements with State, local, and federally- recognized Indian tribal governments. This revision supersedes Office of Management and Budget (OMB) Circular No. A-102, dated March 3, 1988.

On March 12, 1987, the President directed all affected agencies to issue a grants management common rule to adopt government-wide terms and conditions for grants to State and local governments, and they did so. In 1988, OMB revised the Circular to provide guidance to Federal agencies on other matters not covered in the common rule.

Contract Formation for Grants

This section of this Chapter prevails over guidance addressing the same matter in the procurement sections of the Guide. In addition to the Uniform Grant Management Standards published by the Governor's Office, agencies should follow any applicable federal or state grant funding source laws or regulations.

Authority to Grant

There are a few Texas Constitutional provisions that limit the ability of a state agency to award grant funds. Article III, Section 51 of the Texas Constitution provides that the "Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever." Article III, Section 52 of the Texas Constitution prohibits the Legislature from authorizing any political corporation or subdivision of the state "to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." Hence the intent of Sections 51 and 52 is to prevent the state from freely giving public funds to private persons; however, Sections 51 and 52 do not prohibit grants to a private person or entity "if the appropriate governing body (i) determined that the expenditures serves a public purpose and (ii) places sufficient controls on the transaction to ensure that the public purpose is carried out". Tex. Att'y Gen. Op. No. JC-0146 (1999); see e.g., Tex. Att'y Gen. Op. Nos. DM-256 (1993); JM-1146 (1990); JM-551 (1986); H-966 (1977).

Also, in accordance with Article III, Section 44 of the Texas Constitution, an agency must have statutory authorization to grant funds. The award of a grant from the federal government to a state agency does not, in itself, confer authority to the state agency to make grants from the funds without specific state statutory authorization and a state appropriation. The grantor state agency must verify that it has state statutory authority to make the grant even if there is an appropriation of money to fund the grant. Unless the grantor agency has pre-existing state statutory authority to make a grant, an appropriation to make a grant violates Article III, Section 44 of the Constitution. Tex. Att'y Gen. Op. No. JC-0244 (2000). Furthermore, under Article VIII, Section 6, of the Texas Constitution, the statutory language should be specific, which has been interpreted to mean it must specify its purpose. National Biscuit Co. v. State, 135 S.W.2d 687, 693 (Tex. 1940) ("[N]o particular form of words is required to render an appropriation specific within the meaning of the Constitutional provision under discussion. It is sufficient if the Legislature authorizes the expenditure by law, and specifies the purpose for which the appropriation is made.").

Grant Contract Document

Agencies may use different forms of contractual documents to memorialize the grantor-grantee relationship. Some agencies choose to do a “Statement of Grant Award” signed by the grantor and a subsequent “Acceptance of Grant Award” signed by the grantee, with each document containing terms and conditions of the grant. Other agencies may choose to incorporate all the terms and conditions into one grant contract that is signed by both parties.

Regardless of form used, care should be taken to ensure that the basic elements of a contract are included as well as some special provisions that are applicable in a grant situation. These special provisions should ensure that the expenditure serves a public purpose and that sufficient controls are present to ensure the public purpose is carried out. Any other special provisions unique to a grant must be included in the contract or grant agreement.

Special Conditions and Specific Provisions

Applicable standard certifications and assurances of UGM, Part III, Subpart B, Section 14, must be included in every grant contract document. Applicable state or federal laws as well as the administrative rules and regulations should be reviewed, and any applicable terms must be included in the grant contract document. For example, a federal agency, as grantor, may have specific certifications, assurances or requirements for compliance with certain financial guidelines applicable to grantees.

Recommended Terms

Similar to any contractual document, there are various terms that warrant inclusion in a grant contract. The grant contract term and maximum liability amount (the “not-to-exceed” amount) should be clearly stated. A funding out provision in the event funds become unavailable must be included in the grant contract. Rights to inspect and audit, consistent with the state or federal audit agencies, must be included. Provisions regarding targets, outputs, outcomes and performance measures and standards as well as any required reporting by the grantee, may also be included.

Chapter 7

Contract Administration

Contract administration and oversight includes seven (7) general processes:

1. Planning
2. Monitoring Performance
3. Change Management
4. Payment Approval
5. Dispute Resolution
6. Termination
7. Contract Closeout

The primary tasks of contract administration are to:

- Verify contractor performance for purposes of payment.
- Identify material breach of contract by assessing the difference between contract performance and material nonperformance.
- Determine if corrective action is necessary and take such action if required.
- Develop completion plan for exit requirements for acceptance, final payment, and contract closure.

Contract administration starts with developing clear, concise performance based statements of work. The statement of work should be the roadmap for contract administration. Therefore, planning for contract administration occurs prior to issuance of the solicitation. The goal of contract administration is to ensure the contract is satisfactorily performed and the responsibilities of both parties are properly discharged. Effective contract administration minimizes or eliminates problems and potential claims and disputes.
A key factor in successful contract administration is communication. It is essential for contract administrators to understand the provisions of the purchase document, have the ability to communicate contract obligations to all parties involved, and maintain control over the contract performance. [(4)]

A good contract manager ensures that the contract requirements are satisfied, that the goods and services are delivered in a timely manner, and that the financial interests of the agency are protected.

Contract managers must have sufficient knowledge of contracting principles as it relates to their responsibilities in administering the contract. [(4)] It is the contractor's responsibility to perform and meet the requirements of the contract. To do so, contractors sometimes need technical direction and approval from agency personnel. Agency personnel must provide this technical direction and approval in a timely and effective manner. All guidance provided to a contractor must be within the scope of the contract.

Agencies must be careful to not impose additional requirements upon the contractor or manage the contractor's operations to the extent that the contractor is relieved of their responsibility to perform.

The extent of contract administration will not be the same for all contracts. The level of contract administration necessary should be consistent with the complexity and level of risk of the contract, its' term, and dollar value.

Contract Manager Responsibilities

The primary responsibilities of the contract manager are:

- Participating in developing the solicitation and writing the draft documents. Contract administration must be considered during this process.
- Consulting with legal counsel to address any legal concerns and/or issues.
- During solicitation development determine if the contractor's compensation structure is appropriate for the work.
- Serving as the point of contact for disseminating the instructions regarding the work to the contractor/vendor.
- Receiving and responding to communications between the agency and the contractor.
- Managing, approving, and documenting any changes to the contract.
- Managing any state property used in contract performance, e.g., computers, telephones, identification badges, etc.
- Identify and resolve disputes with contractor in a timely manner.

- Implementing a quality control/assurance process.
- Maintaining appropriate records.
- Documenting significant events.
- Monitoring the contractor's progress and performance to ensure goods and services conform to the contract requirements.
- Exercising state remedies, as appropriate, when a contractor's performance is deficient.
- Inspecting and approving the final product/services by submitting a written document accepting the deliverables.
- Monitoring the budgeting/accounting process to ensure sufficient funds are available
- Verify accuracy of invoices and authorize payments consistent with the contract terms.
- Performing contract closeout process ensuring the contract file contains all necessary contract documentation, formal acceptance documented, and document lessons learned. [(4)]

The number of participants in the contract administration process will vary in number from one to many depending on the size, level of risk and complexity of the contract. Early in the procurement process, identify staff to participate in contract management. Identify a single contract manager and others to assist the contract manager. Assign roles and responsibilities which may include:

- Determining the sequence of activities, dependencies, required or desired outcomes, and acceptable performance levels.
- Developing a timetable and start and end date for each performance component. Include milestones with accompanying timeframes, and monitoring and reporting requirements.
- Monitoring and documenting contractor activity on a specified frequency to identify problem areas.
- Meeting with the contractor on a regular basis to review progress, discuss problems and consider necessary changes.
- Providing access to state facilities, equipment, data, staff, materials and information.
- Contacting other staff as necessary to provide equipment and data.
- Establishing scope of authority, clear lines of communication and reporting and specific individuals who will interact directly with the contractor.
- Establishing control of correspondence, data and reports.
- Identifying potential problems and solutions.
- Defining terms or conditions of default.
- Establishing a procedure, identifying a responsible person and establishing a timeframe for handling noncompliance.

- Establishing a procedure, identifying a responsible person and establishing a timeline for making necessary contract decisions, modifications, and changes.

Contract managers' are not authorized to [4]:

- Instruct the contractor to start work before the contract is fully executed.
- Change the scope of the contract without doing so through the formal purchase document amendment process.

Direct the contractor to perform work that is not specifically described in and funded by the

- Contract;
- Extend the time period of the contract without execution of an approved amendment; and
- Allow the contractor to incur any additional costs over the limit set by the contract.

PLANNING

As stated earlier, planning for the administration of a contract should begin with the drafting of the statement of work. Procedures for contract administration should be described in the solicitation document. After the contract is executed, the planning activities should focus on general administrative activities including, but not limited to management of contract amendments through documentation of any changes to the contract scope, schedule and payment. Another central activity to contract administration is the advance coordination and scheduling of resources to assist in the performance of the contract administration processes.

In order to properly plan for contract administration, the contract manager must ensure that he/she thoroughly understands all of the components of the solicitation and contract. Examples of such contract components include:

- Expected outcome measures – includes staging of deliverables, if applicable. Significant deliverables should be tied to the payment schedule.

- Costs – The total cost, including any indirect cost allocation of the goods and services to be performed.

- Risk – Identifying and managing potential risks.

- Contract Performance - When, where, and how the goods and services are to be delivered.

- Acceptance/Rejection Terms – The agency's right to inspect and accept or reject the goods and services and the conditions of acceptance or rejection.

- Contract Dates - The effective date, completion date, renewal terms, and any additional dates necessary to monitor contract performance.

- Complete addresses – Where correspondence is to be sent, where payments are to be made, etc.

POST AWARD CONFERENCE

A post award conference is a meeting with the contractor and includes the principals responsible for administering the contract. The conference is held soon after the contract is awarded. It is an orientation for the contractor to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. The conference serves as an excellent tool to clarify and resolve any potential misunderstandings early on. Although both the contractor and the agency personnel should be fully aware of the contract requirements, the post award conference ensures those involved directly in the contract administration process understand all requirements of contract performance.

Not every contract requires a formal post award conference, but there should be some form of discussion between the contracting parties after award to ensure all parties agree on the performance requirements and the administrative procedures applicable under the terms of the contract. The post award conference should NOT be used to change the terms of the contract.
Agency personnel should decide if a post award conference is necessary. For less complex, low risk, low-dollar value contracts, a telephone call to the contractor may be sufficient. During the telephone conversation, the agency should review the major points of the contract with the contractor (e.g.; amount of contract, major performance milestones, deliverables, reports, meetings) and time and place of delivery. Factors used to determine the need for a post award conference include:

- Type of contract;
- Level of risk associated with the contract;
- Value and complexity;
- Length of contract, period of performance and/or delivery requirements;
- Procurement history of the supplies or services required and expertise of the contractor;
- Urgency of delivery schedule;
- Agency's prior experience with the contractor;
- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

POST AWARD CONFERENCE AGENDA

It should be clearly communicated at the beginning of the conference that the purpose of the meeting is to explain or clarify contract requirements and not to make changes to the contract or re-negotiate the contract terms. The post award conference agenda should cover the following:

1. **Introduction.** Introduce all participants and identify agency and contractor key personnel.

2. **Scope.** Discuss the scope of the contract (i.e., what the agency is buying). Although this may seem overly simplistic, a total and complete meeting of the minds on this point will avoid problems during the life of the contract.

3. **Terms.** Summarize contract terms and conditions, particularly any special contract provisions. This can avoid any misunderstandings later on, and allows the contractor to gain a better understanding of the terms prior to beginning work.

4. **Requirements.** Discuss the technical and reporting requirements of the contract. The technical requirements may be discussed as part of the Scope, above. It is vital that the contractor and the agency have a meeting of the minds regarding technical requirements. The contractor must understand the importance of any reports required under the contract and the importance of submitting them in accordance with contract requirements.

5. **Administration.** Applicable contract administration procedures, including contract monitoring and progress measurement should be discussed.

6. **Rights.** The rights and obligations of both parties and the contractor performance evaluation procedures should be summarized. The agency should explain that contractor will be evaluated on their performance both during and at the conclusion of the contract and that such information may be considered in the selection of future contracts.

7. **Potential Problems.** Potential contract problem areas and possible solutions should be addressed. Any issues or contract areas that the agency believes may lead to a problem later on, or may be subject to differing interpretations, should be discussed.

8. **Payment.** Invoicing requirements and payment procedures should be discussed, especially if the payment will be made according to milestones achieved by the contractor.

9. **Authority**. The roles and responsibilities of the parties' contract managers, contract administrators, project managers, key personnel leads, and any other key staff should be identified. Agency personnel should explain the limits of their authority and obtain the same information regarding contractor personnel.

After the conference, the contract manager shall prepare a summary of the meeting for the contract file which details the topics covered. The summary shall include areas requiring resolution, a list of participants, and in particular, those individuals assigned responsibilities for further action and the due dates for those actions. Copies of the meeting summary shall be distributed to all conference participants.

MONITORING PERFORMANCE

Monitoring the performance of the contractor is a key function of proper contract administration. The purpose is to ensure that the contractor is performing all duties in accordance with the contract and for the agency to be aware of and address any developing problems or issues.

Small dollar value or less complex contracts normally require little, if any, monitoring. However, that does not preclude the possibility of more detailed monitoring if deemed necessary by the agency. Conversely, large dollar contracts may need little monitoring if the items or services purchased are not complex, and the agency is comfortable with the contractor's performance and the level of risk associated with the contract.

ENHANCED CONTRACT AND PERFORMANCE MONITORING

State agencies are required to utilize an enhanced monitoring method for high dollar and high risk contracts. Enhanced monitoring is an increased level of monitoring, beyond the regular monitoring normally used. Such increased monitoring may include, but is not limited to: frequency of site visits, provider meetings, and documentation requirements deemed necessary by the agency to assess progress of the contractor toward meeting the identified goals and outcomes established in respose to assessments of unsatisfactory performance in accordance with this procedure. (1)

Under Texas Government Code, 2261.253(c), state agencies are required to establish by rule a procedure to identify each contract that requires enhanced contract or performance monitoring. This information must be submitted to the agency's governing body or, if the agency is not governed by a multimember governing body, the officer who governs the agency. The agency's contract management office or procurement director shall immediately notify the agency's governing body or governing official, as appropriate, of any serious issue or risk that is identified with respect to a contract monitored under this process.

Contract monitoring may be viewed as:

- A preventive function.
- An opportunity to determine the contractor's need for technical assistance.
- A valuable source of information concerning the effectiveness and quality of services being provided. **(5)**

Two areas of contract monitoring are discussed in this chapter including:

1. Determining what to monitor and the type of monitoring.
2. How to use the results of monitoring reviews.

1. **Determining what to monitor.** Consider the following questions when determining what to monitor:

→ How will the agency know it is receiving what it paid for?

→ How will the agency know that the contractor is complying with the terms of the contract?

→ How will the agency know the contract is complete and determine closure?

Review the statement of work and other contract terms, including contractor compliance requirements. All of these requirements are deliverables that the contractor agreed to when the contract was executed or the purchase order was issued. Design the monitoring program to focus on items that are most important. Generally, this means to focus the monitoring on the outcomes that result from the contract. For example, consider if the agency would be concerned regarding the following issues:

- Eligible taxpayers do not receive the services they should;
- Taxpayers receive less service for which they are eligible;
- Taxpayers receive the wrong services;
- Service priorities for eligible taxpayers are inappropriate;
- Services cost more than they should;
- Money is spent on non-allowable costs (i.e. gifts, etc.);
- The contractor wastes money or does not protect the assets purchased with tax dollars or;
- The contractor inaccurately reports their progress.
- The contractor does not make corrections to goods and/or services identified as not meeting requirement.

Consider the effect that the contract payment methodology has on what needs to be monitored. For example, if payment is based on a firm fixed price (a specific amount of money for a unit of service), it is not necessary to verify contractor's expenses as they are not relevant to this type of contract. Consider buying a box of pencils. The agency knows what they are buying and the cost per pencil. It is irrelevant what the contractor pays for travel or advertising as the agency pays a firm fixed price for the pencils regardless of the contractor's expenses. Under a firm, fixed price contract, the agency should ensure that:

- The number of units billed is the same as the number of units received.
- The quantity and price agree with the contract amounts.

- The units meet or exceed the contract specifications.

If an agency receives grant money to pay for a contract, the agency must consider the nature of the relationship with the contractor. Is the relationship a vendor relationship or a sub-recipient relationship? See OMB Circular A-133, Section 210 (http://www.whitehouse.gov/omb/circulars/a133/a133.html) for guidance on relationship determination. If the relationship is that of a sub-recipient, then federal guidelines and cost principles must be followed. The Uniform Grant Management Standards published by the Governor's Office (http://www.governor.state.tx.us/divisions/stategrants/guidelines/view) will provide guidance as well.

If the contract is a cost reimbursement contract wherein the agency pays for the contractor's cost plus a percentage of overhead and profit, the agency needs to consider the following monitoring reviews:

- Was the item billed really purchased by the contractor?
- Was the item billed used for the purpose of the contract?
- Was the item necessary and reasonable for the purpose of the contract?
- Was the item of the quality and quantity specified in the contract?
- Was the item duplicated in either overhead or profit?
- Was the item listed in the contractor's budget and approved by the agency?

The agency must review the contract to see how the costs are reimbursed. Many contracts require that all costs must be included in the original budget provided by the contractor and approved by the agency. In some cases, the contract may specify that certain costs such as the purchase of a vehicle or use of a subcontractor require approval by the agency prior to purchase.

Monitoring Types

The following section explains how to establish expectations so individuals responsible for contract monitoring and the contractors all understand what will be monitored and the criteria used to evaluate contractor performance.
There are different types of monitoring available, including but not limited to:

Site Visits

More complex contracts and contracts that the agency perceives as having a higher degree of risk may require both reviews and visits to the contractor's facilities to ensure progress is in accordance with the contract schedule. Site visits can be used to verify actual performance against scheduled or reported performance. These can ensure the contractor is dedicating sufficient resources and appropriate personnel to the contract.

Site visits reinforce the importance of the contract to the contractor, as well as provide the opportunity to enhance communications with the contractor.

To perform a site visit, the agency should:

A. Develop a comprehensive and objective site monitoring checklist which:

- Focuses on the outcomes, but also includes compliance requirements. Site monitoring criteria should reference the applicable contract requirement.
- Assess contractor performance the same way. Are any errors considered minor or inconsequential? If so, these must be outlined up front so that the contract is monitored consistently. Clarify areas where monitors may exercise judgment.
- Specify the sample size to be reviewed, but do not disclose specifics to the contractor. For example, an agency may state it will review case documents for the month of August, but should not disclose it will be reviewing case #XXX.

• **Site Visit (full and limited scope).** Full scope site visits are typically scheduled visits to the contractor's place of business. They are based on risk assessment and cover a broad range of contract compliance and performance issues. Limited scope site visits typically focus on a particular problem. Examples of some typical reasons for considering a limited scope site visit include, but are not limited to:

o Contractor is responsible for administering funds from two sources and one source has noted serious problems with the way the contractor used the funds.

o Other contractors have experienced problems in a specific area and there is an indication this contractor might be experiencing the same problem.

o Inconsistencies in the expenditure draw requests are identified and clarification from source documents is necessary.

o Contractor has provided a corrective action plan for a problem, but the agency is not certain the proposed solution will resolve the problem.

B. Documentation Requirements:

- Allow space on the checklist (or on a separate document) to document the results of the site visit. For example, if the site monitor is to review 10 case files, then the documentation must include the identification of the files monitored, e.g. the case number, the staff members tested for salary allocations, the expenditures reviewed.

- Describe the documentation required for the site monitor to bypass an area, i.e. “No problems identified last year with the compliance requirement - not monitored this year.” This allows agencies more time to review higher risk areas.

C. Sampling and Population:

- Ensure the population is complete by including all files relevant to the contract. The contractor should never be the one to select the samples for review.

- If the contractor submits the names of the clients as part of the normal expenditure draw, then the sample can be selected from the client list. Ensure that the clients on the list are paid for by the agency.

- If the contractor cannot locate the sample item selected, it may or may not indicate a problem. Before agreeing to substitute an alternate file, consider the circumstances of the “lost” sample item and determine if the explanation is reasonable or if the site monitors suspects that the contractor did not want the site monitor to see the file.

D. Tailor the site monitoring checklist for each contractor.

While there will be standard items the agency will review for all contractors, each contract/contractor should be reviewed for specific site monitoring requirements unique to that contract/contractor. In addition, consider the following:

- Review specific contract requirements to determine if these merit site monitoring.

- Look for items that fall just below an amount requiring additional approval.

- Consider problems the contractor has had in the past or what is likely to cause problems for this contractor. Are parts of the contract new to the contractor? For example, the contractor may be providing the same services but to a different population during this contract.

- What types of items do not need to be monitored and why? For example, if the contractor uses an information database the agency has tested under previous contracts, then the risk is low in this area and the database may not need to be reviewed.

- Has another agency or another part of the same agency conducted a review? For example, if the agency provides home delivered meals to people with disabilities, and another agency provides the same services, both agencies could coordinate the reviews of shared contractors.

E. Site Monitoring Reports.

The report of the site visit should stand by itself and serve as a record of the site monitoring work. A copy of the report should be sent to the contractor and any others who may benefit from the report.

Even if the contractor corrects a problem in front of the site monitor, the site monitor is obligated to include the problem in the report. This will serve as an indicator to follow up on the problem on future visits to ensure it was corrected.

Include what has been learned during this site visit in the next risk assessment and in future contract requirements. If the site monitor recommends changes for the next contract, include the recommendations in the site monitoring reports. Also include any contractor recommendations for the next contract.

Desk Review. Typically these are agency reviews of reports submitted by the contractor to the agency. Agencies should review the reports for the following:

o Compare the actual performance against the contract requirements. Is the contractor performing in accordance with the contract requirements?

o Compare actual expenditures to the approved budget. Is the contractor following their approved budget plan?

o Compare the current period to prior periods. Are there any unexplained trends? Is the contractor performing work significantly different from the last period or the last year?

o Compare what the current contractor is doing in comparison with other contractors performing similar work.

o Compare the relationships between key components of the report such as:

- The cost per unit of service or the percentage of the fees charged to the program;
- The change in variable costs compared to the units of service provided; and
- Reported salaries match staffing plan.

o Compare the report with what is known about the contractor's operating environment. Did a weather emergency in the area recently increase the cost of construction supplies or is the cause of a temporary reduction in services provided?

Expenditure Document Review. These are reviews of contractor invoices and expenditure draw requests to determine if the rates and services are the same as allowed by the contract. 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 and/or the supporting document is insufficient to support the request, then additional monitoring such as an on-site visit may be necessary.

2. Using monitoring review results. Monitoring reviews, audits, and investigations should be routinely followed up to:

- Ensure corrective actions have been taken;
- Identify common problem areas that might require training; and
- Improve future contracts.

Agencies should design a system that includes criteria and defined follow up actions. The goal of follow up should be to bring the contractor back into compliance with the contract requirements. Follow up is essential as the problem will not correct itself simply by identifying it and including it in the monitoring report.

Monitoring results should also be used to improve the contract requirements for future contracts. If there are unnecessary restrictions or insufficient restrictions, this is the time to make a note of the recommended changes so future contracts can incorporate the changes.

Information on inspection, testing and acceptance of common goods and services. (http://www.window.state.tx.us/procurement/pub/manual/2-42.pdf) can be found in the CPA Procurement Manual.

REPORTING

Reporting includes a contract administrator reporting to executive management, the contractor reporting to the contract administrator, and the state agency reporting to the Texas Procurement and Support Services. There are generally three (3) categories of reports: status reports, activity reports, and Vendor Performance Reports. All types of reporting serve useful functions.

- Status Reports – Describe the progress of the work. The content of the status report should be consistent with and track the organizational structure of the statement of work, i.e. phases, segments, deliverables and products. A status report should describe what work is complete and what work is pending and that status should be contrasted against the contract schedule. Only work that has been verified as completed or accepted should be categorized as complete. If there are any unresolved issues that the agency is contractually obligated to resolve, those issues should be included in the status report and a resolution should be requested. If the scope of work has changed during the contract (by written contract amendment), insist that status reports track the original contract schedule, not a revised contract schedule, unless the amendments provides for a revised contract schedule. If status is tracked against a revised schedule, there is a risk that the schedule will continually change and the status report will be rendered meaningless.

If the contract does not provide for periodic status reports, the agency should ensure that sufficient progress is being made by the contractor. This may be accomplished by requesting a status update from the contractor or a site visit to view the progress.

- Activity Reports – Describe any activity on the project; project activity is not the same as a status report. A project may have a great deal of activity without making substantive progress. On the other hand, activity reporting can be a core feature of contract management. For example, a contractor payment in an outsourcing contract may be based on the number of completed transactions. In this example, activity reporting is critical to contract administration.

- Vendor Performance Reports - Upon completion of a procurement against the contract, the state agency using the contract files a Vendor Performance Report, as required by Texas Government Code, Section 2155.089 and rule (34 TAC §20.108(b). This report is provided through the TPASS Web Portal, and facilitates reporting and resolution of issues between agency and vendor. In addition, it provides an evaluation resource for use by state agencies in subsequent solicitation awards.

Monitoring by Third Parties

In some instances the obligation of monitoring the progress of a contract is assigned to another contractor. This is also known as independent oversight. For example, in the case of a construction contract, the task of ensuring progress in accordance with the contract may be performed by the architectural firm that provided the construction plans. For highly technical work, consultant subject matter experts may perform monitoring services independently or in conjunction with agency staff.

Risk Management

The primary approach to managing risk after a preliminary risk assessment level is to document the initial perception of the level of risk and or specific risks that are identified, identify and assign experienced staff resources to assist in the contract management process.

A preliminary risk assessment should be conducted to make an initial determination about the level, type and amount of management, oversight and resources required to plan and implement the contract from beginning to end. Simply put, as the risk associated with a particular procurement increases, the level and degree of executive management's sponsorship, participation and oversight should be increased by a corresponding level. See Chapter - 2 Planning for risk assessment.

Payment Approval

The costs incurred by the contractor should be in accordance with the contract rate schedule. Invoices should be reviewed to ensure that the contractor's billing coincides with the contract's progress. This requires that the contractor's progress be measurable. Cost incurred or invoices submitted, in and of themselves, are insufficient indicators of the contractor's progress.

If the agency believes that the requested payment exceeds the contractor's progress, an explanation should be requested from the contractor prior to approval of the invoice. Payment should be withheld pending agency satisfaction with the contractor's progress.

Invoices must be approved by program staff prior to payment. Payments must be made in accordance with the Texas Prompt Payment law[lxvii] which requires that correct invoices be paid within 30 days from the date the correct invoice was received or the services/goods received, whichever is later. The invoice should be reviewed to ensure:

- The contractor is billing only for goods or services received by the agency.
- The goods or services have been inspected and accepted.
- The invoice is correct and complies with the pricing, terms, and conditions of the contract.
- The total payments do not exceed the contract limits.

Client services contracts are unique in that acceptance of a good or service is not an indicator that an invoice should be paid. Problems with client services contracts generally surface after invoices are paid. Contract managers dealing with client services contracts should ensure mechanisms exist to implement remedies contractors for poor performance and that future payments may be withheld until performance improves.

Withholding Payment

Agencies have the responsibility to protect the interests of the agency and under appropriate circumstances, it may be necessary to withhold payments from contractors. Circumstances where it may be necessary to withhold payment include, but are not limited to:

- There is a material breach of the contract by the contractor;
- Errors in the invoice;
- Unsupported or undocumented costs;
- To remedy previous overpayments on the same contract; and
- Contractor's performance is non-conforming or unacceptable.

Change Management

Throughout the term of the contract it may become necessary to make changes to the contract. These changes can be minor, administrative changes such as a change of address or they can be substantial changes that affect the price and delivery. There are basically two ways to change a contract. One is a bilateral amendment, in which all parties to the contract agree that a modification is necessary because the scope of work, the term of the contract, or some other provision of the contract needs to be altered. The second is the right to unilaterally modify the contract. In this case, terms and conditions in the original contract set forth the situations under which the agency may exercise a right to modify the contract without the contractor's consent.

Agencies should have an effective change management process in place. Failure to manage and control changes can result in an unintentional modification to the scope of work, extension of the schedule, increase in the contract cost, circumvention of management controls and diminished contractor accountability. An effective change management process includes but is not limited to:

- Formal, written approval of all changes prior to the change taking place. Do not verbally authorize the vendor to begin working on a change before formal process is fully analyzed, documented and approved in writing.

- Evaluation of the impact of each change to the contracting objective, the corresponding deliverable and/or products, the schedule, cost, and increase in agency overhead resulting from the change, impact to work in progress/completed work, standards, and acceptance criteria.

- If the contract contains a contingency allowance, develop a plan for how draws against this allowance will be requested and approved.

- Documentation of all changes, no matter how small and avoids any informal undocumented change process.

- Establish a single point of contact to recommend or authorize any change. Document the change as approved or disapproved. If a change is approved, document the change and the impact to the scope of work through a contract amendment or purchase order change notice, whichever is applicable.

Contract Changes and Contract Scope

Whether or not a contract may be changed, depends upon certain principles. State law requires a competitive process in most situations. The specific method of competition depends upon the type of goods or services needed. If competitive, the resulting contract must be consistent with what was asked for during the competition, usually contained in the solicitation document. Not being consistent can violate the competitive process requirements.

If a change is needed to a contract, the change has to be within the scope, or range, of what was provided in the solicitation. A significant difference would be a material or substantial change in the scope of services, and would not be allowed because it had not been originally subject to fair competition. To permit such a change would go against the ideas of competition and a fair playing field for all of the vendors. Transparency in government procurement is a key government responsibility.

By way of example, if a contract to buy 10 desks is amended to include 300 file cabinets, the change is outside the scope of the contract because vendors did not have the opportunity to compete for the sale of 300 file cabinets. Additional vendors may have competed had they known that file cabinets were being solicited. Such a large quantity of file cabinets could also have had an impact upon which vendors competed. Other vendors may have been interested in bidding on file cabinets that were not interested in bidding on desks.

In order to determine what constitutes scope changes to advertised specifications, the significant question is whether the changes are material or substantial.

Material or substantial changes are not measured by the number of changes made to the original specifications. Rather, they are measured by whether the extent of the changes would so substantially alter the original specifications that not re-advertising the revised specifications would deny a procurement opportunity to someone who would have been able to respond to the revised specifications. If much is revised, then those changes will be treated as a new proposal. A new solicitation is needed to ensure compliance with the bidding statutes.[lxviii]

Although limited, there are several decisions that explain the principles.

In one situation, a Commissioners Court awarded a construction contract. After awarding the contract, it was decided that a tile floor had to be excluded from the original plans. Since the advertised specifications formed the basis for the contract award, the Attorney General Opinion determined that all bidders would need to be given an opportunity to bid on the new specifications. No material or substantial change in the terms could be allowed without that opportunity.[lxix]

In a different procurement, a City advertised for competitive bids on a treatment plant contract. When each of the five bids submitted exceeded money available for the project, the City made more than thirty-five (35) changes to the original plans. But the City only presented these revisions to the original low bidder, who submitted a revised bid—one much lower than its original one. It was determined in the Attorney General Opinion that these changes were substantial enough that the revised plans constituted new specifications requiring new bids. Just because a company is the lowest bidder on one set of specifications does not mean it will be the lowest bidder when the specifications change.[lxx]

Another example involved a County that received bids exceeding its project funds. Initially only negotiating with the lowest bidder for a proposal to reduce scope, it later apparently realized its error and the proposal was rejected. When the lowest bidder appealed his loss in the trial Court, the appellate Court upheld the trial Court's judgment. It emphasized that the competitive bidding process is designed to stimulate competition, and that compliance with statutory bidding requirements is mandatory.[lxxi]

As a general rule, whether a change is material or substantial is a fact question. What is fundamental is the principle that materially changing solicitation specifications after receipt of responses denies an opportunity for others to participate in the solicitation. Therefore, any contract amendments are required to be within the scope of the original contract and the competitive process underlying the original contract.

It is important to remember that application of the above principles will depend upon your particular fact situation, and may not apply to the specifics of a request for proposal or request for offer. Always consult with your legal staff members before proceeding.

Administrative Changes

These are changes that are within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed via a unilateral amendment. Examples of administrative changes include:

- Changes in billing instructions or address;

- Corrections of typographical errors not affecting the substance of the contract;
- Changes as permitted by the specific contract language;
- Changes in agency personnel assigned to the contract.

Substantive Changes

These are contractual changes that affect the rights of both parties. Such changes generally require bilateral amendments (agreement by both parties). Examples of substantive changes include:

- Change in the price of the contract.
- Change in the delivery schedule.
- Change in the quantity.
- Change or nature of deliverables. (i.e. the specifications)
- Change of key personnel.
- Change of any terms and conditions.

Constructive Changes

If a contractor perceives that work beyond the scope of the contract was ordered by the agency, the contractor may claim that the contract was “constructively” changed, and the contractor may be entitled to additional compensation for the changes. Generally, a constructive change will require a bilateral amendment. Constructive changes may occur when agency personnel:

- Provide suggestions to a contractor;
- Accelerate the delivery schedule;
- Direct the work to be performed differently;
- Change the sequencing of the work;
- Delay accepting or rejecting deliverables;
- Delay reviewing invoices and approving payment;
- Interfere with or hinders performance.

Dispute Resolution

Dispute resolution is covered by statute under Texas Government Code Chapter 2260 and it covers some of the contract claims against the state. The goal of any dispute resolution process is to resolve all problems before they escalate to the next level. To avoid escalation of problems to the next level and ensure the agency has not exacerbated potential problems, it is imperative that agency personnel respond promptly to all contractor inquiries. Initial steps to be taken are:

1. Identify the problem - many times what may appear to be a problem can be resolved by providing the contractor with information or clarification.

2. Research facts – the agency should obtain all the information regarding the potential problem from all relevant sources, including the project manager and the contractor.

3. Evaluation – the agency should review all of the facts in conjunction with the requirements and terms and conditions of the contract. The agency should then determine the appropriate course of action.

4. Proper dispute resolution is a core skill of successful contract management. Identification of problems early in the performance period, effectively communicating and formalizing the process in writing via a cure notice procedure or less formal written procedure is essential. A contract termination is a failure by BOTH parties to a contract. Termination is the last resort that rarely needs to be done.

TERMINATION

When a contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions. A contract may be terminated under distinct processes: Termination for Convenience and Termination for Default.

TERMINATION FOR CONVENIENCE

A termination for convenience, also known as no-fault termination, allows the agency to terminate any contract, in whole or in part, at any time in its sole discretion, if it is determined that such termination is in the best interest of the agency.

- The agency shall provide the contractor with written notice specifying whether the agency is terminating all or part of the contract. The notice of termination shall give the date of termination. If the contract is being selectively terminated, the agency should specify which part(s) of the contract are being terminated.

- A termination notice should be issued which includes wording similar to:

Pursuant to Section ___, Termination, this contract is hereby terminated effective [date]. [Contractor name] is directed to immediately stop all work, terminate subcontracts, and place no further orders.
In accordance with this Notice of Termination, you shall:

1) Keep adequate records of your compliance with this notice, including the extent of completion on the date of termination.

2) Immediately notify all subcontractors and suppliers, if any, of this Notice of Termination.

3) Notify the agency Contract Administrator [name], of any and all matters that may be adversely affected by this Termination; and

4) Take any other action required by [agency name] to expedite this Termination.

- The contractor will generally be paid for allowable costs incurred up to the termination. The agency will not be liable for payment to the contractor related to the terminated portion of the work or any work performed or costs incurred after the effective date of termination.

- Upon receipt of any invoice from the contractor for work performed prior to the Notice of Termination, the agency should thoroughly review the invoice to ensure that no excessive costs are included.

TERMINATION FOR DEFAULT

A contract may be terminated for default when the agency concludes that the contractor fails to perform, make progress, or in any way breaches the contract. An agency is not required to terminate a contract even though the circumstances permit such action. Agencies may determine that it is in their best interest to pursue other alternatives. Examples of such alternatives include extending the delivery or completion date, allowing the contractor to continue working or working with the contractor's surety to complete the outstanding work.

Termination for default should be used as last resort and not as punishment. The purpose of a termination for default is essentially to protect the interests of the agency while obtaining the necessary goods or services from another source.

Factors to consider prior to making a termination for default decision include:

1) Has the agency done everything within reason to assist the contractor in curing any default?

2) The provisions of the contract and applicable regulations.

3) The specific contractual failure(s) and the explanation provided for the failures.

4) The urgency of the need for the contracted supplies or services. The agency may need to weigh the respective benefits and/or disadvantages of allowing a delinquent contractor to continue performance or re-soliciting a new contractor.

5) The availability of the supplies or services from other sources and the time required to obtain them (compared to the additional time the current contractor needs to complete the work).

6) Availability of funds and/or resources to re-purchase in the event such costs cannot be recovered from the delinquent contractor. Under a termination for default, the agency is within its rights to demand re-procurement costs from the defaulting contractor. Nevertheless, the contractor may not be financially capable to finance the re-purchase, or such demand may result in protracted legal action.

If a vendor is terminated for default, the contractor is liable for actual damages and costs incurred by the state unless the contract states otherwise.[lxxii]

Excusable Causes. A contract may not be terminated for default when the failure to perform is due to excusable causes. In order to qualify as an excusable cause, the cause must be beyond the control, and without the fault or negligence of the contractor. Such excusable causes include, but are not limited to:

Acts of God or of the public enemy	**Acts of the agency**	**Fires**	**Floods**
Epidemics	**Strikes**	**Freight embargos**	**Unusually severe weather***

*Severe weather, although beyond the contractor's control, will not generally constitute an excusable delay if it is not considered "unusually severe weather". For example, a snow storm in Amarillo in February would not be considered unusual, while it would be considered unusual in Austin. On the other hand, a snow storm in Amarillo in June would indeed be unusual.

If the contractor's failure to perform is due to the default of a subcontractor, in order to qualify as an excusable cause, the default must arise out of causes beyond the control and without the fault or negligence of both the contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.
See Legal Reference Section for additional information on issues related to Contractor Performance.[lxxiii]

Termination for Default Notifications

Prior to terminating a contractor for default, a cure notice should be sent to the contractor. A cure notice is a letter provided to the contractor that provides them a period of time, usually 10 days, to correct or "cure" the deficiency or violation.

Cure Notices. The format for a cure notice may be as follows:

[contractor name] is notified that the [agency name] considers [specify failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days from the date of this letter, the [agency name] may terminate for default under the terms and conditions of the Termination clause of this contract.
Another format for a cure notice is:

Since [contractor name] has failed to perform the above referenced contract within the time required by its terms, the agency is considering terminating the contract under the provisions for default. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes

beyond your control and without fault or negligence on your part. Accordingly, you are the given the opportunity to present, in writing, any facts bearing on the questions to [agency point of contact] within 10 days from the date of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist.

Any assistance given to you on this contract or any acceptance by [agency name] of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of [agency name] to condone any delinquency or to waive any rights the [agency name] has under the contract.

Notice of Termination. If the contractor fails to cure the situation or provide a satisfactory explanation as requested, the contract may be terminated. The Notice of Termination should contain the following:

1) The contract number, if any, and date of contract;

2) The effective date of termination;

3) Reference to the clause under which the contract is being terminated;

4) A concise, accurate statement of the facts justifying the termination; and

5) A statement that the supplies or services being terminated may be re-procured and that the contractor will be held liable for any additional costs incurred due to the re-purchase.[lxxiv] Before including this statement, the contract should be reviewed to determine whether the right is available under the contract.

State Agency Reporting of Contracting Information

As stewards of public funds, all state agencies are required to manage finances and human resources in a way that supports sound business principles. Since 1989, state law has required agencies to report their expenditures using a computerized and uniform statewide accounting system created and implemented by the Comptroller of Public Accounts. In 2007, to further financial and reporting uniformity, the legislature required the Comptroller's office to develop, maintain and support Enterprise Resource Planning (ERP) to ensure that the uniform statewide accounting system included the administration of general ledger, accounts payable, accounts receivable, budgeting, inventory, asset management, billing, payroll, projects, purchasing, grants and human resources. Since then, the Comptroller has been integrating ERP in the uniform statewide accounting system through the Centralized Accounting and Payroll/Personnel System (CAPPS).

In 2015, the legislature included "solicitations and contracting" as part of the "purchasing" element in ERP. Texas Government Code, Section 2101.001(1)(l). State agencies using CAPPS are required to provide information related to solicitations and contracting according to the requirements that will be adopted in rule by the Comptroller.

A state agency shall develop and implement contract reporting requirements for each contract for the purchase of goods or services that has a value exceeding one million dollars. The agency must provide information on compliance with financial provisions and delivery schedules under the contract. There must be corrective action plans required under the contract and the status of any active corrective action plan. Any liquidated damages assessed or collected under the contract must also be reported.

In addition, a state agency shall verify that accuracy of any information reported about the contract if the information is based on information provided by a contractor. An agency shall verify the delivery time of goods or services scheduled under a contract as well .

THE CONTRACT ADMINISTRATION FILE

RETENTION OF CONTRACT AND RELATED DOCUMENTS BY STATE AGENCIES

State agencies have always been required to maintain documentation related to the contracting practice in state government. Openness, accountability, and honesty define government transparency. Transparency is government's obligation to share information with citizens.(7) The right and the means to examine the process of decision making allows citizens to see what their government is doing.(8) In 2015, the Legislature lengthened the time that state agencies are required to maintain contract documentation from four years to seven years or until any litigation issues are resolved. A state agency:

(1) shall retain in its records each contract entered into by the state agency and all contract solicitation documents related to the contract; and

(2) may destroy the contract and documents only after the seventh anniversary of the date:

(A) the contract is completed or expires; or

(B) all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents are resolved.

This retention period for contracts and associated documents applies notwithstanding the agency's retention schedule. Texas Government Code, Section 441.1855.

MASTER FILE

Keeping one complete master contract administration file is critical. The file will provide a basis for settling claims and disputes should they arise in administrative or court actions. Throughout the life of the contract, the contract administration file should contain such things as:

- A copy of the current contract and all modifications;
- A copy of all specifications, drawings or manuals incorporated into the contract by reference;
- A reference list or a list of prior contracts with this specific vendor (if they offer valuable historical data);
- The solicitation document, the contractor's response, evaluation determination, and the notice of award document;
- A list of contractor submittal requirements;

- A list of government furnished property or services;
- A list of all information furnished to the contractor;
- A copy of the pre-award conference summary, if conducted;
- A schedule of compliance review, internal correspondence, if applicable;
- A copy of all general correspondence related to the contract;
- The originals of all contractor data or report submittals;
- A copy of all routine reports required by the contract such as sales reports, pricing schedules, approval requests, and inspection reports;
- A copy of all notices to proceed, to stop work, to correct deficiencies, or change orders;
- A copy of all letters of approval pertaining to such matters as materials, the contractor's quality control program, prospective employees, and work schedules;
- The records/minutes of all meetings, both internal and external. Include sign-in sheets and/or agendas;
- A copy of all contractor invoices, information relative to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments; and
- A copy of all backup documentation for contractor payment or progress payment; and copies of any audits.

Agencies should maintain an original of all contracts on file in a central repository. This allows contract managers to reference past or current contracts for useful information relating to a current project.

CONTRACT CLOSE-OUT

The contract close-out process is usually a simple but detailed administrative procedure. The purpose is to verify that both parties to the contract have fulfilled their contractual obligations and there are not responsibilities remaining. In addition, contract close-out is the time to assess the success of the contract and determine if there are any lessons learned for future contracting.

A contract is completed when all goods or services have been received and accepted; all reports have been delivered and accepted; all administrative actions have been accomplished; all agency furnished equipment and material have been returned; and final payment has been made to the contractor.

To initiate the close-out process, the agency should first determine that the contractor has satisfactorily performed all required contractual obligations. A contract is ready for close out when:

- All deliverables, including reports have been delivered and accepted by the agency. Contract managers should compare actual performance against performance measures, goals and objectives to determine whether all required work has been completed;

- Final payment has been made;

- All monitoring issues have been resolved;
- All property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract;
- Final acceptance from the Project Manager has been received (if applicable);
- Contractor is aware of and in compliance with records retention requirements and a plan has been developed for contract file maintenance; and
- Any deficiencies found as part of the closeout process are documented and communicated to all appropriate parties.

Reporting Vendor Performance

State agencies are required to report vendor performance through the Vendor Performance Tracking System (VPTS) on every purchase over $25,000, including delegated purchases, TPASS contracts, and exempt purchases. Additionally, VPTS entries provide state agencies with important vendor information prior to making a contract award. Texas Administrative Code, Title 34, Part 1, Chapter 20, Subchapter C, Rule §20.108. See webpage link below for TAC information:

http://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=20&rl=108

Upon completion or termination of a contract, and as part of the close-out process, each state agency must review the vendor's performance and report the results of the review to the Comptroller using the VPTS.

Comptroller Evaluation

Using the information provided through the VPTS, the Comptroller evaluates the vendor's performance. The Comptroller will rate the vendor on an A through F scale with A being the highest grade. If a vendor receives a grade lower than a C they may protest this classification to the Comptroller.

A state agency is required to use the vendor performance tracking system to determine whether to award a contract to a vendor reviewed in the tracking system. The comptroller will determine how the rating scale affects a vendor's eligibility for state contracts and the grades on the scale that disqualify a vendor from state contracting.

GRANT CLOSE-OUT

Grants have specific contractual close out requirements. In addition to final reports and invoicing requirements there must be retention and access requirements for grant related records. These requirements can be found in the Uniform Grant Management Standards published by the Governor's Office.

Agencies will close out the grant award when it determines that all applicable administrative actions and all required work of the grant have been completed. The awarding agency should provide any necessary additional information on grant closeouts.

Grant close-out period should be not less than 45 days nor later than 90 days after the expiration or termination of the grant. The grantee must submit all financial, performance, and other reports required in the grant. Upon request by the grantee, federal/state agencies may extend this timeframe. These close-out reports may include but are not limited to:

- Final performance or progress report.
- Final Financial Report.
- Final request for payment.
- Property Inventory Report.

Sample Contract Close-Out List

Project Name	
Prepared by (Print)	Date
Customer	Contract
Contact Telephone / E-mail	

1. ☐ yes ☐no ☐n/a All products or services required were provided to the buyer.

2. ☐ yes ☐no ☐n/a Documentation adequately shows receipt and formal acceptance of all contract items.

3. ☐yes ☐no ☐n/a No claims or investigations are pending on this contract.

4. ☐yes ☐no ☐n/a Any buyer furnished property or information was returned to the buyer.

5. ☐yes ☐no ☐n/a All actions related to contract price revisions and changes are concluded.

6. ☐yes ☐no ☐n/a All outstanding subcontracting issues are settled.

7. ☐yes ☐no ☐n/a If a partial or complete termination was involved, action is complete.

8. ☐yes ☐no ☐n/a Any required contract audit is now complete.

NOTES:

References

1. A Guide to Best Practices for Contract Administration," OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP), October 2004, https://www.acquisition.gov/bestpractices/bestpcont.html

2. Gregory A. Garrett, "Post Award Contract Administration," Contract Management (July 2007), http://www.ncmahq.org/files/Articles/CBC0B_CM0707_F05.pdf

3. "Change Management," SearchCIO-Market.com," TechTarget (2007-2010), http://searchcio-midmarket.techtarget.com/sDefinition/0,,sid183_gci799426,00.html

4. "**Contract Administration Principles,"**Chapter 11 – Contract Administration, (December 2004) **http://www.documents.dgs.ca.gov/pd/delegations/chapter11.pdf**

5. "Managing/Monitoring the Contract, Monitoring Contract Performance" OFM- Contract Services,, **http://www.ofm.wa.gov/contracts/resources/managing_monitoring.pdf**

6."**Managing Risks in the Procurement Process"** Asian Organization of Supreme Audit Institutions, International Organisation of Supreme Audit Institutions **http://www.scribd.com/doc/27036222/Managing-Risks-in-the-Procurement-Process**

7. "Transparency and Open Government | The White House," https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment

8."**Transparency (behavior)"** Wikipedia The Free Encyclopedia, **https://en.wikipedia.org/wiki/Transparency_(behavior)**

9."**Enhanced Monitoring"** State of Connecticut Department of Developmental Services, **http://www.ct.gov/dds/lib/dds/dds_manual/ig/igpr003_enhanced_monitoring.pdf**

APPENDIX 1

State of Texas
[Agency Name and Logo]

REQUEST FOR PROPOSALS

[Title]

RFP No.

NIGP CLASS ITEM(s)

Proposal Due Date: {Date}

Proposal Due Time: [Time] pm (Central Time in [City], Texas)

Posting Date: [Date]

<u>NOTE**</u>** This RFP is composed of two parts: (1) Part A: Special Instructions, (including attachments and appendices, if any) and (2) Part B: General Instructions and Contract Terms and Conditions (including attachments and appendices, if any). In the event an instruction or term in Part A conflicts with an instruction or term in Part B, the instruction or term in Part A prevails, and any addenda or amendments to either Part A or Part B control over the original versions.

RESPONSE SUBMISSION CHECKLIST

IMPORTANT:
RESPONDENTS MUST ADDRESS ALL INQUIRIES AND COMMUNICATIONS CONCERNING THIS RFP TO THE INDIVIDUAL LISTED IN SECTION A.10.2 – POINT-OF-CONTACT OR THE HUB COORDINATOR IN SECTION A.12.

COMMUNICATIONS WITH ANYONE OTHER THAN THE POINT-OF-CONTACT OR THE HUB COORDINATOR MAY RESULT IN DISQUALIFICATION OF A RESPONSE.

Please read all instructions, documentation, and requirements contained within this RFP.

Respondents must complete and submit all required documents or documentation requested in this RFP to be considered responsive for evaluation and award.

[add or delete as applicable]

Reference Section A.14 – Organization of the Proposal for Submission.

[AGENCY] may disqualify responses received without the required documentation identified below, except as noted.

- ☐ CONFIDENTIAL/PROPRIETARY INFORMATION
- ☐ EXECUTION OF PROPOSAL – ATTACHMENT A
- ☐ RESPONDENT INFORMATION FORM – ATTACHMENT B
- ☐ PREFERENCES – ATTACHMENT C
- ☐ AUTHORIZED WARRANTY SERVICE PROVIDER – ATTACHMENT D
- ☐ HUB SUBCONTRACTING PLAN (HSP) – Reference Section A.11
  There are no exceptions for the submission of the HSP. Therefore, [AGENCY] will reject responses received without the completed HSP as a material failure to comply with the requirements of this RFP and disqualify Respondents.
- ☐ MANDATORY COMPENSATION OR PRICING SHEET: Submit electronically in the original format.
- ☐ EXCEPTIONS (IF APPLICABLE)
- ☐ CONFLICT OF INTEREST DISCLOSURE
- ☐ SAMPLES
- ☐ MANUFACTURER'S PRICE LIST
- ☐ DESCRIPTIVE LITERATURE FOR PRODUCTS OFFERED
- ☐ FINANCIAL RESPONSIBILITY/STABILITY

Reference Sections A.14 and A.15 for Submission Requirements

RESPONDENT MUST SUBMIT THE MANDATORY PRICE SHEET ELECTRONICALLY IN THE ORIGINAL FORMAT.

Respondent must submit an electronic response to the following e-mail address: [Agency address]

[AGENCY] recommends beginning the process well in advance of 4:00 pm on the due date.

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A.1 DEFINITIONS

When capitalized, the following terms and acronyms have the meaning set forth below. All other terms have the meaning set forth in Merriam-Webster's Collegiate® Dictionary, Eleventh Edition. These definitions also apply to Part B of this RFP.

TERM	DEFINITION
Contract	Any Contract(s) resulting from this solicitation, consisting of the Contract documentation as provided in Section B.3.4.
Contractor	The Respondent(s) awarded a Contract as a result of the RFP.
[AGENCY]	The [AGENCY], the state agency issuing this solicitation.
Customer	State of Texas agencies, institutions of higher education, and cooperative purchasing members, including [AGENCY], that are required or permitted by law to purchase goods and services under contracts established by [AGENCY]. The requirements and eligibility of any given state agency, institution of higher

	education, or other entity to purchase goods and services under Contracts established by [AGENCY] are subject to exceptions, restrictions, and change in accordance with applicable current or subsequent law and regulation.
ESBD	The Electronic State Business Daily, which is available online at http://esbd.[Agency].state.tx.us/
Party or Parties	Either [AGENCY] or Respondent, separately or collectively
Proposal	A response submitted to [AGENCY] as a result of this solicitation.
Respondent	Any person or vendor who submits a Proposal in response to this solicitation. Unless the context clearly indicates otherwise, all terms and conditions of this Contract that refer to Respondent apply with equal force to Contractor.
RFP	Request for Proposals, which is the type of solicitation embodied in this document.

A.2 DESCRIPTION OR SCOPE OF WORK OVERVIEW

[MAY NEED TO VARY WITH INDIVIDUAL RFPs]
The [AGENCY], of the State of Texas requests sealed proposals to establish a Contract for [AGENCY].

A.3 TERM OF THE CONTRACT

The Contract commences upon the issuance of a Notice of Award by [AGENCY] and automatically expires on [expiration date].

[*insert Alpha number (#)*] one-year periods for renewal will be at [AGENCY]'s sole option.
1st Renewal Option:
2nd Renewal Option:
3rd Renewal Option:

[AGENCY] may extend the Contract for six months following the last period of renewal or for such additional time as the Comptroller deems necessary to secure and transition to a new contract.

A.4 COMPENSATION, FEES AND PRICING

Proposed prices or discounts offered to the State may be considered the Respondent's most favored Customer pricing. However, [AGENCY] reserves the right to negotiate pricing. In the event that Contractor offers or provides a decrease in price or an increase in discount to its customers for the same commodities or services, under the same terms and conditions, provided for the State of Texas pursuant to its Contract, Contractor must provide the same decrease in price or increase in discount for the State of Texas. [AGENCY] recommends that Contractor provide any price decrease or discount increase voluntarily**.**

[MAY NEED TO VARY WITH INDIVIDUAL RFPs] *(e.g., Fixed Price, Index)*
USE ONE THE FOLLOWING AS APPROPRIATE AND DELETE ALL OTHERS

A.4.1 Compensation and Fees:

Provide a compensation and fee schedule for each product/service to be performed in response to this RFP, including an estimated maximum amount. This information should be included as listed on the Compensation and Fees Exhibit.

A.4.2 Pricing Structure – Firm Price with Escalation

{FIRM PRICE WITH PPI}
Prices offered, as part of the Respondent's Proposal, to the State must be firm, fixed prices. [AGENCY] may negotiate this proposed pricing, and request a Best and Final Offer, prior to Contract award. Pricing may only change in accordance with the Price Adjustments provision of the Contract. In the event a Contractor offers or provides a lower price to a specific Customer(s) for the same commodities or services, under the same terms and conditions, provided for the State of Texas pursuant to its Contract, the Contractor must provide the same lower price to all [AGENCY].

Pricing must remain firm during the initial term of the Contract with escalation in accordance with Section A.5.2.

Shipping will be F.O.B. destination; therefore, unit prices are requested for {statewide, Texas Zone or Highway District} delivery and must include all shipping, handling/delivery fees, and fuel surcharges.

A.4.3 Pricing Structure – Discount from List

{DISCOUNT FROM LIST TYPE}
Pricing must remain firm during the initial 90 days of the Contract with escalation in accordance with Section A.5.2.

Shipping will be F.O.B. destination; therefore, unit prices are requested for {statewide, Texas Zone or Highway District} delivery and must include all shipping, handling/delivery fees and fuel surcharges.

This Contract provides for price increases only in connection with increases in manufacturer list pricing. Consequently, each Respondent must include with its Proposal a manufacturer's price list (or lists, as applicable) for all products included in Respondent's Proposal. The manufacturer's price list(s) provided must be the latest in effect as of Respondent's Proposal submission under this RFP and must include manufacturer's prices for all products for which Respondent is seeking an award under this RFP. The list(s) must be published in a form recognized in the applicable industry; a price list prepared for purposes of this RFP is not acceptable. The manufacturer's price list(s) must reflect the effective date of the list or include verification that the prices are current as of Respondent's Proposal submission date.

[AGENCY] reserves the right, in its sole discretion to determine the acceptability of a price list. In [AGENCY]'s sole discretion, [AGENCY] may disqualify any Proposal for failure to include a manufacturer's price list by the Proposal due date. If no manufacturer's price list is provided, [AGENCY] may still award a Contract based on the proposed pricing, but the Respondent will not be entitled to any price increases during the life of the Contract, including renewal periods, if any. Additionally, Respondent will not be entitled to any price increase on any item that is not included in Respondent's manufacturer's price list submitted with Respondent's Proposal.

A.5 PRICE ADJUSTMENTS

A.5.1 Price Decreases or Discount Increases

Contractors are required to immediately implement any price decrease or discount increase that may become available. Contractor must notify [AGENCY] in writing so that [AGENCY] may update the Contract.

Notification of price decreases or discount increases should be sent by e-mail to: [Agency E-mail]
Or mail to:

[AGENCY Contract Management address]

A.5.2 Price Increase Calculation

Use Firm Price or Discount from List and delete as appropriate:
{For Firm Price with Escalation}
Prices may be adjusted annually at time of renewal or at the sole discretion of [AGENCY] throughout the term of the Contract upwardly or downwardly when correlated with the index as specified below and as published by the Bureau of Labor Statistics (BLS), Region VI, Washington, DC 20212.

BLS website: http://data.bls.gov/cgi-bin/srgate

Producer Price Index: [number/description]
Consumer Price Index: [number/description]

{Make sure these directions work for the PPI or CPI specified}
Note: Once at website enter the index number in the Series ID box and click Next and "Retrieve Data."

When using the most recent monthly information from the index, the following applies:
A = Index from the month of the due date for responses of this RFP, OR
The effective date/month of the last approved price increase
B = Current or latest baseline index

The allowable percent change must be calculated as follows:
B-A ÷ A x 100% = Percent of allowable price increase

The Contractor may offer price decreases in excess of the allowable percent change.

{Discount from List}
For any price increase request, Contractor will calculate the maximum allowable price increase as determined by the following formula:

Original Awarded Price ÷ Original Mfg. Price X New Mfg. Price = Max. Allowable Contract Price

In calculating this formula, as to each item for which a price increase is requested:

(1) "Original Awarded Price" is the price at which the Contract for the item is initially awarded to the Contractor as a result of this RFP;
(2) "Original Mfg. Price" is the price reflected on the manufacturer's price list submitted with Contractor's original Proposal in response to this RFP; and
(3) "New Mfg. Price" is the price reflected in manufacturer's price documentation submitted by Contractor in support of its price increase request.

Failure by the Contractor to calculate this formula and provide any supporting documentation will not be considered a properly submitted price increase request. Additionally, as stated above, if no manufacturer's price list was submitted with the Contractor's original Proposal, as to the items for which a price increase is requested, no increase is permitted.

A.5.3 Price Increase Requests

{Firm Price with Escalation}
Prices may be adjusted annually at time of renewal or at the sole discretion of [AGENCY] throughout the term of the Contract upwardly or downwardly when correlated with the index identified in Section A.5.2.

Contractor must provide supporting documentation to justify all price increase requests. Any request submitted by a Contractor that fails to use the formula as indicated in Section A.5.2 for calculating a price increase will not

be considered a complete, properly submitted price increase request. Additionally, any request submitted by a Contractor that fails to provide supporting documentation will not be considered a complete, properly submitted price increase request.

{Discount from List}
Proposed pricing must remain firm for 90 days from the Notice of Award of the Contract. After such 90-day period, price increases may be requested based upon changes in an approved manufacturer's price list.

Contractor must provide supporting documentation to justify all price increase requests. Any request submitted by a Contractor that fails to use the formula as indicated in Section A.5.2 for calculating a price increase will not be considered a complete, properly submitted price increase request. Additionally, any request submitted by a Contractor that fails to provide supporting documentation will not be considered a complete, properly submitted price increase request. As stated above, if no manufacturer's price list was submitted with the Contractor's original Proposal as to the items for which a price increase is requested, no increase is permitted.

[AGENCY] Contract Management Office reserves the right to accept, reject, or negotiate increases within 15 calendar days after receipt of a complete, properly submitted request. The Contractor will receive written notification from [AGENCY Contract Management] documenting action taken, to include effective dates when appropriate.

If a complete, properly submitted price increase request is rejected, the Contractor may request cancellation from the Contract of the items for which price increase was rejected by submitting a written cancellation request to [AGENCY Contract Management]. [AGENCY] has the sole option to approve or reject all item cancellation requests. If approved, cancellation will not go into effect for 15 calendar days after written notice of approval.

Purchase orders dated prior and up to the effective date of approval or cancellation, as applicable, must be honored at the price reflected on the order.

Price increase requests and cancellation requests under this section should be sent by e-mail to: [AGENCY e-mail]
Or mail to:

[AGENCY ADDRESS]

A.6 INSURANCE

A.6.1 Insurance

In its proposal, Respondent must provide a statement of its intent to obtain and maintain for the term of the Contract the minimum insurance coverage specified. Respondent should also describe other insurance coverage maintained by Respondent in the ordinary course of business and provide proof of same in its proposal. Proof of insurance may be provided in the form of current certificates of insurance.

The Contractor will, within five business days of a Notice of Award, provide [AGENCY] with current certificates of insurance or other proof acceptable to [AGENCY]. Contractor will maintain the required insurance during the initial term and any renewal period exercised.

Minimum Required Amounts of Insurance Coverage	
Type of Insurance	**Each Occurrence/Aggregate**
Workers' Compensation	Statutory Limits
Employer's Liability Bodily Injury by Accident Bodily Injury by Disease Bodily Injury by Disease	 $1,000,000 Each Accident $1,000,000 Each Employee $1,000,000 Policy Limit
Commercial General Liability (occurrence based)	Bodily Injury and Property Damage $1,000,000 Each Occurrence Limit $2,000,000 Aggregate Limit $5,000 Medical Expense each person $2,000,000 Products/Completed Operations Aggregate Limit $1,000,000 Personal Injury and Advertising Liability $50,000 Damage to Premises Rented
Automobile Liability All Owned, Hired and Non-Owned Vehicles	$500,000 Combined Single Limit (for each accident)
Umbrella/Excess Liability	$1,000,000 Per Occurrence
Additional Insurance	Additional insurance may be required by Customer depending on Customer's particular circumstances. Customer will identify this insurance when placing a Purchase Order.

All required insurance coverage must issue from a company or companies that:

(1) have both a Financial Strength Rating of "A" or better from A.M. Best Company, Inc.; and
(2) have a Financial Size Category Class of "VII" or better from A. M. Best Company, Inc.

All insurance policies for required coverage must be issued by companies authorized to do business under the laws of the State of Texas and in a form satisfactory to [AGENCY]. All required insurance contracts must:

(1) be written on a primary and non-contributory basis with any other insurance coverages Respondent currently has in place; and
(2) include a Waiver of Subrogation Clause.

All certificates of insurance for required coverage other than workers compensation and professional liability must name the State of Texas and its Officers, Directors, and Employees as additional insureds.

Contractor shall:

(1) provide written to [AGENCY Contract Management] by e-mail at [AGENCY email] and by U.S. First Class Mail to [AGENCY address] at least 30 calendar days prior to any cancellation, non-renewal, or material change of a required policy;
(2) ensure all insurance policies and certificates of insurance for required coverage are written to include all products, services, and locations related to Contractor's performance under the Contract; and
(3) deliver to [AGENCY Contract Management] by e-mail at [AGENCY email] and by U.S. First Class Mail to [AGENCY Contract Management address] all renewal policies at least ten calendar days prior to any expiration of a required policy. All renewal policies and corresponding certificates of insurance must meet all terms set forth in the Contract.

Contractor must ensure that all provisions of the Contract concerning liability, duty, and standard of care, together with the indemnification provision, are underwritten by contractual liability coverage sufficient to include such Contractor's obligations under the Contract.

A.7 SERVICES SCOPE OF WORK OR REQUIRED DELIVERABLES

A.7.1 Proposed Services:

With respect to each of the services outlined, provide the information requested below:
[Other examples of Proposal Contents:]

A.7.2 Experience and Qualifications:

Describe services your organization has provided in the past 5 years that demonstrates your organization's capability to carry out the proposed services. Include the nature of the services provided, scope of activities, and the organization for which the service was provided. Also, provide any experience in providing similar services to public entities. Include resumes for all personnel who will be responsible for the management and day-to-day operations of the products/services solicited in this RFP.

A.7.3 References:

Include a minimum of three (3) references from clients for whom similar services were performed or products were provided. Include project description, contact names, position, and company name and telephone number for each reference listed.]

A.8 REQUIREMENTS AND SPECIFICATIONS

A.8.1 Proprietary Specifications

{Applies to All RFP types, but DELETE IF NOT PROPRIETARY}
These specifications are being advertised under Texas Government Code Section 2155.067.
Only responses on items conforming exactly to these specifications, which includes proposing only the brand name(s), make and model number(s) specified, will be considered in determining an award.

A.8.2 Referenced Brand Example

Catalogs, brand names, or manufacturer's references are descriptive only and indicate type and quality desired. Proposals on brands of like nature and quality will be considered. If proposing other than the referenced brands/model number, Respondent must show manufacturer, brand, or trade name, product number and provide complete descriptive information of product offered and include it with response.

A.8.3 [Agency or Contractor] Requirements

{Add Detailed Requirements ***that apply to all line items; otherwise list under each line item***}

A.8.4 Specifications

Reference the Mandatory Pricing Sheet for line items.

All parts that are necessary for the {equipment} to be complete and ready for operation or that are considered standard must be furnished by the Contractor.

{Add Detailed Information or Reference Attachment}
Or {Add detailed specs in outline format}
Line 1:
{Delete if Proprietary}
Referenced Manufacturer/Model No. or Equal: {Mfg/#}

A.8.5 Approved/Qualified Products List (APL/QPL)

[*delete if not needed or modify to fit commodity or add to separate attachment*]
[MAY NEED TO VARY WITH INDIVIDUAL RFPs]
[AGENCY] maintains an APL/QPL of the following products that meet or exceed the requirements of the specification(s) outlined in this RFP.

Manufacturer	Brand Name / Product Number

To have a new product listed on the APL/QPL, the following procedures are required:
Submit a written request to [AGENCY]'s Texas Procurement and Support Services Division and include the following documentations:

{Edit as applies to commodities}
1. Official Certificate of Analysis from an independent laboratory must list the following:
   a. Manufacturer Name
   b. Brand Name or Trade Name
   c. Batch or Lot Identification Number
   d. Each analytical result given as outlined in the RFP specifications
   e. Laboratory Name, Address, and Contact Information
2. Detailed technical specifications
3. Product literature
4. Material Safety Data Sheet (MSDS)

[AGENCY] will review the Certificate of Analysis and if approved, samples will be requested, in writing by [AGENCY], for compatibility testing. [AGENCY] will provide shipping instructions to Contractor at the time of the request.

A minimum of 60 days will be required for compatibility testing to be conducted.

Sample sizes should be no less than {indicate quantity/capacity/unit of measure}.

Each sample must be accompanied with a current MSDS from the manufacturer. [AGENCY] may request more samples in writing. [AGENCY] will not accept samples unless accompanied with the current MSDS document for that material.

A.8.6 Sample Requirements – Prior To Award

[*delete if not needed*] [MAY NEED TO VARY WITH INDIVIDUAL RFPs]

[AGENCY] may request samples prior to award for evaluation purposes.

If requested, Respondent must submit samples within seven calendar days upon notification. Late or non-receipt of the samples may result in disqualification. [AGENCY] will provide submission instructions for samples [AGENCY] at the time of request.

Samples must be exactly as proposed in the response to this solicitation. The sample(s) must conform to the item specification of this RFP. A sample not conforming to the specifications will be disqualified.

Samples will not be returned to the Respondent. Any and all cost associated with the samples will be incurred by the notified Respondent(s).

OR

Samples are required to be submitted with response for evaluation purposes. Late or Non-receipt of the samples may result in disqualification.

Samples must be exactly as proposed in the response to this solicitation. The sample(s) must conform to the item specification of this RFP. A sample not conforming to the specifications will be disqualified.

Samples will not be returned to the Respondent. Any and all cost associated with the samples will be incurred by the notified Respondent(s).

OR

A.8.7 Pre-Production Sample Requirements – Post Award

The Contractor(s) **may be** required to submit a pre-production sample for any awarded line item for verification of the product's compliance with the specifications of the RFP. The request will be provided in writing from [AGENCY].

The cost of providing the pre-production sample will be the responsibility of the Contractor.

The size of the pre-production sample will be mutually agreed upon by the Contractor and the [AGENCY].

The pre-production sample(s) will be tested to verify compliance with the test parameters identified below or on Attachment #.

If the pre-production sample meets the test parameters and specifications, it will then be considered part of the first order and if the product is not currently listed on the Approved Products List (APL), it will be added. Upon completion of the inspection, written authorization will be made for shipment of the balance of the order.

If the pre-production sample does not meet the specifications, the state reserves the right to cancel the Contract and re-award or re-advertise the line item. The pre-production sample will not be returned to the Contractor.

A.8.8 Sample Testing – Post Award

The [AGENCY] reserves the right to perform random sample testing. This sample will be {#} from each shipment or lot. The sample(s) must conform to the item specification of this RFP. A sample not conforming to the specifications will be rejected and will be communicated to the Contractor in writing. Reference Section A.7.8 – Compliant Products

A.8.9 Condition of Products

Proposed and delivered products must be new, unused, of current production, and in first class condition, including containers suitable for shipment and storage, unless otherwise specified in the solicitation**.**

A.8.10 Quantities

[AGENCY] does not guarantee a specific volume to be purchased throughout the term of the Contract. No minimum compensation to the Contractor is guaranteed. Quantities indicated for each item in the Mandatory Pricing Sheet are estimates only and are based upon previous usage for a one-year period. These estimates should not be construed as a minimum or a maximum quantity that [AGENCY] may order.

[*state any minimum order requirements*]

A.8.11 Warranty Requirements

[*delete if not needed*] [MAY NEED TO VARY WITH INDIVIDUAL RFPs]

Respondents must enter the warranty in the appropriate column on the Mandatory Price Sheet.

a. Warranty
The warranty will cover the completed product and all parts of the product and all materials and parts required to repair any faults and/or defects of design, material, and workmanship of the product.

The warranty will begin on the date the equipment is inspected and accepted by the [AGENCY] and will run for {#} year or months. If no time or specific protocol for acceptance is specified elsewhere in the Contract or the [AGENCY] purchase order, items are presumed accepted ten working days after receipt.

The Contractor will provide warranty service free of any charge, including all necessary repairs, any shipping necessary to return the equipment or ship it to a repair site and removing or reinstalling the equipment when necessary. The Contractor will repair any materials and parts that are defective in materials or workmanship. In the event repair is not possible, the Contractor will either replace the equipment with new equipment of similar composition and price or refund the full purchase price of the equipment, whichever the [AGENCY] prefers.

b. Warranty Service
Respondents are required to complete and return with proposal, Attachment E – Authorized Warranty Service Provider contact information.

After the [AGENCY] contacts the Contractor's authorized warranty service provider, the service representative will come to the [AGENCY] specified location and take any necessary action to correct problems covered by the warranty.

{Language for use with products such as clothing, shoes, and consumable type products}

A.8.12 Warranty/Guarantee

c. Warranty/Guarantee
The products proposed are to be warranted against defects in workmanship and material. The warranty/guarantee will run for entire life of the Contract from the date the product is inspected and accepted by the [AGENCY]. If no time or specific protocol for acceptance is specified elsewhere in the Contract or the [AGENCY] purchase order, items are presumed accepted ten working days after receipt.

d. Replacement

1) Contractor must guarantee replacement of improperly manufactured products due to defective materials or product during the initial Contract period and any exercised renewal options.
2) The replacements must be processed and received by the [AGENCY] within two weeks of written notification.
3) Contractor will provide replacement free of any charge, including any shipping necessary to return the product when necessary.
4) Contractor will either replace the product with new product or refund the full purchase price of the product, whichever the [AGENCY] prefers.
5) **Contractor must provide their replacement procedures.**

A.9 SHIPPING, DELIVERY, AND PACKAGING

[MAY NEED TO VARY WITH INDIVIDUAL RFPs]

A.9.1 Identification of Shipments and Documentation:

In addition to the complete destination address, each delivery must be clearly marked with the purchase order number. Each shipment must be accompanied by a packing slip.

A.9.2 Material Safety Data Sheet (MSDS)

The Material Safety Data Sheet (MSDS) applicable to each product must be submitted with shipment(s) as applicable by law.

A.9.3 Manufacturer's Statement of Origin (MSO)

Contractor must furnish the [AGENCY] a MSO (Certificate of Title will not meet this requirement). The unit will not be considered "delivered" until [AGENCY] receives MSO. MSO will either be furnished at the time of unit delivery or within 48 hours of unit delivery to the receiving [AGENCY] and will be made out in the name of the individual [AGENCY] Contractor should contact the [AGENCY] to obtain proper [AGENCY] name and address for assignment of the MSO.

A.9.4 Packaging and Labeling

All items shipped must be properly labeled, with weather resistant labeling, showing the brand name, package quantity, lot number (if applicable) and any other necessary identifying information.

A.9.5 Special Delivery Requirements

[AGENCY]s may have specific, internal delivery rules and policies. These will be provided on each purchase order issued by the [AGENCY]. The Contractor(s) will be required to adhere to those requirements.

A.9.6 Hours of Delivery

Contractor must deliver made during the hours of 8:00 am to 4:00 pm based on the [AGENCY]'s time zone. Respondent is encouraged to obtain [AGENCY]'s hours of operation at time of order.

Prior approval by the [AGENCY] is required for after-hours delivery. In the event of any approval by the [AGENCY] for after-hours delivery, Respondent may not invoice any additional charges for that delivery.

A.9.7 Delivery Schedule

Respondent will furnish, in the space indicated on the Mandatory Price Sheet, a delivery schedule for each line item as to time required for delivery after receipt of order (ARO) under normal conditions.

Delivery Days means calendar days, unless otherwise specified. Failure to state delivery time may disqualify Respondent. [AGENCY], at its sole option, may choose to negotiate delivery times.

A.9.8 Delivery Delays

If delay is foreseen, Contractor must give written notice to [AGENCY] and must keep [AGENCY] advised at all times of status of order. Default in promised delivery (without accepted reasons) or failure to meet specifications authorizes the [AGENCY] to purchase goods and services of this RFP elsewhere and charge any increased costs for the goods and services, including the cost of re-soliciting, to the Contractor. Failure to pay a damage assessment is cause for Contract cancellation and/or debarment or removal of the Respondent from the State's Centralized Master Bidders List (CMBL).

A.9.9 Compliant Products

Providing products or materials which do not meet all specification requirements does not constitute delivery. Delivery does not occur until the Contractor delivers products or materials in full compliance with the specifications to [AGENCY]'s F.O.B. destination, unless delivery is specifically accepted, in whole or in part, by the [AGENCY]. [AGENCY] reserves the right to require new delivery or a refund in the event that materials or products not meeting specifications are discovered after payment has been made.

A.10 RETURN, CANCELLATION, AND RESTOCKING FEE:

The [AGENCY] may request that a Contractor accept return of merchandise that meets specifications and has already been delivered or that a Contractor cancel an order prior to delivery. If the Contractor does not agree to the [AGENCY]'s request, the [AGENCY] and Contractor must attempt to resolve the matter. [AGENCY], in its sole discretion, will determine if the merchandise return request or order cancellation request, as applicable, must be accepted by the Contractor. If [AGENCY] determines that the merchandise will be returned or the order cancelled as originally requested by the [AGENCY] and the return is determined by [AGENCY] to have resulted through no fault of the Contractor, the Contractor may request a reasonable restocking charge. The [AGENCY] may pay a restocking charge (no more than 10% of the cost of the item) if [AGENCY] determines that the charge is justifiable; however, [AGENCY] will not pay restocking or other fees for cancellations requested prior to shipment by the Contractor.

A.11 PURCHASE ORDERS AND INVOICES

A.11.1 Agency Purchase Order [one-time buy only]

{Agency} will issue an internal purchase order referencing the [AGENCY] Contract number as referenced on the Notice of Award.

The Contractor agrees not to deliver goods or services awarded under this RFP until issuance of a Purchase Order by {Agency}.

The delivery days after receipt of order will begin the date the {Agency} purchase order is received by the Contractor.

A.11.2 Invoices and Expedited Payment Discounts

Reference Part B, General Instructions and Contract Terms and Conditions, Section B.5.3 Invoicing and Payment Requirements.

Payment terms for the State of Texas are typically 30 days. Please indicate the additional discount extended to each monthly invoice on Attachment B – Respondent Contact Information Form.

A.12 PROPOSAL INFORMATION

A.12.1 Calendar of Events

Respondent must submit its Proposal to [AGENCY] in time for verification and confirmation that each Proposal is received and documented in accordance with the due date and time indicated in the schedule below.

[AGENCY] reserves the right to revise this schedule or any portion of this RFP by published Addendum on the ESBD.

Event	Date
ESBD Posting Date	
Deadline for Submitting Questions	
Official Response to Questions	or as soon thereafter as practical
Answers to questions will be provided through an Addendum, posted on the ESBD and notification sent via e-mail.	
PROPOSAL/RESPONSE DUE DATE/TIME	
Date:	
Time:	4:00 pm Central Time in Austin TX

[AGENCY] will post any amendment to this solicitation as an addendum on the ESBD. Interested parties are responsible for periodically checking the ESBD for updates to the RFP prior to submitting a Proposal. Respondent's failure to check the ESBD will in no way release the selected Contractor(s) from the requirements of "addenda or additional information" nor will any resulting additional costs to meet the requirements be allowed after award(s).

A.12.2 Questions

Respondents must send all questions regarding this RFP to the [AGENCY] Point-of-Contact identified in Section A.10.3. Respondents must reference the appropriate RFP page and section number in its questions, and must submit them by the deadline set forth in Section A.10.1. However, [AGENCY], in its sole discretion, may respond to questions received after the deadline. [AGENCY]'s responses to questions will be posted to the ESBD. [AGENCY] reserves the right to amend answers prior to the Proposal submission deadline.

Respondents must notify [AGENCY] of any ambiguity, conflict, discrepancy, exclusionary specification, omission, or other error in the RFP in the manner required and by the deadline for submitting questions. If a Respondent fails to notify [AGENCY] of such issues, Respondent submits its Proposal at its own risk, and if awarded a Contract: (1) waives any claim of error or ambiguity in the RFP or resulting Contract, (2) will not contest [AGENCY]'s interpretation of such provision(s), and (3) is not entitled to additional compensation, relief, or time by reason of ambiguity, error, or later correction.

A.12.3 Point-of-Contact

Respondents must direct all inquiries and communications concerning this RFP to the Point-of-Contact listed below.

Respondents may communicate solely with the [AGENCY] Point-of-Contact except as expressly approved in advance by the [AGENCY] Point-of-Contact.

Failure to comply with these requirements and communications with anyone other than the Point-of-Contact without express prior approval may result in disqualification of a response.

Respondents may not use this e-mail address for submission of a response. Follow the instructions outlined in Sections A.14 and A.15 for proper submission.

[AGENCY Point of Contact]
[*Name*], CTPM, CTCM
512-~~###-####~~
E-mail: [Agency email]

After award of any Contract resulting from this RFP, all requests for Contract changes and all communications relating to the Contract will be processed through the [AGENCY] Contract Management Office as referenced in in Section A.5.3.

A.12.4 Pre-Proposal Conference

[*delete if not needed*]
The Pre-Proposal Conference is scheduled for the date and time listed above in the Calendar of Events section. The location of the conference is:

[*address*]

The pre-proposal conference allows Respondents opportunities to ask [AGENCY] questions or clarify provisions of this RFP. Respondents are encouraged to notify the point of contact regarding attendance of the Pre-Proposal Conference no later than [DATE].

A.12.5 Documents and Attachments Included with this RFP

[MAY NEED TO VARY WITH INDIVIDUAL RFPs]
The RFP package also includes the following Documents and Attachments.

Documents and Attachments	
1.	XML Price Sheet Instructions
2.	Mandatory Price Sheet (to be returned in format requested)
3.	Part A: Special Instructions (This Document)
4.	Part B: General Instructions and Contract Terms and Conditions
5.	Execution of Proposal and Assurances (with Certification) – Attachment A Respondent Information Form – Attachment B Preferences – Attachment C Authorized Warranty Service Provider – Attachment D HUB Subcontracting Plan (HSP)

A.13 HUB SUBCONTRACTING PLAN – REFERENCE PART B; SECTION B.2.3

Respondents must complete and return the HUB Subcontracting Plan (HSP) documentation with the proposal to be considered responsive. [AGENCY] will reject responses received without the HSP as a material failure to comply with the requirements of this RFP.

For assistance with the HSP, obtaining HUB lists if web access is not possible, or for further explanation of the [AGENCY] HUB program, please contact:

HUB Coordinator
512-
[AGENCY E-mail]

Probable subcontracting opportunities:

NIGP Class/Item	Description
962-86	Transportation of Goods and Other Freight Services (Respondents shipping or delivering goods from their facility within the State of Texas, using other than their own transportation assets, are subcontracting and must complete all HSP requirements.)
962-95	Warehousing and Storage Services (Not Storage Space Rental)

This list is neither mandatory nor exhaustive. Other areas of subcontracting may be more appropriate given the Respondent's business structure and internal resources. Please see the attached HUB Subcontracting Plan for further instructions that require vendors to identify the specific areas intended for subcontracting.

Respondents are highly encouraged to contact [AGENCY] HUB Administration at 512-xxx-xxxx or [AGENCY e-mail] for assistance with completing the HSP forms, obtaining HUB lists if web access is not possible, and/or further explanation of the [AGENCY] HUB program.

A.14 EVALUATION OF PROPOSALS

[MAY NEED TO VARY WITH INDIVIDUAL RFPs]
[AGENCY] reserves the right to award Contract(s) without any negotiations and reserves the right to not make awards.

The Respondent is strongly encouraged to provide its best price in its Proposal because [AGENCY] makes absolutely no guarantee that there will be any opportunity to negotiate or provide alternative pricing at any point during the RFP process. [AGENCY] may limit the number of proposals in the competitive range to consist of the greatest number of proposals that will permit an efficient competition among the Respondents based in accordance with the proposed pricing and the required criteria specified in the RFP. [AGENCY] may seek additional information and solicit BAFOs only from those Respondents determined to be in the competitive range.

A.14.1 Evaluation

Proposals will be evaluated by [AGENCY] employees and by other non-[AGENCY] employees who may be invited to assist as evaluators.

Each evaluated proposal will be reviewed and scored according to the table set out below.

Evaluation Criteria:

1	Price, Total Cost of Ownership	40%
2	Compliance with Specifications, Quality, Reliability, Characteristics to meet stated or implied needs	25%
3	Delivery Timeframe	15%
4	Indicators of probable performance under Contract	10%
5	Other relevant factors	10%
	Total	100%

[AGENCY] reserves the right to conduct studies and other investigations as necessary to evaluate any Proposal. [AGENCY] reserves the right to waive any minor or immaterial response requirements noted in the submission process. Submission of Proposals confers no legal rights upon any Respondent. [AGENCY] will determine whether negotiations or Best and Final Offers are necessary and may invite selected Respondents to provide oral presentations of their Proposals.

Respondent(s) should be aware that sealed Proposals and information regarding sealed Proposals cannot and will not be disclosed to the public prior to award of Contract(s).

Past Performance: A Respondent's past performance will be measured based upon pass/fail criteria, in compliance with applicable provisions of Texas Government Code §§ 2155.074, 2155.075, 2156.007, 2157.003, and 2157.125. Respondents may fail this selection criteria for any of the following conditions:

- A score of less than 90% in the Vendor Performance System:
- Currently under a Corrective Action Plan through [AGENCY]:
- Having repeated negative Vendor Performance Reports for the same reason:
- Having a record of repeated non-responsiveness to Vendor Performance issues; or
- Having purchase orders that have been cancelled in the previous 12 months for non-performance (late delivery, etc.).

Contractor performance information is located on the [AGENCY] website and can currently be accessed at: http://www.window.state.tx.us/procurement/prog/vendor_performance/.

[AGENCY] may conduct reference checks with other entities regarding past performance. In addition to evaluating performance through the Vendor Performance Tracking System (as authorized by 34 Texas Administrative Code § 20.108), [AGENCY] may examine other sources of vendor performance including, but not limited to, notices of termination, cure notices, assessments of liquidated damages, litigation, audit reports, and non-renewals of Contracts. Such sources of vendor performance may include any governmental entity, whether an agency or political subdivision of the State of Texas, another state, or the Federal government. Further, [AGENCY] may initiate such examinations of Contractor performance based upon media reports. Any such investigations shall be at the sole discretion of [AGENCY], and any negative findings, as determined by [AGENCY], may result in non-award to the Respondent.

A.15 BEST VALUE AND AWARD PROCESS

A.15.1 Best Value

[AGENCY] will consider best value for the state as directed by Texas Government Code § 2155.074 when awarding a Contract to a Respondent.

A.15.2 Award Notice

If the RFP is awarded, [AGENCY] will issue a notice of award to the successful Respondent in response to this RFP.

However, there is no guarantee that an award or any Contract will result from this solicitation.

{Use for All or None and delete statement above}
[AGENCY] intends to make an award to one Respondent based on all or none pricing for all line items that provides the best value to the State.

A.16 ORGANIZATION OF THE PROPOSAL FOR SUBMISSION

[MAY NEED TO VARY WITH INDIVIDUAL RFPs]
The Proposal shall include all information required in this RFP and shall be in the format described in this document. The Respondent is solely responsible for thoroughly understanding the RFP and its attachments, exhibits, and forms. Any questions concerning this RFP should be directed to the Point of Contact by the Deadline for Submitting Questions identified in Part A. The Respondent is cautioned to pay particular attention to the clarity and completeness of its Proposal. The Respondent is solely responsible for its Proposal and all documentation submitted.

A Proposal constitutes a binding offer by the Respondent. **[AGENCY] will disqualify any response to this RFP that includes any type of disclaimer or other statement indicating that the response does not constitute a binding offer.**

Respondent must be as precise, accurate, and succinct as possible. Respondent must provide detailed descriptions of how they will fulfill each requirement. Evaluators may consider the clarity and completeness of a Proposal.

A.16.1 Confidential/Proprietary Information

If any material in the Proposal is considered by Respondent to be confidential or proprietary information, Respondent **must** clearly mark the applicable pages of Respondent's submission to indicate each claim of confidentiality. Additionally, Respondent must include a statement on company letterhead identifying all Proposal section(s) and page(s) that have been marked as confidential. Merely making a blanket claim that the entire Proposal is protected from disclosure because it contains some proprietary information is not acceptable, and will make the entire Proposal subject to release under the Texas Public Information Act. See Section B.2.7, Part B: General Instructions and Contract Terms and Conditions.

By submitting a Proposal, each Respondent agrees to reproduction by the State of Texas, [AGENCY], and other State agencies, without cost or liability, of any copyrighted portions of Respondent's proposal or other information submitted by Respondent to comply with any Legislative Budget Board reporting requirements or other reporting requirements mandated by law.

A.16.2 Execution of Proposal – Attachment A

Respondent is required to complete, sign and submit the Execution of Proposal – Attachment A. Failure to complete, sign, and submit this form with Respondent's Proposal may disqualify the Proposal.

A.16.3 Respondent Information Form – Attachment B

Respondent must provide all requested information on this form and submit the form with Respondent's Proposal.

A.16.4 Preferences – Attachment C

Respondents are encouraged to carefully review this attachment and complete as applicable. [AGENCY] will give preferences as required by law.

A.16.5 Authorized Warranty Service Provider – Attachment D

All information on this form must be provided as requested.

A.16.6 HUB Subcontracting Plan - Reference Section A.11

The Respondent must fill out the HUB Subcontracting Plan (HSP) and submit it with the Proposal to be considered responsive. [AGENCY] will reject responses received without the HSP as a material failure to comply with the requirements of this RFP.

A.16.7 Mandatory Pricing Sheet or Compensation/Fee Schedule

Respondent must complete the Mandatory Price Sheet or Compensation/Fee Schedule and return with response in the format requested.

A.16.8 Assumptions and Exceptions

No assumptions should be included in a Proposal. All issues or questions that might be advanced or addressed by way of assumption should be submitted to [AGENCY] pursuant to Section A.10.2. **The inclusion of assumptions in a Proposal may result in a Respondent not being awarded a contract.**

Respondents are encouraged, in lieu of including exceptions in their Proposals, to address all issues that might be advanced by way of exception by submitting such issues to [AGENCY] pursuant to Section A.10.2. Any exception included in a Proposal may result in a Respondent not being awarded a Contract. However, if a Respondent includes exceptions in its Proposal, the Respondent shall clearly identify each exception it takes, noting the specific RFP section number, section title, detailed description of exception taken, and Respondent's proposed language advanced in lieu of the language to which exception is taken. If there are no exceptions, the Respondent shall explicitly state that the Respondent takes no exception to any part of this RFP.

[AGENCY], as a state agency, is prevented by the Texas Constitution from indemnifying vendors. The Respondent is discouraged from including a term in its Proposal that requires [AGENCY] to indemnify it. Such a term may result in the Proposal being deemed non-responsive.

On company letterhead or in a Microsoft Excel® spreadsheet submitted with Respondent's Proposal, the Respondent must identify exceptions using the following format:

Section	Section Title	Exception	Proposed Language

Any exception that does not provide all information required (e.g., the specific RFP section number, section title, detailed description of exception taken, and Respondent's proposed language advanced in lieu of the language to which exception is taken) in the format set forth above will be rejected without consideration.

A.16.9 Conflict of Interest Disclosure

By signing the Execution of Proposal, Respondent affirms that the execution of an agreement between Respondent and the State will not create a conflict of interest or cause an appearance of a conflict of interest. In its Proposal, Respondent must disclose any existing or potential conflicts of interest or possible issues that might create appearances of impropriety relative to Respondent's (and its proposed subcontractors') submission of a Proposal and possible selection as Contractor or its performance of the Contract. A description of some conflicts of interest may be found in Part B, General Instructions and Contract Terms and Conditions, Section B.1.2, but this list should not be considered exhaustive or limiting.

If the circumstances certified by Respondent change or additional information is obtained subsequent to submission of Proposals, by submitting a response Respondent agrees that it is under a continuing duty to supplement its response under this provision, and Respondent shall submit updated information as soon as reasonably possible upon learning of any change to Respondent's affirmation.

A.16.10 Manufacturer's Price List {Keep for Discount from List ONLY}

Reference Section A.4 – Pricing Structure.
The required price lists should be included with the response.

A.16.11 Descriptive Literature for Products Offered {Delete if Proprietary}

Reference Section A.6 – Requirements and Specifications
If proposing other than referenced brands/model number, Respondent must indicate manufacturer, brand or trade name and product number on the Mandatory Price Sheet and provide with Respondent's Proposal complete descriptive information of each such product offered.

A.16.12 Financial Responsibility/Stability

Respondent must provide evidence of financial responsibility and stability for performance of providing the goods and services for which Respondent is submitting a Proposal. Respondent must disclose the source of any outside financial resources that Respondent will utilize to enable it to perform any Contract awarded pursuant to the RFP. Respondent must show financial capability, demonstrate financial solvency, and verify the capacity to fulfill the requirements of the RFP. [AGENCY] reserves the right to determine the financial integrity and responsibility of a Respondent and to reject a Proposal on the grounds of Respondent's financial soundness.

Respondent must submit copies of the following documentation, as applicable. If not applicable, Respondent must explain why not.

1. Two of the most recent audited financial statements, including financial statements with all sub-schedules and footnotes, to include balance sheet, profit and loss statements, change in financial position and management letters, with findings and responses to findings
2. For privately and singularly owned business where audited financial statements are not required, unaudited financials will suffice
3. At least one rating from organizations such as Dunn & Bradstreet or Fitch Ratings

4. A document with the following information:
   a. Gross Revenues
   b. Net Income
   c. Current Ratio
   d. Contingent liabilities to the extent that they would materially affect gross revenues, materially affect net income, or reduce the current ratio below 1.0.

A.16.13 Signed Addenda to RFP

Respondent must submit signed addenda, if any, with its Proposal.

A.16.14 References [OPTIONAL]

Respondents must provide three references for contracts they have had in similar size and scope to this Contract. At a minimum, Respondent should provide the following for each reference: Entity Name, Annual Amount of Contract, Dates of Contract, Contact Name, Phone Number, and Address.

A.17 SUBMITTING THE PROPOSAL TO [AGENCY]

[MAY NEED TO VARY WITH INDIVIDUAL RFPs]
The Proposal must clearly state the Proposal Due Date and Time identified in Section A.10.1 Calendar of Events and be titled: Proposal Submitted for RFP [#] {Description}

RESPONDENT MUST SUBMIT THE PRICE SHEET ELECTRONICALLY IN ITS ORIGINAL FORMAT EVEN IF RESPONDENT SUBMITS A HARD COPY OF ITS PROPOSAL.

A.17.1 Electronic Submission

Please read all instructions carefully for submitting electronically:
Use the following e-mail address to submit your response electronically. I**t is recommended that each Respondent begin the process well in advance of 4:00 pm on the due date:**

[AGENCY e-mail]

The e-mail subject line should contain the RFP number and title as indicated on the cover page. The Respondent is solely responsible for ensuring that Respondent's complete electronic Proposal is sent to, and actually received by, [AGENCY] in a timely manner and at the proper destination server.

IMPORTANT NOTE: [AGENCY] recommends a limit on the attachments to 10MB each. This may result in the sending multiple e-mails to [AGENCY email] for the submission of all documentation contained in a response.

ALL DOCUMENTS SHOULD BE SUBMITTED IN MICROSOFT OFFICE® FORMATS (WORD® AND EXCEL®) OR IN A FORM THAT MAY BE READ BY MICROSOFT OFFICE® SOFTWARE. ANY DOCUMENTS WITH SIGNATURES SHALL BE SUBMITTED AS AN ADOBE® PORTABLE DOCUMENT FORMAT (PDF) FILE. [AGENCY] IS NOT RESPONSIBLE FOR DOCUMENTS THAT CANNOT BE READ OR CONVERTED. UNREADABLE PROPOSALS MAY BE, IN [AGENCY]'S DISCRETION, REJECTED AS NONRESPONSIVE.

Please be aware that your Internet Service Provider may limit file sizes on your outgoing emails, so try to avoid graphics, pictures, letterheads, etc., which consume a lot of space. These typically include *.tif/*.tiff, *.gif, & *.bmp file extensions, but may include others, as well. [AGENCY]'s firewall virus protection runs at all times, so during times of new active virus alerts, incoming traffic may be delayed while virus software scans emails with attachments.

[AGENCY] takes no responsibility for electronic Proposals that are captured, blocked, filtered, quarantined or otherwise prevented from reaching the proper destination server by any [AGENCY] anti-virus or other security software.

To confirm receipt of all electronic submissions, contact [Agency Phone No.] or request a confirmation by e-mail.

A.17.2 Hard Copy Submission

In lieu of electronic submission, [AGENCY] currently still accepts hard copy Proposal. Respondent must submit one original signed paper copy.

[AGENCY] will no longer provide proof of delivery for Proposal delivered by hand to the outside drop box or by courier; however, [AGENCY] will document all Proposals that [AGENCY] receives with a date/time stamp for receipt documentation purposes.

Respondent may send Proposal to [AGENCY] at the following addresses:

By U.S. Mail:
AGENCY ADDRESS

By Hand Delivery to (#:## am - #:## pm):
AGENCY ADDRESS

By Overnight/Express Mail to (#:## am - #:## pm):
AGENCY ADDRESS

Facsimile Responses are *not allowed* without prior written approval from [AGENCY].

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B.1 INTRODUCTION

B.1.1 Definitions

THE DEFINITIONS USED IN PART A OF THIS RFP APPLY TO THIS PART B AS WELL. UNLESS THE CONTEXT CLEARLY INDICATES OTHERWISE, ALL TERMS AND CONDITIONS OF THIS CONTRACT THAT REFER TO "RESPONDENT" APPLY WITH EQUAL FORCE TO CONTRACTOR.

B.1.2 Conflicts of Interest

B.1.2.1 Actual and Perceived Conflicts

By submitting a Proposal, Respondent represents and warrants that neither it nor its employees and subcontractors have an actual or potential conflict of interest in entering a Contract with [AGENCY]. Respondent also represents and warrants that entering a Contract with [AGENCY] will not create the appearance of impropriety. In its Proposal, Respondent must disclose any existing or potential conflict of interest that it might have in contracting with [AGENCY]. The requirement to disclose any actual or potential conflict of interest will continue during the term of the contract, and will survive until the end of the recordkeeping requirement in B.7.4. The [AGENCY] will decide, in its sole discretion, whether an actual or perceived conflict should result in Proposal disqualification or Contract termination.

B.1.2.2 Current And Former [Agency] Employees

In addition to the disclosures required above, Respondent must also disclose any of its personnel who are current or former officers or employees of the [AGENCY] or who are related, within the third degree by consanguinity (as defined by Texas Government Code § 573.023) or within the second degree by affinity (as defined by Texas Government Code § 573.025), to any current or former officers or employees of the [AGENCY].

Respondents must comply with all applicable Texas and federal laws and regulations relating to the hiring of former state employees (see e.g., Texas Government Code Chapters 572 and 573). Such "revolving door" provisions generally restrict former agency heads from communicating with or appearing before the agency on certain matters for two years after leaving the agency. The revolving door provisions also restrict some former employees from representing clients on matters that the employee participated in during state service or matters that were in the employees' official responsibility. Respondent, by signing this solicitation, certifies that it has complied with all applicable laws and regulations regarding former state employees.

Respondent must identify each employee who works for more than one staffing company at any facility and ensure that the employee's cumulative weekly hours worked at all state facilities through any one staffing company does not exceed 40 hours per week.

See also B.7.8.6, Certification Concerning Restricted Employment for Former State Officers or Employees under Texas Government Code § 572.069.

B.1.3 Construction of this RFP and the Contract

B.1.3.1 Global Drafting Conventions

The terms “include,” “includes,” and “including” are terms of inclusion and enlargement. When used in this Contract these terms should be read as if followed by the phrase “without limitation.”

Unless explicitly stated otherwise, any references to “Sections,” “Articles,” “Exhibits,” or “Attachments” are deemed to be references to the Sections, Articles, Exhibits, and Attachments to this RFP and the Contract.

B.1.3.2 Headings

The Article and Section headings in this RFP and the Contract are for reference and convenience only and may not be considered in the interpretation of this RFP or the Contract.

B.2 THE RFP PROCESS

B.2.1 SUBMITTING QUESTIONS ABOUT THE RFP

Respondent will have until the Deadline for Submitting Questions, identified in Part A, to submit in writing all questions regarding this RFP. Respondent may only send questions to the Point of Contact. All questions must precisely and specifically cite the RFP section to which the question refers. [AGENCY] will, at its discretion, answer the questions in a Question and Answer Document posted on the ESBD.

Only answers that [AGENCY] provides in writing are official. Information in any form other than the materials constituting this RFP, the Question and Answer Document, and any RFP addendum is not binding on [AGENCY].

All questions submitted to [AGENCY] must include the identity of the sender, the sender’s title, company name, mailing address, telephone number, and facsimile number or e-mail address, as applicable.

Minor questions for which the answer will not affect the interpretation of the RFP or change the contents of a Proposal (for example, a question regarding delivery of the sealed Proposal) may be answered orally or by e-mail by [AGENCY].

B.2.2 Addenda to the RFP

Should an addition or correction to this RFP become necessary, [AGENCY] will post an addendum relating the necessary information on the ESBD. Respondent is responsible for periodically checking the ESBD for addenda or additional information relating to this RFP. Respondent is required to acknowledge each addendum by returning a signed copy of the addendum with its Proposal.

B.2.3 Testing and Inspection

[AGENCY] may test and inspect goods and services purchased under the Contract to ensure compliance with the specifications of this RFP and the Contract. [AGENCY] may also test and inspect goods and services before they are purchased under the Contract.

Authorized [AGENCY] personnel must have access to the Respondent’s place of business for the purpose of inspecting the goods. To the extent practical, the [AGENCY] inspections will not disrupt the Respondent's daily operations. [AGENCY] will test samples submitted with the Proposal or samples taken from regular shipments. Respondent will bear all costs of testing and inspection. In the event the goods tested fail to meet or exceed all

conditions and requirements of the RFP and Contract, [AGENCY] will reject the goods in whole or in part, at [AGENCY's] option. [AGENCY] will return the goods to Respondent or hold them for disposition at Respondent's expense. Latent defects may result in cancellation of the Contract at no expense to the state.

If material fails to meet specifications, the Respondent will be notified by fax, mail, or e-mail. Respondent will have ten working days after receipt of the notification to remove the rejected material from state property at the Respondent's expense. [AGENCY] will dispose of the material Respondent does not remove in the allotted time period and will charge Respondent for all disposal expenses.

B.2.4 Accuracy of the Proposal

Respondent's Proposal must be true and correct and must contain no cause for claim of omission or error. Proposals may be withdrawn in writing at any time prior to the submittal deadline.

B.2.5 HUB Subcontracting Plan Requirements

It is the policy of [AGENCY] to promote and encourage contracting and subcontracting opportunities for State of Texas certified Historically Underutilized Businesses (HUBs) in all contracts in compliance with Texas Government Code Chapter 2161. Eligible Respondents are encouraged to become HUB certified. Respondents may find State of Texas HUB applications at:http://www.window.state.tx.us/procurement/prog/hub/hub-forms/.

Definitions for State of Texas HUB certifiable businesses can be found in 34 Texas Administrative Code Chapter 20, Subchapter B, which is available at:http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=5&ti=34&pt=1&ch=20&sch=B&rl=Y

A HUB Subcontracting Plan Form must be filled out and returned with the Proposal to be considered responsive. If the Proposal does not include a HUB Subcontracting Plan, [AGENCY] will reject the Proposal as a material failure to comply with advertised specifications.

[AGENCY] identified probable subcontracting opportunities in Part A. This list should not be considered a mandatory or an exhaustive list. Other areas of subcontracting may be more appropriate given the Respondent's business structure and internal resources. Please see the attached HUB Subcontracting Plan for further instructions that require vendors to identify the specific areas intended for subcontracting.

Search the State of Texas HUB Database for HUB vendors by the NIGP class and item at: http://www2.cpa.state.tx.us/cmbl/hubonly.html.

Additional minority and women owned business association resources are available for subcontracting notices at: http://www.window.state.tx.us/procurement/prog/hub/mwb-links-1/.

Respondent can find additional information and training regarding how to complete a HUB Subcontracting Plan on the CPA Website at the following link: http://www.window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan/.

B.2.6 Cost of Submitting the Proposal

[AGENCY] will not reimburse the Respondent for any cost related to its Proposal. Respondent is responsible for any expense related to the preparation and submission of its Proposal.

B.2.7 Public Information Act Disclosures

[AGENCY] is a governmental body subject to the Texas Public Information Act (PIA), Texas Government Code Chapter 552. The Proposal and other information submitted to the [AGENCY] by the Respondent are subject to release as public information by the [AGENCY]. The Proposal and other submitted information is presumed subject to disclosure unless a specific exception to disclosure under the PIA applies. If it is necessary for the Respondent to include proprietary or otherwise confidential information in its Proposal or other submitted information, the Respondent must clearly label that proprietary or confidential information and identify the legal basis for confidentiality. Merely making a blanket claim that the entire Proposal is protected from disclosure because it contains some proprietary information is not acceptable, and will make the entire Proposal subject to release under the PIA. In order to trigger the process of seeking an Attorney General opinion on the release of proprietary or confidential information, the specific provisions of the Proposal that are considered by the Respondent to be proprietary or confidential must be clearly labeled as described above. Any information which is not clearly identified by the Respondent as proprietary or confidential will be deemed subject to disclosure pursuant to the PIA. Respondent will irrevocably deemed to have waived, and Respondent agrees to fully indemnify the State of Texas, [AGENCY] any claim of infringement by [AGENCY] regarding the intellectual property rights of Respondent or any third party for any materials appearing in the Proposal.

Contractor is required to make any information created or exchanged with a state governmental entity (as defined by Texas Government Code § 2252.907(d)) pursuant to this Contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in at least one of the following formats that is accessible by the public at no additional charge to the State of Texas, [AGENCY], : portable document format (pdf) compatible with the latest version of Adobe Acrobat®; Microsoft Word®; Microsoft Excel®; or, hard copy (paper).

If Respondent's Proposal contains any information, which Respondent claims is confidential and not subject to release under the PIA, Respondent must prepare and deliver to [AGENCY] four CDs containing the following information:

1. Two CDs containing complete copies of all of Respondent's submissions pursuant to this RFP. Respondent must mark these "Complete Proposal Documents, [Respondent's Name], [AGENCY] RFP [RFP Number]. CONTAINS CONFIDENTIAL INFORMATION."
2. Two CDs, each containing copies of all of Respondent's submissions with all information claimed as confidential excised, blacked out, or otherwise redacted. Each of these CDs must also contain an Appendix which contains clear references to all redacted information including a general description of the redacted information. Respondent must mark these CDs "For Public Release: Redacted Version of [Respondent's Name], [AGENCY] RFP [RFP Number]."

B.2.8 Agency Posting of Contracts

Without prior written notice to Respondent, the redacted Proposal submitted under Subsection 2 of Section B.2.7, Public Information Act Disclosures, may be posted on [AGENCY]'s website as part of the Contract per Texas Government Code § 2261.253(a).

B.2.9 Irrevocability of the Proposal

The Proposal is irrevocable for 120 calendar days following the Proposal Opening Date and Time identified in Part A. [AGENCY] may extend this period with Respondent's written agreement.

B.3 CONTRACT INFORMATION

B.3.1 Amending the Contract

All alterations, additions, or deletions of the Contract must be in writing and mutually agreed upon by both Parties and put into effect with a Contract Amendment issued by the [AGENCY]. Respondent will not be entitled to payment for any additional services, work, or products that are not authorized by a properly executed Contract amendment.

B.3.2 Order of Precedence

In the event of any conflict or contradiction between or among these documents, the Notice of Award, as modified by any Contract Amendments, controls over the RFP and the Proposal. The RFP, as modified by any Addenda, controls over the Proposal.

B.3.3 Terminating the Contract

B.3.3.1 Convenience of the State of Texas

[AGENCY] reserves the right to terminate the Contract at any time, in whole or in part, without cost or penalty, by providing 30 calendar days' advance written notice, if [AGENCY] determines that such termination is in the best interest of the state. In the event of such a termination, Contractor must, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination. [AGENCY]will be liable for payments for any goods or services ordered from Contractor before the termination date.

B.3.3.2 Cause/Default

If Contractor fails to provide the goods or services contracted for according to the provisions of the Contract, or fails to comply with any of the terms or conditions of the Contract, [AGENCY] may, upon written notice of default to Contractor, immediately terminate all or any part of the Contract. Termination is not an exclusive remedy, but will be in addition to any other rights and remedies provided in equity, by law or under the Contract.

[AGENCY] may exercise any other right, remedy or privilege which may be available to it under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the Contract, or to recover damages for the breach of any agreement being derived from the Contract. The exercise of any of the foregoing remedies will not constitute a termination of the Contract unless [AGENCY] notifies Contractor in writing prior to the exercise of such remedy. Contractor will remain liable for all covenants and indemnities under the Contract. Contractor will be liable for all costs and expenses, including court costs, incurred by [AGENCY] with respect to the enforcement of any of the remedies listed in this Contract.

B.3.3.3 Change in Federal or State Requirements

If federal or state laws, regulations, or requirements are amended or judicially interpreted so that either [AGENCY] or Respondent cannot reasonably fulfill the Contract and if the Parties cannot agree to an

amendment that would enable substantial continuation of the Contract, the Parties will be discharged from any further obligations under the Contract.

B.3.3.4 TCPPD Purchasing Preference

Pursuant to Texas Human Resources Code Chapter 122, state agencies must purchase products and services meeting the agency's specifications offered by a Community Rehabilitation Program (CRP) certified by the Texas Council on Purchasing from People with Disabilities (TCPPD), or its Central Nonprofit Agency, Texas Industries for the Blind and Handicapped (TIBH). Should any item(s) awarded under any contract pursuant to this RFP become available from a CRP through TIBH or TCPPD during the term of the contract, the state may cease all use of the awarded contract immediately upon the availability of such product or service, and may terminate the contract for some or all of such products or services awarded.

B.3.3.5 Rights upon Termination or Expiration of Contract

In the event that the Contract is terminated for any reason, or upon its expiration, the [AGENCY] retains ownership of all associated work products and documentation obtained from Contractor under the Contract.

B.3.3.6 Survival of Terms

Termination of the Contract for any reason does not release Contractor from any liability or obligation set forth in the Contract that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including the provisions regarding confidentiality, indemnification, transition, records, audit, property rights, dispute resolution, and invoice and fees verification.

B.3.4 Contract Documentation

The Contract will consist of the Notice of Award, Listing of Awarded Items, and any Contract Amendments to these documents issued by [AGENCY]; this RFP, together with any modifications made through Addenda; and the successful Proposal, together with any clarifications that are submitted at the request of [AGENCY].

B.4 CONTRACT MANAGEMENT

B.4.1 Contract Managers

B.4.1.1 The [AGENCY] Contract Manager

The [AGENCY] Contract Manager has the authority to:

- sign Controlled Correspondence;
- serve as the day-to-day point-of-contact;
- coordinate quality control reviews;
- approve invoices;
- coordinate meetings with Respondent;
- investigate complaints;
- receive requests for substitutions or changes in goods or services awarded under the Contract;
- initiate contract amendments; and

- discuss pricing changes.

B.4.1.2 The Respondent's Contract Manager

Respondent must identify its Contract Manager to [AGENCY] in writing within 10 days of the issuance of the Purchase Order. Respondent should document all subsequent changes of Respondents Contract Manager through Controlled Correspondence. Respondent's Contract Manager must be someone with the authority to:

- make decisions regarding the deliverables required by the Contract;
- sign Controlled Correspondence;
- serve as the day-to-day point-of-contact;
- coordinate quality control reviews;
- coordinate meetings with the [AGENCY]; and
- investigate complaints.

B.4.2 Controlled Correspondence

In order to track and document requests for decisions or information pertaining to the Contract, and the subsequent response to those requests, [AGENCY] and Respondent will use Controlled Correspondence as discussed throughout this Contract. [AGENCY] will manage the Controlled Correspondence for the Contract. For each Controlled Correspondence document, [AGENCY] will assign a tracking number and the appropriate Party's Contract Manager will sign the document.

Controlled Correspondence cannot be used to change pricing or alter the terms of the Contract. Controlled Correspondence cannot be the basis of a claim for equitable adjustment of pricing. Any changes that involve the pricing or the terms of the Contract must be by a properly executed Contract amendment. However, the Controlled Correspondence process may be used to document refinements and interpretations of the provisions of the Contract, to document the cost impacts of proposed changes, and to document [AGENCY]-approved changes to Respondent's HUB subcontracting plan.

Both Parties will maintain Controlled Correspondence documents in ongoing logs as part of the normal status reporting process. Any communication not generated in accordance with this process is not binding upon the Parties and is of no effect.

B.4.3 Notices and Liaisons

B.4.3.1 Delivery of Written Notices

Both Parties must deliver any required notice in writing to the other Party and to the addresses specified in this Section or the Respondent Information Form. The Parties deem the notice to have been given immediately if delivered in person to the receiving Party's address. The Parties deem notice to have been given on the date of certified receipt, if placed in the United States mail, postage prepaid, by registered or certified mail with return receipt requested, addressed to the receiving Party at its specified address.

B.4.3.2 Notice to Respondent

Within 10 days of the issuance of the Notice of Award, Respondent must send [AGENCY] written notice of the address and contact person for legal notice and Controlled Correspondence purposes. If there is

any change to this information during the term of the contract, Respondent must notify [AGENCY] by Controlled Correspondence.

B.4.3.3 Notice to [AGENCY]

[AGENCY]'s address for all purposes under this Contract other than Controlled Correspondence is as follows.

Mailing Address	Physical Address
[Agency Address]	[Agency Address]

With copies to (registered or certified mail with return receipt is not required for copies):

Mailing Address	Physical Address
[Agency Address]	[Agency Address]

B.4.4 Subcontracting Approval

Respondent must perform the Contract with its own resources and those subcontractors identified in Respondent's HUB Subcontracting Plan. In the event that Respondent determines that it is necessary or expedient to execute additional or alternative subcontracts for any of the performances under the Contract, Respondent must submit a revised HUB Subcontracting Plan for prior approval before executing any subcontracts. Respondent must also transmit to the [AGENCY] for review and prior [AGENCY] approval a true copy of the subcontract it proposes to execute with a subcontractor.

Respondent, in subcontracting for any performances specified in the RFP or resulting Contract, expressly understands and acknowledges that in entering into such subcontract(s), [AGENCY] is in no manner liable to any subcontractor(s) of the Respondent. In no event will this provision relieve Respondent of the responsibility for ensuring that the performances rendered under all subcontracts are rendered so as to comply with all terms of this RFP and Contract. Respondent must manage all quality and performance, project management, and schedules for subcontractors. Respondent is solely responsible and accountable for the completion of all work for which Respondent has subcontracted.

B.4.5 No Implied Authority

Any authority delegated to the Respondent by [AGENCY] is limited to the terms of the Contract. Respondent may not rely upon implied authority and specifically is not delegated authority under the Contract to: (1) make public policy; (2) promulgate, amend, or disregard [AGENCY] program policy; or (3) unilaterally communicate or

negotiate, on behalf of the [AGENCY], with any member of the U.S. Congress or any member of their staff, any member of the Texas Legislature or any member of their staff, or any federal or state agency.

B.4.6 Cooperation with the [AGENCY]

Respondent must ensure that it cooperates with [AGENCY] and other state or federal administrative agencies, at no charge to the [AGENCY], for purposes relating to the administration of the Contract. Respondent agrees to reasonably cooperate with and work with the [AGENCY]'s contractors, subcontractors, and third party representatives as requested by the [AGENCY].

B.4.7 Dispute Resolution

B.4.7.1 Informal Meetings. [AGENCY] and Contractor will meet as needed to implement the terms of this Contract and will make a good faith attempt to resolve any disputes informally.

B.4.7.2 Alternative Dispute Resolution at State Office of Administrative Hearings. If the Parties' attempts to resolve their disagreements informally fail, the parties may agree, but are not required, to utilize the non-binding alternative dispute resolution services of the State Office of Administrative Hearings (SOAH) to attempt to resolve their disagreements, claims, or disputes under this Contract. Contractor will pay all costs of the mediation unless [AGENCY], in its sole good faith discretion, approves its payment of all or part of such costs. [AGENCY] or Contractor's participation in, or the results of, any mediation under this subsection or the provisions of this Section will not be construed as a waiver by [AGENCY] or Contractor of any rights, privileges, defenses, remedies, or immunities available to the parties under this Contract or available to [AGENCY] as an agency of the State of Texas.

B.4.7.3 Texas Government Code Chapter 2260. The Parties must use the dispute resolution process provided for in Texas Government Code Chapter 2260, as further described in this Section, to attempt to resolve any claim for breach of this Contract made by Contractor.

Contractor's must submit claims for breach of this Contract that the Parties cannot resolve in the ordinary course of business according to the negotiation process provided in Texas Government Code Chapter 2260, Subchapter B. To initiate the process, Contractor must submit written notice, as required by subchapter B, to [AGENCY]'s [Executive Director] and to [AGENCY] as stated in Section B.4.3. This written notice must specifically state that the provisions of Chapter 2260, subchapter B, are being invoked. Compliance by Company with subchapter B is a condition precedent to the filing of a contested case proceeding under Texas Government Code Chapter 2260, Subchapter C.

The contested case process provided in Texas Government Code Chapter 2260, Subchapter C is Contractor's sole and exclusive process for seeking a remedy for any alleged breach of this Contract by [AGENCY] if the Parties are unable to resolve their disputes informally. Compliance with the contested case process provided in Texas Government Code Chapter 2260, Subchapter C is a condition precedent to seeking consent to sue from the Legislature under Texas Civil Practices and Remedies Code Chapter 107. Neither the execution of this Contract by [AGENCY] nor any other conduct of any [AGENCY] representative relating to this Contract will be considered a waiver of sovereign immunity.

The submission, processing, and resolution of Contractor's claim are governed by CPA's published rules, in 34 Tex. Admin. Code Chapter 1, Subchapter F.

B.4.7.4 Company's Continued Performance. Notwithstanding any other provision of this Contract to the contrary, unless otherwise requested or approved in writing by [AGENCY], Contractor must continue performance and will not be excused from performance during the period any breach of contract claim, dispute or mediation is pending under either of the above processes.

However, Contractor may suspend performance during the pendency of such claim or dispute if Contractor has complied with all provisions of Texas Government Code § 2251.051 and such suspension of performance is expressly applicable and authorized under that law.

B.4.8 Fraud, Waste, and Abuse. By submitting a Proposal to the RFP, Respondent represents and warrants that it has read and understood and will comply with [AGENCY]'s Anti-Fraud Policy, found at: http://www.window.state.tx.us/ssv/ethics.html, as such Policy currently reads and as it is amended throughout the term of the Contract.

B.4.9 Renegotiation of Price

[AGENCY] will monitor market prices and prices paid by other governmental entities or other states for substantially similar goods and services during the term of the Contract. If [AGENCY] determines that substantially similar goods and services are selling for meaningfully lower prices than the prices established in the Contract, [AGENCY] may initiate price renegotiations with Respondent and amend the Contract to reflect a new, lower price, if agreed to by the Parties.

B.4.10 Name Changes and Organizational Changes

Respondent must provide [AGENCY] with written notice by Controlled Correspondence of all name changes and organizational changes relating to Respondent including any merger, acquisition, or sale no later than ten business days of such change. Respondent, in its notice, must describe the circumstances of the name change or organizational change, state its new name, provide the new Tax Identification Number, and describe how the change will impact its ability to perform the Contract. If the change entails personnel changes for personnel performing the responsibilities of the Contract for Respondent, Respondent must identify the new personnel and provide résumés to [AGENCY], if résumés were originally required by the RFP. [AGENCY] may request other information about the change and its impact on the Contract and Respondent must supply the requested information within five working days of receipt of the request. All written notifications of organizational change must include a detailed statement specifying the change and supporting documentation evidencing continued right of Respondent or successor entity, as applicable, to maintain its status as a party to this Contract.

[AGENCY] may terminate the Contract due to any change to Respondent that materially alters the Respondent's ability to perform under the Contract. [AGENCY] has the sole discretion to determine if termination is appropriate. See also Section B.7.10 (No Assignment by Contractor).

B.4.11 News Releases

[AGENCY] does not endorse any vendor, commodity, or service. News releases pertaining to this transaction and/or advertisements, publications, declarations and any other pronouncements by the Respondent using any means or media mentioning the State of Texas or the [AGENCY] must be approved in writing by the State of Texas, [AGENCY] as applicable, prior to public dissemination. Respondent may not send out unsolicited electronic mail or facsimile transmissions to [AGENCY] without prior written approval of the [AGENCY] Contract Manager, regardless of whether the proposed communication specifically references the awarded contract.

B.5 FINANCIAL INFORMATION

B.5.1 Appropriations

All obligations of [AGENCY] are subject to the availability of legislative appropriations and, fs expending federal funds, to the availability of the federal funds applicable to the Contract. Respondent acknowledges that the ability of [AGENCY] to make payments under the Contract is contingent upon the continued availability of funds. Respondent further acknowledges that funds may not be specifically appropriated for the Contract and [AGENCY] continual ability to make payments under the Contract is contingent upon the funding levels appropriated for each particular appropriation period. [AGENCY] will use all reasonable efforts to ensure that such funds are available. Respondent agrees that if future levels of funding for [AGENCY] are not sufficient to continue operations without any operational reductions, the [AGENCY], in its discretion, may terminate the Contract, either in whole or in part, in its discretion, may terminate a pending order under the Contract, either in whole or in part. In the event of such termination, [AGENCY] will not be considered to be in default or breach under the Contract, nor will either be liable for any further payments ordinarily due under the Contract, nor will either be liable for any damages or any other amounts which are caused by or associated with such termination. [AGENCY] will make best efforts to provide reasonable written advance notice to the Respondent of any such Contract or order termination. In the event of such a termination, Respondent must, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination, either on that particular order if an order is being terminated, or the Contract, if the Contract is being terminated. [AGENCY] will be liable for payments limited only to the portion of work the [AGENCY] authorized in writing and which the Respondent has completed, delivered to the [AGENCY] , and which has been accepted by the [AGENCY] . All such work must be completed, per the Contract requirements, prior to the effective date of termination.

B.5.2 Audit Requirements

Pursuant to Texas Government Code § 2262.154, the State Auditor’s Office, or successor agency, may conduct an audit or investigation of Respondent or any other entity or person receiving funds from the state directly under the Contract or indirectly through a subcontract under the Contract. The acceptance of funds by Respondent or any other entity or person directly under the Contract or indirectly through a subcontract under the Contract acts as acceptance of the authority of the State Auditor’s Office, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Respondent or other entity that is the subject of an audit or investigation must provide the State Auditor’s Office with access to any information the State Auditor’s Office considers relevant to the investigation or audit. The Contract may be amended unilaterally by the [AGENCY] to comply with any rules and procedures of the State Auditor’s Office in the implementation and enforcement of Texas Government Code § 2262.154. **Respondent must ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through Respondent and the requirement to cooperate is included in any subcontract it awards**.

B.5.3 Invoicing and Payment Requirements

In order to receive payment under the Contract, Contractor must submit an original invoice to the [AGENCY], which will be designated in the purchase order as the "Bill To" address. To be a proper invoice that may be accepted and paid, the invoice must include the following information and/or attachments:

(1) Name and address of the Contractor.

(2) Contractor's Texas Identification Number (TIN).

(3) Contractor's invoice remittance address.

(4) The purchase order or contract number authorizing the delivery of products or services.

(5) A description of what the Contractor delivered, including, as applicable, the time period, serial number, unit price, quantity, and total price of the products and services. If the invoice is for a lease, the Contractor must also include the payment number (e.g., 1 of 36).

If an authorized dealer has fulfilled the purchase order, then the dealer's information should be supplied in lieu of Contractor's information.

If an invoice does not meet this Section's requirements, [AGENCY] will send Contractor written notice with the improper invoice within 21 calendar days after receipt of the invoice. The notice will contain a description of the defect or impropriety and any additional information the Contractor needs to correct the invoice.

For purposes of this Section and Sections 0 and 0, the [AGENCY] will only be receiving and paying invoices when [AGENCY] has placed an order with the Contractor for [AGENCY] needs.

B.5.4 Disputed Invoices

As stated above, Contractor will receive notice of an error in an invoice submitted for payment by not later than the 21st day after the date the invoice was received by the state. If an invoice dispute is resolved in favor of the Contractor, the Contractor is entitled to receive interest on the unpaid balance of the invoice, beginning on the date the invoice became overdue, pursuant to Texas Government Code § 2251.021. If a dispute is resolved in favor of [AGENCY], Contractor will submit a corrected invoice that must be paid in accordance with Texas Government Code § 2251.021. The unpaid balance accrues interest if [AGENCY] does not pay the corrected invoice by the appropriate date.

B.5.5 Time and Manner of Payment

Pursuant to Texas Government Code Chapter 2251, Payment by the [AGENCY] is overdue on the 31st day after the later of: (1) the date the [AGENCY] receives the goods under the Contract; (2) the date the performance of the service under the contract is completed; or (3) the date the [AGENCY] receives the invoice for the goods or service.

B.5.6 Antitrust and Assignment of Claims

Contractor represents and warrants that neither Contractor nor any firm, corporation, partnership, or institution represented by Contractor, or anyone acting for such firm, corporation or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated directly or indirectly the Proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract.

Contractor assigns to the State of Texas all of Contractor's rights, title, and interest in and to all claims and causes of action Contractor may have under the antitrust laws of Texas or the United States for overcharges associated with the Contract.

B.5.7 Debts and Delinquencies

[AGENCY] is prohibited from issuing any payment to a person or entity that has been reported as having an indebtedness or delinquency to the state. Contractor agrees that, to the extent Contractor owes any debt or delinquent taxes to the State of Texas, [AGENCY] will apply any payments or other amounts Contractor is otherwise owed under this Contract toward the debt or delinquent taxes until the debt or delinquent taxes are paid in full. Contractor agrees to comply with all applicable laws regarding satisfaction of debts or delinquencies to the State of Texas.

B.5.8 Liability for and Payment of Taxes

[AGENCY] is exempt from State Sales tax and Federal Excise tax. [AGENCY] will furnish Tax Exemption Certificate(s) to the Respondent upon request. The Respondent must pay all taxes resulting from the RFP and Contract including any federal, state, or local income, sales, excise, franchise, or property taxes. [AGENCY] is not liable to reimburse the Respondent for the payment of taxes incurred by Respondent in acquiring any goods or services as a part of any work called for in this RFP and Respondent's invoice may not include any amount for such taxes, as long as the [AGENCY] has provided the requested Tax Exemption Certificates.

B.5.9 Method of Purchase and Vesting Ownership

[AGENCY] will purchase all goods or services through this Contract using an outright purchase. Upon installation, acceptance, and payment, [AGENCY] will receive title to any personal property purchased and delivered to it, except as otherwise agreed to in the Contract.

B.5.10 No Debt Against the State

The Contract does not create any debt by or on behalf of the State of Texas.

B.5.11 Refunds

If [AGENCY] determines that it has overpaid the Contractor under the Contract, Contractor will refund that amount to the [AGENCY], depending on the entity that overpaid. [AGENCY] may offset and deduct the amount of the overpayment from any amount owing, as a reimbursement, but unpaid to the Contractor. Contractor will refund any overpayment within 30 calendar days of receipt of the notice of the overpayment.

If any reimbursement, or a portion of a reimbursement, is disallowed as a result of an audit finding that the Contractor failed to follow the requirements for the Contract, then the Contractor agrees that the [AGENCY] may recoup the disallowed amount from funds payable under the Contract, to the extent the disallowed amount was incurred by the [AGENCY]. If an audit identifies a disallowed amount after the expiration date of the Contract, [AGENCY] will send the Contractor notice of the audit results and specifically identify the amount that must be refunded by the Contractor. Contractor will refund the disallowed amount within 30 calendar days of receipt of the notice.

B.5.12 Travel

Respondent is responsible for any travel or per diem required to perform its obligations under the Contract. All travel and per diem that the state requests in addition to what the Contract requires the Respondent to provide at the Respondent's expense will be paid in accordance with State of Texas Travel Allowance Guide.

B.5.13 Direct Deposit

[AGENCY] encourages Contractors to receive payment by electronic means (e.g., direct deposit) as provided by CPA.

B6 CONFIDENTIALITY AND SECURITY

Contractor must maintain and protect any information it receives, compiles, or creates as a result of the Contract in accordance with any federal, state, or local laws and regulations that apply. Contractor must establish a method to secure the confidentiality of records and other information relating to the [AGENCY] in accordance with applicable federal and state laws, rules, and regulations.

The obligations of Contractor under this Confidentiality and Security section will survive this Contract and must be included in all subcontracts.

B.7 TERMS AND CONDITIONS

B.7.1 Affirmations

Submitting a Proposal with a false statement is a material breach of contract and the Proposal or the Contract will be void. Respondent will be removed from all bid lists. By submission of a signed Proposal, the Respondent certifies the following.

B.7.1.1 Respondent has not given, offered to give, and does not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response. Violation of this requirement may result in the termination of the Contract at [AGENCY]’s discretion.

B.7.1.2 Respondent waives any claim against and releases [AGENCY], its officers, employees, agents, and attorneys from liability with respect to disclosure of information provided under or in this Contract or otherwise created, assembled, maintained, or held by Respondent and determined by the Attorney General or a court of law to be subject to disclosure under the Texas Public Information Act.

B.7.1.3 Respondent will promptly notify [AGENCY] in the event that any representations and warranties provided in this Contract are no longer true and correct. Respondent acknowledges that all of its representations and warranties contained in any part of its Proposal and this Contract are material and have been relied upon by the [AGENCY] in selecting the Respondent for the award of the Contract. Further, the Respondent warrants and represents that all of its statements and representations made to the [AGENCY] prior to being awarded the Contract, and those made during the negotiation of this Contract, are material, true and correct.

B.7.2 Civil Rights

The Respondent agrees that no person will, on the ground of race, color, religion, sex, national origin, age, disability, political affiliation, or religious belief, be excluded from the participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment in the administration of, or in connection with, any program or activity funded in whole or in part with funds available under this Contract. Respondent will comply with Executive Order 11246, “Equal Employment Opportunity," as amended by Executive Order 11375, “Amending Executive Order 11246 relating to Equal Employment Opportunity,” and as supplemented by regulations at 41 C.F.R. Part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity Department of Labor.”

B.7.3 Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion

[AGENCY] is federally mandated to adhere to the directions provided in the President’s Executive Order (EO) 13224, Executive Order on Terrorist Financing - Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross-referencing respondents/vendors with the Federal General Services Administration's System for Award Management (SAM), https://www.sam.gov, which is inclusive of the United States Treasury’s Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

Respondent certifies that the responding entity and its principals are eligible to participate in this transaction and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity and the Respondent is in compliance with the State of Texas statutes and rules relating to procurement and that Respondent is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at https://www.sam.gov.

B.7.4 Records Retention

Respondent must retain all financial records, supporting documents, statistical records, and any other records or books relating to the performances called for in the Contract. Respondent must retain these records for a period of seven years after the expiration of the Contract, or until [AGENCY] or the State Auditor’s Office (SAO) is satisfied that all audit and litigation matters are resolved, whichever period is longer. Respondent will grant access to all books, records, and documents pertinent to the Contract to [AGENCY], SAO, and any federal governmental entity that has authority to review records due to federal funds being spent under the Contract.

B.7.5 Environmental Protection

Respondent must comply with all applicable standards, orders, or regulations issued pursuant to the mandates of the Clean Air Act (42 U.S.C. § 7401 *et seq*.) and the Federal Water Pollution Control Act, as amended, (33 U.S.C. § 1251 *et seq*.).

B.7.6 Prohibition on Lobbying

Respondent must comply with the provisions of a federal law known generally as the Lobbying Disclosure Act, 2 U.S.C. §1601 *et seq*. By submitting a Proposal, Respondent certifies that it will not and has not used federally

appropriated funds to pay any person or organization for influencing or attempting to influence any officer or employee of any federal agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant, or any other award covered by 31 U.S.C. § 1352. It also certifies that Respondent will disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal award.

B.7.7 Copyrights and Publications

Respondent understands and agrees that, where activities supported by the Contract produce original books, manuals, films, or other original material (referred to in this Contract as "the works"), Respondent may copyright the works subject to the reservation by [AGENCY] of a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for state or political subdivision purposes:

- the copyright in the works developed under the Contract, and
- any rights of copyright to which Respondent purchases ownership with funding from the Contract.

Respondent may publish, at its expense, the results of Contract performance with prior [AGENCY] review and approval of that publication. Any publication (written, visual, or sound) must include acknowledgment of the support received from [AGENCY]. Respondent must provide one copy of any such publication to [AGENCY]. [AGENCY] reserves the right to require additional copies before or after the initial review. Respondent must provide all copies free of charge to [AGENCY].

B.7.8 Certifications

B.7.8.1 Child Support Obligations

Under Texas Family Code § 231.006, (relating to child support) Respondent, by submitting its Proposal, certifies that it is not ineligible to receive a payments under the Contract and acknowledges that the Contract may be terminated and payment may be withheld if this certification is inaccurate.

B.7.8.2 Franchise Tax Certification

Respondent, by submitting its Proposal, certifies that it is exempt or not delinquent in the payment of any franchise taxes owed the State of Texas under Chapter 171, Texas Tax Code. If Respondent is a qualifying business entity type per Texas Comptroller of Public Accounts guidelines and is not set up in the Texas Franchise Tax system, Respondent must do so prior to contracting with the State of Texas.

B.7.8.3 Certification Concerning Dealings with Public Servants

Respondent, by submitting its Proposal, certifies that it has not given and does not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this transaction.

B.7.8.4 Certification Concerning Financial Participation

Under Texas Government Code § 2155.004, Respondent certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate. Section 2155.004 prohibits a person or entity from receiving a state contract if that person or entity received compensation for participating in preparing the solicitation or specifications for the Contract.

B.7.8.5 Certification Concerning Hurricane Relief

A state agency may not accept a bid or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five year period preceding the date of the bid or award, has been: (1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005.

Under Texas Government Code Section 2261.053Respondent certifies that the individual or business entity named in this proposal or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.

Under Texas Government Code Section 2155.006Respondentcertifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.

B.7.8.6 CERTIFICATION CONCERNING RESTRICTED EMPLOYMENT FOR FORMER STATE OFFICERS OR EMPLOYEES UNDER TEXAS GOVERNMENT CODE §572.069

Respondent certifies that it has not employed and will not employ a former [AGENCY] or state officer who participated in a procurement or contract negotiation for [AGENCY] involving Respondent within two years after the state officer or employee left state agency employment or service.

This certification only applies to former state officers or employees whose state service or employment ceased on or after September 1, 2015.

B.7.9 Independent Contractor

Respondent is not an employee, officer, or agent of [AGENCY] for any purpose under this solicitation or Contract. Respondent is and remains an independent contractor in relationship to [AGENCY]. [AGENCY] is not responsible for withholding taxes from payments made under the Contract. Respondent may not claim vacation pay, sick leave, retirement benefits, social security, worker's compensation, health or disability benefits, unemployment insurance benefits, or employee benefits of any kind from [AGENCY].

B.7.10 No Assignment by Contractor

Respondent may not assign its rights under the Contract or delegate the performance of its duties under the Contract without prior written approval from the [AGENCY].

B.7.11 Indemnification and Liability

Acts or Omissions

Contractor shall indemnify and hold harmless the State of Texas, [AGENCY], , AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR

DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES arising out of, or resulting from any acts or omissions of the Contractor or its agents, employees, subcontractors, order fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. THE DEFENSE SHALL BE COORDINATED BY CONTRACTOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CONTRACTOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. CONTRACTOR AND THE [AGENCY] AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

Infringements

a) Contractor shall indemnify and hold harmless the State of Texas, [AGENCY], AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES from any and all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the PERFORMANCES OR ACTIONS OF CONTRACTOR PURSUANT TO THIS CONTRACT. CONTRACTOR AND THE [AGENCY] AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. CONTRACTOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY CONTRACTOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CONTRACTOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL.

b) Contractor shall have no liability under this section if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without Contractor's written approval, (iii) any modifications made to the product by the Contractor pursuant to [AGENCY'S] specific instructions, (iv) any intellectual property right owned by or licensed to [AGENCY], or (v) any use of the product or service by [AGENCY] that is not in conformity with the terms of any applicable license agreement.

c) If Contractor becomes aware of an actual or potential claim, provides Contractor with notice of an actual or potential claim, Contractor may (or in the case of an injunction against [AGENCY], shall), at Contractor's sole option and expense; (i) procure for the [AGENCY] the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that[AGENCY'S] use is non-infringing.

Taxes/Workers' Compensation/Unemployment Insurance – Including Indemnity

1) CONTRACTOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, CONTRACTOR SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF CONTRACTOR'S AND CONTRACTOR'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS CONTRACT. CONTRACTOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. THE STATE OF TEXAS, [AGENCY] SHALL NOT BE LIABLE TO THE CONTRACTOR, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF

TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

2) CONTRACTOR AGREES TO INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS, [AGENCY], AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, AND/OR ASSIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEYS' FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION IN ITS PERFORMANCE UNDER THIS CONTRACT. CONTRACTOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY CONTRACTOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CONTRACTOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. CONTRACTOR AND THE [AGENCY] AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

B.7.12 Respondent Liability for Damage to Government Property

Respondent is liable for all damages to government-owned, leased, or occupied property and equipment caused by Respondent and its employees, agents, subcontractors, and suppliers, including any delivery or cartage company, in connection with any performance pursuant to the Contract. Respondent must notify the [AGENCY] Contract Manager in writing of any such damage within one calendar day.

B.7.13 Force Majeure

[AGENCY] and Respondent will not be responsible for delays in performance under the Contract should it be prevented from performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributable to the fault or negligence of [AGENCY], or Respondent.

In the event of an occurrence under this Section, the [AGENCY] or Respondent (parties) will be excused from any further performance or observance of the requirements so affected for as long as such circumstances prevail and the party continues to use commercially reasonable efforts to recommence performance or observance whenever and to whatever extent possible without delay. The party will immediately notify the other party by telephone (to be confirmed in writing within five calendar days of the inception of such occurrence) and describe at a reasonable level of detail the circumstances causing the non-performance or delay in performance.

B.7.14 Buy Texas

In accordance with Texas Government Code § 2155.4441, Respondent must, in performing any services under the Contract, purchase products and materials produced in Texas when they are available at a comparable price and in a comparable period of time to products and materials produced outside Texas.

B.7.15 Miscellaneous Terms and Conditions

B.7.15.1 Permits

Respondent will be responsible, at the Respondent's expense, for obtaining all permits or licenses required by city, county, state, or federal rules, regulations, law, or codes that pertain to the Contract.

B.7.15.2 Electrical Items

All electrical items provided by Respondent to [AGENCY] under the Contract must meet all applicable OSHA standards and regulations, and bear the appropriate listing from UL, FMRC, or NEMA, or other applicable regulating body.

B.7.15.3 Executive Head

Pursuant to Texas Government Code § 669.003, the [AGENCY] may not enter into a contract with a person who employs a current or former Executive Head of a state agency until four years have passed since that person was the executive head of the state agency. By submitting a Proposal, Respondent certifies that it does not employ any person who was the Executive Head of a state agency in the past four years.

B.7.15.4 Terminated Contracts

By submitting a Proposal, Respondent certifies that it has not had a contract terminated or been denied the renewal of any contract for non-compliance with policies or regulations of any state or federally funded program within the past five years nor is it currently prohibited from contracting with a governmental agency. If the Respondent does have such a terminated contract, Respondent must identify each and provide an explanation for the termination.

B.7.16 Non-Waiver of Rights

Failure of a Party to require performance by another Party under the Contract will not affect the right of such Party to require performance in the future. No delay, failure, or waiver of either Party's exercise or partial exercise of any right or remedy under the Contract operates to limit, impair, preclude, cancel, waive, or otherwise affect such right or remedy. A waiver by a Party of any breach of any term of the Contract will not be construed as a waiver of any continuing or succeeding breach.

B.7.17 No Waiver

The Parties expressly agree that no provision of the Contract is in any way intended to constitute a waiver by the [AGENCY] or the State of Texas of any immunities from suit or from liability that the [AGENCY] or the State of Texas may have by operation of law.

Nothing in this Contract should be construed as a waiver of the sovereign immunity of the State of Texas, [AGENCY]. This Contract does not constitute or should not be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas, [AGENCY]. The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas, [AGENCY], under this Contract or under applicable law does not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel. [AGENCY] does not waive any privileges, rights, defenses, or immunities available to [AGENCY] by entering into this Contract or by its conduct prior to or subsequent to entering into this Contract.

B.7.18 Severability

If any provision of the Contract is for any reason held to be unenforceable, the rest of it remains fully enforceable.

B.7.19 Applicable Law and Venue

Respondent agrees that the Contract in all respects will be governed by and construed in accordance with the laws of the State of Texas, except for its provisions regarding conflicts of laws. Respondent also agrees that the exclusive venue and jurisdiction of any legal action or suit concerning the [AGENCY] under this Contract is, and that any such legal action or suit will be brought, in a court of competent jurisdiction in Travis County, Texas.

B.7.20 Compliance with Laws; Dealing with Public Servants

The Respondent must comply with all applicable laws at all times, including, without limitation, the following: (i) Texas Penal Code § 36.02, which prohibits bribery; (ii) Texas Penal Code § 36.09, which prohibits the offering or conferring of benefits to public servants; (iii) Texas Government Code § 2155.003, which prohibits the chief clerk or any other employee of the [AGENCY] from having 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 accept from any person to whom a contract has been awarded anything of value or a promise, obligation, or contract for future reward or compensation.

Respondent must give all notices and comply with all laws and regulations applicable to furnishing and performance of the Contract. Except where otherwise expressly required by applicable laws and regulations, [AGENCY] is not responsible for monitoring Respondent's compliance with any laws or regulations. If Respondent performs any work knowing or having reason to know that it is contrary to laws or regulations, Respondent bears all claims, costs, losses and damages caused by, arising out of or resulting.

B.7.21 Insurance and Other Security

Respondent represents and warrants that it will obtain and maintain for the term of the Contract all insurance coverage required specifically by Part A of this RFP and generally to ensure proper fulfillment of the Contract and its liabilities thereunder. Respondent will insure any of its motor vehicles used to fulfill its duties under the Contract and ensure that its subcontractors do the same. Such insurance must comply with Texas statutory requirements and also cover any cargo being delivered to [AGENCY].

B.7.22 Deceptive Trade Practices; Unfair Business Practices

Respondent represents and warrants that it has not been the subject of allegations of Deceptive Trade Practice violations under Texas Business and Commerce Code Chapter 17 or allegations of any unfair business practice in any administrative hearing or court suit. Respondent represents and warrants that it has not been found to be liable for such practices in such proceedings. Respondent certifies that it has no officers who have served as officers of other entities who have been the subject of allegations of Deceptive Trade Practice violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

B.7.23 Immigration

The Contractor represents and warrants that it will comply with the requirements of the Immigration and Nationality Act (8 U.S.C.§ 1101 et seq.) and all subsequent immigration laws and amendments.

B.7.24 Key Personnel Change Management

Respondent agrees that the key personnel assigned to the Contract will remain available for the entirety of the project throughout the term of the Contract as long as that individual is employed by Respondent or unless [AGENCY] agrees to a change in the key personnel.

B.7.25 Federal, State, and Local Laws, Regulations, and Requirements

B.7.25.1 Contractor must comply with all laws, regulations, requirements and guidelines applicable to a Contractor providing services to the State of Texas as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract. [AGENCY] reserves the right, in its sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for [AGENCY] or Contractor's compliance with all applicable federal, state, and local laws and regulations.

Contractor will indemnify the State of Texas and will pay all costs, penalties, or losses resulting from Respondent's omission or breach of this Section.

B.7.26 Taxes

B.7.26.1 State and Federal Tax Law.
Respondent must comply will all federal and state tax laws and withholding requirements.

B.7.26.2 Federal Tax Reform Act.
Contractor must demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2s to common law employees.

B.7.27 Worker's Compensation

Respondent is responsible for both federal and state unemployment insurance coverage and standard Worker's Compensation insurance coverage. The State of Texas is not liable to Respondent or its employees for any Unemployment or Workers' Compensation coverage or any federal or state withholding requirements.

B.7.28 No Liability Upon Termination

If this Contract is terminated for any reason, the State of Texas and [AGENCY] are not liable to Respondent for any damages, claims, losses, or any other amounts arising from or related to termination. However, Respondent may be entitled to the remedies provided in Texas Government Code Chapter 2260.

B.7.29 Felony Criminal Convictions

Respondent represents and warrants that Respondent has not and Respondent's employees have not been convicted of a felony criminal offense, or that, if such a conviction has occurred, Respondent has fully advised [AGENCY] as to the facts and circumstances surrounding the conviction. If awarded the contract, Respondent has a continuing duty to amend, supplement, or correct this representation and warranty not later than ten days after discovering additional information relating to felony criminal convictions of Respondent or any of its employees. Respondent will not allow any employee convicted of a felony criminal offense to perform tasks related to the contract without such disclosure and express permission from [AGENCY].

B.7.30 Drug-Free Workplace

Respondent must comply with the applicable provisions of the Drug-Free Work Place Act of 1988.

B.7.31 Vendor Performance Before and After Award

In accordance with Texas Government Code §§ 2155.074 and 2262.055, vendor performance may be used as a disqualification factor in the award of any contract resulting from this solicitation.

[AGENCY] may conduct reference checks with other entities regarding past performance. In addition to evaluating performance through the Vendor Performance Tracking System (VPTS) as authorized by 34 Texas Administrative Code § 20.108, [AGENCY] may examine other sources of Respondent performance including notices of termination, cure notices, assessments of liquidated damages, litigation, audit reports, and non-renewals of contracts. These sources of Respondent performance may include any governmental entity, whether an agency or political subdivision of the State of Texas, another state, or the federal government. Further, [AGENCY] may initiate these examinations of Respondent's performance based upon media reports. Any investigations are at [AGENCY]'s sole discretion, and any negative findings, as determined by [AGENCY], may result in a non-award to Respondent. Information pertaining to VPTS is located on CPA's website at: http://www.window.texas.gov/procurement/prog/vendor_performance/.

Additionally, per Texas Government Code § 2155.089, [AGENCY] will review successful Respondent's performance under a contract resulting from this solicitation after the contract is completed or otherwise terminated. These reviews and any resulting classification grades will be posted on the Vendor Performance Tracking System as noted in Texas Government Code § 2262.055.

B.7.32 State of Texas Debarment

In the event that Respondent has repeated unfavorable VPTS performance reviews, repeated unfavorable VPTS grading classifications, or has more than two contract terminations within the preceding three years for unsatisfactory performance, the Texas Comptroller of Public Accounts may bar a vendor from participating in state contracts for a period commensurate with the seriousness of Respondent's action and the damage to the state's interests.

B.7.33 Electronic and Information Resources Accessibility Standards, As Required by 1 Texas Administrative Code Chapter 213 (Applicable to State Agency and Institutions of Higher Education Purchases Only)

(1) Effective September 1, 2006, state agencies and institutions of higher education must procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 Texas Admin. Code Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.

(2) Respondent must provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (***http://www.buyaccessible.gov***). Respondents not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at ***http://www.section508.gov/***.

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HUB Subcontracting Plan (HSP)

QUICK CHECKLIST

While this HSP Quick Checklist is being provided to merely assist you in readily identifying the sections of the HSP form that you will need to complete, it is very important that you adhere to the instructions in the HSP form and instructions provided by the contracting agency.

➤If you will be awarding all of the subcontracting work you have to offer under the contract to only Texas certified HUB vendors, complete:

- ☐ Section 1 - Respondent and Requisition Information
- ☐ Section 2 a. - Yes, I will be subcontracting portions of the contract.
- ☐ Section 2 b. - List all the portions of work you will subcontract, and indicate the percentage of the contract you expect to award to Texas certified HUB vendors.
- ☐ Section 2 c. - Yes
- ☐ Section 4 - Affirmation
- ☐ GFE Method A (Attachment A) - Complete an Attachment A for each of the subcontracting opportunities you listed in Section 2 b.

➤If you will be subcontracting any portion of the contract to Texas certified HUB vendors and Non-HUB vendors, and the aggregate percentage of all the subcontracting work you will be awarding to the Texas certified HUB vendors with which you do not have a *continuous contract in place for more than five (5) years *meets or exceeds* the HUB Goal the contracting agency identified in the "Agency Special Instructions/Additional Requirements", complete:**

- ☐ Section 1 - Respondent and Requisition Information
- ☐ Section 2 a. - Yes, I will be subcontracting portions of the contract.
- ☐ Section 2 b. - List all the portions of work you will subcontract, and indicate the percentage of the contract you expect to award to Texas certified HUB vendors and Non-HUB vendors.
- ☐ Section 2 c. - No
- ☐ Section 2 d. - Yes
- ☐ Section 4 – Affirmation
- ☐ GFE Method A (Attachment A) - Complete an Attachment A for each of the subcontracting opportunities you listed in Section 2 b.

➤If you will be subcontracting any portion of the contract to Texas certified HUB vendors and Non-HUB vendors or only to Non-HUB vendors, and the aggregate percentage of all the subcontracting work you will be awarding to the Texas certified HUB vendors with which you do not have a *continuous contract in place for more than five (5) years does not *meet or exceed* the HUB Goal the contracting agency identified in the "Agency Special Instructions/Additional Requirements", complete:**

- ☐ Section 1 - Respondent and Requisition Information
- ☐ Section 2 a. - Yes, I will be subcontracting portions of the contract.
- ☐ Section 2 b. - List all the portions of work you will subcontract, and indicate the percentage of the contract you expect to award to Texas certified HUB vendors and Non-HUB vendors.
- ☐ Section 2 c. - No
- ☐ Section 2 d. - No
- ☐ Section 4 - Affirmation
- ☐ GFE Method B (Attachment B) - Complete an Attachment B for each of the subcontracting opportunities you listed in Section 2 b.

➤If you will not be subcontracting any portion of the contract and will be fulfilling the entire contract with your own resources (i.e., employees, supplies, materials and/or equipment, to include transportation and delivery), complete:

- ☐ Section 1 - Respondent and Requisition Information
- ☐ Section 2 a. - No, I will not be subcontracting any portion of the contract, and I will be fulfilling the entire contract with my own resources.
- ☐ Section 3 - Self Performing Justification
- ☐ Section 4 - Affirmation

***Continuous Contract**: Any existing written agreement (including any renewals that are exercised) between a prime contractor and a HUB vendor, where the HUB vendor provides the prime contractor with goods or service, to include transportation and delivery under the same contract for a specified period of time. The frequency the HUB vendor is utilized or paid during the term of the contract is not relevant to whether the contract is considered continuous. Two or more contracts that run concurrently or overlap one another for different periods of time are considered by CPA to be individual contracts rather than renewals or extensions to the original contract. In such situations the prime contractor and HUB vendor are entering (have entered) into "new" contracts.*

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HUB Subcontracting Plan (HSP)

In accordance with Texas Gov't Code §2161.252, the contracting agency has determined that subcontracting opportunities are probable under this contract. Therefore, all respondents, including State of Texas certified Historically Underutilized Businesses (HUBs) must complete and submit this State of Texas HUB Subcontracting Plan (HSP) with their response to the bid requisition (solicitation).

NOTE: Responses that do not include a completed HSP shall be rejected pursuant to Texas Gov't Code §2161.252(b).

The HUB Program promotes equal business opportunities for economically disadvantaged persons to contract with the State of Texas in accordance with the goals specified in the 2009 State of Texas Disparity Study. The statewide HUB goals defined in 34 Texas Administrative Code (TAC) §20.13 are:

- ***11.2 percent for heavy construction other than building contracts,***
- ***21.1 percent for all building construction, including general contractors and operative builders' contracts,***
- ***32.9 percent for all special trade construction contracts,***
- ***23.7 percent for professional services contracts,***
- ***26.0 percent for all other services contracts, and***
- ***21.1 percent for commodities contracts.***

- - Agency Special Instructions/Additional Requirements - -

In accordance with 34 TAC §20.14(d)(1)(D)(iii), a respondent (prime contractor) may demonstrate good faith effort to utilize Texas certified HUBs for its subcontracting opportunities if the total value of the respondent's subcontracts with Texas certified HUBs meets or exceeds the statewide HUB goal or the agency specific HUB goal, whichever is higher. When a respondent uses this method to demonstrate good faith effort, the respondent must identify the HUBs with which it will subcontract. If using existing contracts with Texas certified HUBs to satisfy this requirement, only the aggregate percentage of the contract expected to be subcontracted to HUBs with which the respondent **does not** have a **continuous contract*** in place **for more than five (5) years** shall qualify for meeting the HUB goal. This limitation is designed to encourage vendor rotation as recommended by the 2009 Texas Disparity Study.

SECTION-1: RESPONDENT AND REQUISITION INFORMATION

a. Respondent (Company) Name: _____ State of Texas VID #: _____

Point of Contact: _____ Phone #: _____

E-mail Address: _____ Fax #: _____

b. Is your company a State of Texas certified HUB? ☐ **- Yes** ☐ **- No**

c. Requisition #: _____ Bid Open Date: _____ (mm/dd/yyyy)

1

Enter your company's name here: _____ **Requisition #:** _____

SECTION-2: RESPONDENT's SUBCONTRACTING INTENTIONS

After dividing the contract work into reasonable lots or portions to the extent consistent with prudent industry practices, and taking into consideration the scope of work to be performed under the proposed contract, including all potential subcontracting opportunities, the respondent must determine what portions of work, **including contracted staffing, goods, services, transportation and delivery will be subcontracted**. Note: In accordance with 34 TAC §20.11., a "Subcontractor" means a person who contracts with a prime contractor to work, to supply commodities, or to contribute toward completing work for a governmental entity.

a. Check the appropriate box (Yes or No) that identifies your subcontracting intentions:

☐ - ***Yes***, I will be subcontracting portions of the contract. (If ***Yes***, complete Item b of this SECTION and continue to Item c of this SECTION.)

☐ - ***No***, I will not be subcontracting any portion of the contract, and I will be fulfilling the entire contract with my own resources, including employees, goods, services, transportation and delivery. (If ***No***, continue to SECTION 3 and SECTION 4.)

b. List all the portions of work (subcontracting opportunities) you will subcontract. Also, based on the total value of the contract, identify the percentages of the contract you expect to award to Texas certified HUBs, and the percentage of the contract you expect to award to vendors that are not a Texas certified HUB (i.e., Non-HUB).

Item #	Subcontracting Opportunity Description	HUBs		Non-HUBs
		Percentage of the contract expected to be subcontracted to HUBs with which you do not have a continuous contract* in place for more than five (5) years.	Percentage of the contract expected to be subcontracted to HUBs with which you have a continuous contract* in place for more than five (5) years.	Percentage of the contract expected to be subcontracted to non-HUBs.
1		%	%	%
2		%	%	%
3		%	%	%
4		%	%	%
5		%	%	%
6		%	%	%
7		%	%	%
8		%	%	%
9		%	%	%
10		%	%	%
11		%	%	%
12		%	%	%
13		%	%	%
14		%	%	%
15		%	%	%
Aggregate percentages of the contract expected to be subcontracted:		**%**	**%**	**%**

(Note: If you have more than fifteen subcontracting opportunities, a continuation sheet is available online at http://window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan/).

c. Check the appropriate box (Yes or No) that indicates whether you will be using **only** Texas certified HUBs to perform **all** of the subcontracting opportunities you listed in SECTION 2, Item b.

☐ - ***Yes*** (If ***Yes***, continue to SECTION 4 **and** complete an "HSP Good Faith Effort - Method A (Attachment A)" for **each** of the subcontracting opportunities you listed.)

☐ - ***No*** (If ***No***, continue to Item d, of this SECTION.)

d. Check the appropriate box (Yes or No) that indicates whether the aggregate expected percentage of the contract you will subcontract **with Texas certified HUBs** with which you **do not** have a **continuous contract*** in place with for more than five (5) years, **meets or exceeds** the HUB goal the contracting agency identified on page 1 in the "**Agency Special Instructions/Additional Requirements.**"

☐ - ***Yes*** (If ***Yes***, continue to SECTION 4 **and** complete an "HSP Good Faith Effort - Method A (Attachment A)" for **each** of the subcontracting opportunities you listed.)

☐ - ***No*** (If ***No***, continue to SECTION 4 **and** complete an "HSP Good Faith Effort - Method B (Attachment B)" for **each** of the subcontracting opportunities you listed.)

***Continuous Contract**: Any existing written agreement (including any renewals that are exercised) between a prime contractor and a HUB vendor, where the HUB vendor provides the prime contractor with goods or service, to include transportation and delivery under the same contract for a specified period of time. The frequency the HUB vendor is utilized or paid during the term of the contract is not relevant to whether the contract is considered continuous. Two or more contracts that run concurrently or overlap one another for different periods of time are considered by CPA to be individual contracts rather than renewals or extensions to the original contract. In such situations the prime contractor and HUB vendor are entering (have entered) into "new" contracts.*

Enter your company's name here: _____ **Requisition #:** _____

SECTION-2: RESPONDENT's SUBCONTRACTING INTENTIONS (CONTINUATION SHEET)

This page can be used as a continuation sheet to the HSP Form's page 2, Section 2, Item b. Continue listing the portions of work (subcontracting opportunities) you will subcontract. Also, based on the total value of the contract, identify the percentages of the contract you expect to award to Texas certified HUBs, and the percentage of the contract you expect to award to vendors that are not a Texas certified HUB (i.e., Non-HUB).

Item #	Subcontracting Opportunity Description	HUBs		Non-HUBs
		Percentage of the contract expected to be subcontracted to HUBs with which you do not have a continuous contract* in place for more than five (5) years.	Percentage of the contract expected to be subcontracted to HUBs with which you have a continuous contract* in place for more than five (5) years.	Percentage of the contract expected to be subcontracted to non-HUBs.
16		%	%	%
17		%	%	%
18		%	%	%
19		%	%	%
20		%	%	%
21		%	%	%
22		%	%	%
23		%	%	%
24		%	%	%
25		%	%	%
26		%	%	%
27		%	%	%
28		%	%	%
29		%	%	%
30		%	%	%
31		%	%	%
32		%	%	%
33		%	%	%
34		%	%	%
35		%	%	%
36		%	%	%
37		%	%	%
38		%	%	%
39		%	%	%
40		%	%	%
41		%	%	%
42		%	%	%
43		%	%	%
44		%	%	%
45		%	%	%
Aggregate percentages of the contract expected to be subcontracted:		%	%	%

***Continuous Contract**: Any existing written agreement (including any renewals that are exercised) between a prime contractor and a HUB vendor, where the HUB vendor provides the prime contractor with goods or service, to include transportation and delivery under the same contract for a specified period of time. The frequency the HUB vendor is utilized or paid during the term of the contract is not relevant to whether the contract is considered continuous. Two or more contracts that run concurrently or overlap one another for different periods of time are considered by CPA to be individual contracts rather than renewals or extensions to the original contract. In such situations the prime contractor and HUB vendor are entering (have entered) into "new" contracts.*

HSP – SECTION 2
(Continuation Sheet)

Enter your company's name here: _____ **Requisition #:** _____

SECTION-3: SELF PERFORMING JUSTIFICATION (If you responded "No" to SECTION 2, Item a, you must complete this SECTION and continue to SECTION 4.)

If you responded "No" to SECTION 2, Item a, in the space provided below **explain how** your company will perform the entire contract with its own employees, supplies, materials and/or equipment, to include transportation and delivery.

SECTION-4: AFFIRMATION

As evidenced by my signature below, I affirm that I am an authorized representative of the respondent listed in SECTION 1, and that the information and supporting documentation submitted with the HSP is true and correct. Respondent understands and agrees that, if awarded any portion of the requisition:

- The respondent will provide notice as soon as practical to all the subcontractors (HUBs and Non-HUBs) of their selection as a subcontractor for the awarded contract. The notice must specify at a minimum the contracting agency's name and its point of contact for the contract, the contract award number, the subcontracting opportunity they (the subcontractor) will perform, the approximate dollar value of the subcontracting opportunity and the expected percentage of the total contract that the subcontracting opportunity represents. A copy of the notice required by this section must also be provided to the contracting agency's point of contact for the contract no later than ten (10) working days after the contract is awarded.
- The respondent must submit monthly compliance reports (Prime Contractor Progress Assessment Report – PAR) to the contracting agency, verifying its compliance with the HSP, including the use of and expenditures made to its subcontractors (HUBs and Non-HUBs). (The PAR is available at http://www.window.state.tx.us/procurement/prog/hub/hub-forms/progressassessmentrpt.xls).
- The respondent must seek approval from the contracting agency prior to making any modifications to its HSP, including the hiring of additional or different subcontractors and the termination of a subcontractor the respondent identified in its HSP. If the HSP is modified without the contracting agency's prior approval, respondent may be subject to any and all enforcement remedies available under the contract or otherwise available by law, up to and including debarment from all state contracting.
- The respondent must, upon request, allow the contracting agency to perform on-site reviews of the company's headquarters and/or work-site where services are being performed and must provide documentation regarding staffing and other resources.

Signature	Printed Name	Title	Date (mm/dd/yyyy)

Reminder:

- If you responded "**Yes**" to **SECTION 2, Items c or d**, you must complete an "HSP Good Faith Effort - Method A (Attachment A)" **for each** of the subcontracting opportunities you listed in SECTION 2, Item b.
- If you responded "**No**" **SECTION 2, Items c and d,** you must complete an "HSP Good Faith Effort - Method B (Attachment B)" **for each** of the subcontracting opportunities you listed in SECTION 2, Item b.

HSP Good Faith Effort - Method A (Attachment A)

Rev. 09/15

Enter your company's name here: _____ **Requisition #:** _____

IMPORTANT*:** If you responded "Yes***" to **SECTION 2, Items c or d** of the completed HSP form, you must submit a completed "HSP Good Faith Effort - Method A (Attachment A)" for **each** of the subcontracting opportunities you listed in **SECTION 2, Item b** of the completed HSP form. You may photo-copy this page or download the form at http://window.state.tx.us/procurement/prog/hub/hub-forms/hub-sbcont-plan-gfe-achm-a.pdf

SECTION A-1: SUBCONTRACTING OPPORTUNITY

Enter the item number and description of the subcontracting opportunity you listed in SECTION 2, Item b, of the completed HSP form for which you are completing the attachment.

Item Number: _____ **Description:** _____

SECTION A-2: SUBCONTRACTOR SELECTION

List the subcontractor(s) you selected to perform the subcontracting opportunity you listed above in SECTION A-1. Also identify whether they are a Texas certified HUB and their VID number, the approximate dollar value of the work to be subcontracted, the expected percentage of work to be subcontracted, and indicate whether the company is a Texas certified HUB.

Company Name	Texas certified HUB	VID Number (Required if Texas certified HUB)	Approximate Dollar Amount	Expected Percentage of Contract
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%

REMINDER: As specified in SECTION 4 of the completed HSP form, if you (respondent) are awarded any portion of the requisition, you are required to provide notice as soon as practical to **all** the subcontractors (HUBs and Non-HUBs) of their selection as a subcontractor. The notice must specify at a minimum the contracting agency's name and its point of contact for the contract, the contract award number, the subcontracting opportunity they (the subcontractor) will perform, the approximate dollar value of the subcontracting opportunity and the expected percentage of the total contract that the subcontracting opportunity represents. A copy of the notice required by this section must also be provided to the contracting agency's point of contact for the contract no later than ten (10) working days after the contract is awarded.

Page 1 of 1
(Attachment A)

HSP Good Faith Effort - Method B (Attachment B)

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Enter your company's name here: _____ **Requisition #:** _____

IMPORTANT*:** If you responded "No***" to **SECTION 2, Items c** and **d** of the completed HSP form, you must submit a completed "HSP Good Faith Effort - Method B (Attachment B)" for **each** of the subcontracting opportunities you listed in **SECTION 2, Item b** of the completed HSP form. You may photo-copy this page or download the form at http://window.state.tx.us/procurement/prog/hub/hub-forms/hub-sbcont-plan-gfe-achm-b.pdf.

SECTION B-1: SUBCONTRACTING OPPORTUNITY

Enter the item number and description of the subcontracting opportunity you listed in SECTION 2, Item b, of the completed HSP form for which you are completing the attachment.

Item Number: _____ **Description:** _____

SECTION B-2: MENTOR PROTÉGÉ PROGRAM

If respondent is participating as a Mentor in a State of Texas Mentor Protégé Program, submitting its Protégé (Protégé must be a State of Texas certified HUB) as a subcontractor to perform the subcontracting opportunity listed in SECTION B-1, constitutes a good faith effort to subcontract with a Texas certified HUB towards that specific portion of work.

Check the appropriate box (Yes or No) that indicates whether you will be subcontracting the portion of work you listed in SECTION B-1 to your Protégé.

☐ **- Yes** (If ***Yes***, to continue to SECTION B-4.)

☐ **- No / Not Applicable** (If ***No*** or ***Not Applicable***, continue to SECTION B-3 and SECTION B-4.)

SECTION B-3: NOTIFICATION OF SUBCONTRACTING OPPORTUNITY

When completing this section you MUST comply with items **a**, **b**, **c** and **d**, thereby demonstrating your Good Faith Effort of having notified Texas certified HUBs and trade organizations or development centers about the subcontracting opportunity you listed in SECTION B-1. Your notice should include the scope of work, information regarding the location to review plans and specifications, bonding and insurance requirements, required qualifications, and identify a contact person. When sending notice of your subcontracting opportunity, you are encouraged to use the attached HUB Subcontracting Opportunity Notice form, which is also available online at http://www.window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan.

Retain supporting documentation (i.e., certified letter, fax, e-mail) demonstrating evidence of your good faith effort to notify the Texas certified HUBs and trade organizations or development centers. Also, be mindful that a working day is considered a normal business day of a state agency, not including weekends, federal or state holidays, or days the agency is declared closed by its executive officer. The initial day the subcontracting opportunity notice is sent/provided to the HUBs and to the trade organizations or development centers is considered to be "day zero" and does not count as one of the seven (7) working days.

a. Provide written notification of the subcontracting opportunity you listed in SECTION B-1, to three (3) or more Texas certified HUBs. Unless the contracting agency specified a different time period, you must allow the HUBs at least seven (7) working days to respond to the notice prior to your submitting your bid response to the contracting agency. When searching for Texas certified HUBs, ensure that you use the State of Texas' Centralized Master Bidders List (CMBL) and Historically Underutilized Business (HUB) Search directory located at http://mycpa.cpa.state.tx.us/tpasscmblsearch/index.jsp . HUB Status code "**A**" signifies that the company is a Texas certified HUB.

b. List the **three (3) Texas certified HUBs** you notified regarding the subcontracting opportunity you listed in SECTION B-1. Include the company's Vendor ID (VID) number, the date you sent notice to that company, and indicate whether it was responsive or non-responsive to your subcontracting opportunity notice.

Company Name	VID Number	Date Notice Sent (mm/dd/yyyy)	Did the HUB Respond?
			☐ - Yes ☐ - No
			☐ - Yes ☐ - No
			☐ - Yes ☐ - No

c. Provide written notification of the subcontracting opportunity you listed in SECTION B-1 to two (2) or more trade organizations or development centers in Texas to assist in identifying potential HUBs by disseminating the subcontracting opportunity to their members/participants. Unless the contracting agency specified a different time period, you must provide your subcontracting opportunity notice to trade organizations or development centers at least seven (7) working days prior to submitting your bid response to the contracting agency. A list of trade organizations and development centers that have expressed an interest in receiving notices of subcontracting opportunities is available on the Statewide HUB Program's webpage at http://www.window.state.tx.us/procurement/prog/hub/mwb-links-1/.

d. List **two (2) trade organizations or development centers** you notified regarding the subcontracting opportunity you listed in SECTION B-1.Include the date when you sent notice to it and indicate if it accepted or rejected your notice.

Trade Organizations or Development Centers	Date Notice Sent (mm/dd/yyyy)	Was the Notice Accepted?
		☐ - Yes ☐ - No
		☐ - Yes ☐ - No

HSP Good Faith Effort - Method B (Attachment B) Cont.

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Enter your company's name here: _____ **Requisition #:** _____

SECTION B-4: SUBCONTRACTOR SELECTION

Enter the item number and description of the subcontracting opportunity you listed in **SECTION 2, Item b,** of the completed HSP form for which you are completing the attachment.

a. Enter the item number and description of the subcontracting opportunity for which you are completing this Attachment B continuation page.

Item Number: _____ **Description:** _____

b. List the subcontractor(s) you selected to perform the subcontracting opportunity you listed in **SECTION B-1**. Also identify whether they are a Texas certified HUB and their VID number, the approximate dollar value of the work to be subcontracted, the expected percentage of work to be subcontracted, and indicate whether the company is a Texas certified HUB.

Company Name	Texas certified HUB	VID Number (Required if Texas certified HUB)	Approximate Dollar Amount	Expected Percentage of Contract
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%
	☐ - Yes ☐ - No		$	%

c. If any of the subcontractors you have selected to perform the subcontracting opportunity you listed in **SECTION B-1** is **not** a Texas certified HUB, provide written justification for your selection process (attach additional page if necessary):

REMINDER: As specified in SECTION 4 of the completed HSP form, if you (respondent) are awarded any portion of the requisition, you are required to provide notice as soon as practical to **all** the subcontractors (HUBs and Non-HUBs) of their selection as a subcontractor. The notice must specify at a minimum the contracting agency's name and its point of contact for the contract, the contract award number, the subcontracting opportunity it (the subcontractor) will perform, the approximate dollar value of the subcontracting opportunity and the expected percentage of the total contract that the subcontracting opportunity represents. A copy of the notice required by this section must also be provided to the contracting agency's point of contact for the contract no later than ten (10) working days after the contract is awarded.

Rev. 09/15

HUB Subcontracting Opportunity Notification Form

In accordance with Texas Gov't Code, Chapter 2161, each state agency that considers entering into a contract with an expected value of $100,000 or more shall, before the agency solicits bids, proposals, offers, or other applicable expressions of interest, determine whether subcontracting opportunities are probable under the contract. The state agency I have identified below in **Section B** has determined that subcontracting opportunities are probable under the requisition to which my company will be responding.

34 Texas Administrative Code, §20.14 requires all respondents (prime contractors) bidding on the contract to provide notice of each of their subcontracting opportunities to at least three (3) Texas certified HUBs (who work within the respective industry applicable to the subcontracting opportunity), and allow the HUBs at least seven (7) working days to respond to the notice prior to the respondent submitting its bid response to the contracting agency. In addition, at least seven (7) working days prior to submitting its bid response to the contracting agency, the respondent must provide notice of each of its subcontracting opportunities to two (2) or more trade organizations or development centers (in Texas) that serves members of groups (i.e., Asian Pacific American, Black American, Hispanic American, Native American, Woman, Service Disabled Veteran) identified in Texas Administrative Code, §20.11(19)(C).

We respectfully request that vendors interested in bidding on the subcontracting opportunity scope of work identified in **Section C, Item 2**, reply no later than the date and time identified in **Section C, Item 1**. Submit your response to the point-of-contact referenced in **Section A**.

SECTION: A PRIME CONTRACTOR'S INFORMATION

Company Name: _____ **Phone #:** _____

Point-of-Contact: _____ **Fax #:** _____

E-mail Address: _____ **Fax #:** _____

SECTION: B CONTRACTING STATE AGENCY AND REQUISITION INFORMATION

Agency Name: _____

Point-of-Contact: _____ **Phone #:** _____

Requisition #: _____ **Bid Open Date:** _____ (mm/dd/yyyy)

SECTION: C SUBCONTRACTING OPPORTUNITY RESPONSE DUE DATE, DESCRIPTION, REQUIREMENTS AND RELATED INFORMATION

1. Potential Subcontractor's Bid Response Due Date:

If you would like for our company to consider your company's bid for the subcontracting opportunity identified below in Item 2, we must receive your bid response no later than _____ **on** _____ **.**

Central Time Date (mm/dd/yyyy)

In accordance with 34 TAC §20.14, each notice of subcontracting opportunity shall be provided to at least three (3) Texas certified HUBs, and allow the HUBs at least seven (7) working days to respond to the notice prior to submitting our bid response to the contracting agency. In addition, at least seven (7) working days prior to us submitting our bid response to the contracting agency, we must provide notice of each of our subcontracting opportunities to two (2) or more trade organizations or development centers (in Texas) that serves members of groups (i.e., Asian Pacific American, Black American, Hispanic American, Native American, Woman, Service Disabled Veteran) identified in Texas Administrative Code, §20.11(19)(C).

(A working day is considered a normal business day of a state agency, not including weekends, federal or state holidays, or days the agency is declared closed by its executive officer. The initial day the subcontracting opportunity notice is sent/provided to the HUBs and to the trade organizations or development centers is considered to be "day zero" and does not count as one of the seven (7) working days.)

2. Subcontracting Opportunity Scope of Work:

3. Required Qualifications: - Not Applicable

4. Bonding/Insurance Requirements: - Not Applicable

5. Location to review plans/specifications: - Not Applicable

APPENDIX 2

<Agency Name>

SOLICITATION ANNOUNCEMENT

Date: < >
[Bid/Proposal] No.: < >
Class < > Item < >

The **<AGENCY NAME>** will be soliciting **[Invitation for Bids/Request for Proposals]** for **<enter commodity or service description>. <service location(s)>.**

[Bid/Proposal] forms and specifications for this **[commodity/service]** will be furnished to any company desiring to submit a **[bid/proposal].** To request a solicitation package, please fill out the information below and return to the address , scan to e-mail or fax number indicated. To ensure that you receive the solicitation package in a timely manner,

PLEASE RETURN THIS REQUEST BY <DATE>.

Vendor ID No.:	
Company Name:	
Company Address: (include city,state,zip)	
Point-of-Contact:	
Telephone No.:	
Fax No.:	

Return completed form by mail to:

<AGENCY NAME
ADDRESS
POINT OF CONTACT>

Or you may fax completed form to: <POINT OF CONTACT> at <FAX NUMBER>

NOTE: IF YOU FAX A REQUEST, DO NOT INCLUDE A COVER SHEET AND DO NOT MAIL ORIGINAL.

If you received this announcement for a class and item which does not pertain to your business, please modify your existing CMBL profile by following the steps at http://www.window.state.tx.us/procurement/prog/cmbl/. For general questions regarding the CMBL, reference the contact information available at the bottom of the above website page.

This announcement should only be used where there are solicitation attachments which cannot be posted to the Electronic State Business Daily (ESBD) and required to be mailed or picked up by interested vendors.

For solicitations exceeding $25,000, this announcement, if applicable, should be posted to the Electronic State Business Daily (ESBD) or the full solicitation package posted. Revised 8/2015

APPENDIX 3

PRE-SOLICITATION CONFERENCE GUIDELINES

Objective: A pre-solicitation conference is sometimes required to clarify specifications. Typically, the program staff, in conjunction with the Purchasing Department, determines if a pre-solicitation conference is necessary. If a pre-solicitation conference is necessary, the solicitation document must include:

- ❑ Exact physical location, including room number.
- ❑ Date and time of conference. The date must allow sufficient time for bidders to receive and review the solicitation prior to the conference. Typically, this is 7-10 days after the solicitation is published.

It may be essential for potential bidders/respondents to visit the site prior to submitting a bid/proposal; therefore, include in the solicitation:

- ❑ Agency contact information for scheduling appointments for site visits.

If the conference is mandatory, the following statement must be included in the solicitation. "Failure to attend the pre-bid/proposal conference will result in disqualification of the response."

If a mandatory conference is required, consider additional dates dependent if the expected attendee count will be large.

<u>Typically, the purchaser conducts the conference. The purchaser provides:</u>

- ❑ A recording device (optional)
- ❑ A sign-in sheet for attendees
- ❑ Additional copies of the solicitation

<u>The conference begins as follows:</u>

- ❑ Purchaser's opening remarks such as the purpose of the conference, requisition number and title of the procurement.
- ❑ Announce conference is being recorded, if applicable. Advise attendees to turn off or turn to vibrate any cell phones or pagers.
- ❑ Remind everyone to sign in, especially for mandatory conferences.
- ❑ Inform attendees that answers will be given to questions raised at the conference whenever possible, but any answer which changes or affects the RFP requirements will be reviewed and published in an Addendum to the RFP. Vendors may not rely on verbal answers that differ from the RP requirements.
- ❑ Introduce agency representatives.
- ❑ Introduce attendee's. (optional depending on number attending conference)
- ❑ Review solicitation by section or page and ask for questions regarding each section and/or page. (Do not read the RFP word for word – summarize and allow for questions)
- ❑ Take notes of any addendum items or significant discussions.

❑ Site inspections may be conducted prior to or after the solicitation review, depending on the circumstances, but prior to close of the conference. After site inspections all attendee's should return to conference room to ask any questions as a result of the site inspection.

❑ Recap – Discuss and confirm the items to be included in addendum and that answers to all documented questions will be provided in writing, if any. Remind attendees that oral changes are not official until they are included in an addendum.

❑ Collect sign-in sheets. Note: Usually attendees want copies of the sign-in sheets. If possible, make copies for attendees prior to the end of the conference.

<u>After the conference:</u>

❑ Keep recorded conference minutes in the contract file as official documentation of the meeting. The minutes may or may not be transcribed.
❑ Purchaser prepares addendum to include the question and answer documentation with input from the program staff. Program staff will review for accuracy prior to mailing.
❑ Purchaser will determine if there is sufficient time until response due date or if due date should be extended.
❑ E-mail, mail or fax addendum to attendees if needed.
❑ Send copy of addendum to program staff. If architectural or engineering plans are involved, advise program staff to provide a copy to the Architect or Engineer so they can provide copies to the plan rooms.
❑ Post addendum on the Electronic State Business Daily.

Revised 8/2015

APPENDIX 4

ADMINISTRATIVE REVIEW CHECKLIST

[Solicitation No.]
[Solicitation Title]

[Respondent Name]

	Yes	No
1. Execution of Proposal – Signed	☐	☐
2. HUB Subcontracting Plan	☐	☐
3. Submitted original and required # of copies	☐	☐
4. Addenda Acknowledged	☐	☐
5. Mandatory Pre-Bid Conference Attendance (if applicable)	☐	☐
6. Proposal Content		
Company Information	☐	☐
Experience and Qualifications	☐	☐
Compensation and Fees	☐	☐
References	☐	☐
Licenses/Certificate	☐	☐

	Yes	No
SOLICITATION RESPONSIVE	☐	☐

Revised 8/2015

APPENDIX 5

EVALUATION TEAM GUIDELINES

Purchaser Responsibilities

Note: This procedure is provided as a general guideline for agencies to use and may be customized to meet individual agency needs. Agencies should determine their own internal policies and procedures in regard to evaluation teams.

Prior to the Evaluation Team meeting:

☐ Establish date and time for the team to meet. This should be done within one (1) week of publishing solicitations. Reserve adequate size conference room or ensure that program has done so. Review responses to ensure all are responsive meeting all minimum requirements and provide all required information to be considered for evaluation.

☐ Prepare sufficient copies of the technical evaluation matrix for each team member (depending on the number of responses received).

☐ Assemble copies of all responses for each team member. Remove pricing information as the scores for pricing are calculated by the Purchasing Department and are not typically provided to the evaluators.

Evaluation Team Meeting:

☐ Provide and collect signed Non-Disclosure Statements, two (2) each, from the team members. Team members each keep a copy for their records and as a reminder of their responsibilities. For those not in attendance, request prior to providing responses for evaluation.

☐ Hand out evaluation packages to each member. Package includes:

- Evaluation Team Briefing document (see attached).
- Copy of the RFP and any addenda. Members should already be familiar with these documents prior to the meeting.
- Copy of all responsive proposals received.
- Evaluation Matrix (appropriate number of copies – depending on the number of responses received).
- Non-Disclosure Statement (2 copies for each member)
- Pencils

☐ Review briefing document with team. (see attached)

☐ Collect signed non-disclosure statements. Check statement to ensure it is signed and has not been modified. Team members each keep a copy for their records and as a reminder of their responsibilities.

☐ Review the evaluation matrix to ensure team understands how the matrix works and how the proposals will be evaluated. Explain the scoring process. Team members should be reminded to compare the proposals to the requirements set forth in the RFP and not to each other.

☐ Advise members that evaluations are subject to the Open Records Act and thus should be aware of information that is written on the matrix. However, it is helpful in the de-briefing process if the evaluators write in the comment section – especially if the score is unusually low or high. This allows respondents to know where their strengths and weaknesses are so they can improve on future proposals.

- Team members should consult with the purchaser regarding any clarifications of a proposal. The purchaser will contact the respondent, obtain an explanation, and prepare a written response. All members will be provided a copy of the response.

- Generally, a Purchasing Department representative (typically the purchaser) remains during the meeting to answer any questions which may arise and to ensure proper procedures are followed. Sometimes, due to time constraints, remote location of team members or other circumstances, it is not possible for all members to be together for the evaluation. However, this is the preferred method. If the evaluation team conducts their evaluation outside of the meeting room, provide deadline for evaluation score matrices to be turned in to Purchasing.

- Scores are not divulged between team members. Members may ask questions if they are unable to find information, do not understand information in a proposal or require the technical assistance of other members.

- After the technical evaluations are completed all evaluation matrices are turned into the Purchasing Department.

After the Meeting

- Technical scores are verified and calculated by the purchaser. Technical scores are added to the price score and the total scores are calculated.

- Recommendation for negotiations, discussions and/or award is determined by the purchaser and legal counsel.

- Remind all team members that they should continue to refer any questions about the selection and award process to the Purchasing Department.

Revised 8/2015

APPENDIX 6

EVALUATION TEAM BRIEFING INSTRUCTIONS

RFP#
Briefing Date:

Non-voting Members

[Insert names of non-voting members – typically this is the purchaser].

Voting Members

[Insert names of voting members]

Member Responsibilities:

- Sign Non-Disclosure Forms. This form states that you will not divulge any information concerning this submittal/evaluation to anyone who is not a part of the team. Provide and collect signed Non-Disclosure Statements, two (2) each, from the team members. Team members each keep a copy for their records and as a reminder of their responsibilities. For those not in attendance, request prior to providing responses for evaluation.

- Evaluate submittals independently and impartially.

- If a respondent/contractor contacts you, refer them to the purchaser. If the respondent/contractor continues to contact you, remind them all communications between vendors and other agency staff members concerning the solicitation is strictly prohibited. Inform them failure to comply with this requirement may result in their proposal being disqualified.

- If a team member has questions on the submittal, submit in writing to the purchaser. The purchaser will contact the respondent, obtain an explanation and prepare a written response. All members will be provided a copy of the response.

- Please safeguard the submittal when not evaluating.

- Purchasing Department will score pricing and tabulate total scores.

Questions between team members are allowed, but team member should respond only with technical information. Do not give individual opinions about respondents and/or the content of their responses.

Be sure to put your name and the respondent name on each sheet.

Revised 8/2015

APPENDIX 7A

NON-DISCLOSURE STATEMENT

{Description}

RFP No. {##}

I am acting at the request of the **Texas Procurement and Support Services Division of the Office of the Comptroller of Public Accounts** as a participant in the development and/or award of the referenced RFP.

I, the undersigned, hereby certify that the following statements are true and correct and that I understand and agree to be bound by the commitments contained herein. I will immediately inform CPA if, at any time during the solicitation process, any of these statements are no longer true and correct.

* I am acting of my own accord and am not acting under duress. I am not currently employed by, nor am I receiving any compensation from, nor have I been the recipient of any present or future economic opportunity, employment, gift, loan, gratuity, special discount, trip, favor, or service from or in connection with any potential vendor.

* I agree not to disclose or otherwise divulge any information pertaining to the contents or status of this procurement and its development to anyone other than the team leader or other team members. I understand the terms "disclose or otherwise divulge" to include, but not be limited to, reproduction or transmission of any part of any draft solicitation documents, related correspondence, or any submittals, or removal of same from designated areas without prior authorization from the evaluation team leader.

* I have no preconceived position on the relative merits of any submittals nor have I established a personal preference or position on the worth or standing of any respondent participating in this action.

* I agree to perform any and all tasks related to the solicitation in an unbiased manner, to the best of my ability, and with the best interest of the State of Texas paramount in all decisions.

* I understand that, prior to the signing of a contract resulting from this solicitation or a decision by the CPA not to award such a contract, all information pertaining to the development of or evaluation of the responses to the solicitation is confidential. Prior to such a decision, I will not discuss any such information with anyone other than relevant CPA staff, my agency's procurement, legal, and/or management staff, or CPA legal counsel assigned to this procurement. Further, I agree to take all steps necessary to protect the complete confidentiality of any response or offer in my possession during this period of time.

* I have been given the opportunity to review this statement prior to signing. If I have questions or concerns about this statement, I am to contact the CPA purchaser and/or attorney(s) assigned to the solicitation. **I have not made any changes or deletions on this form without informing the CPA purchaser or attorney. If any changes were made without express notice, CPA may remove me from further involvement in the solicitation, and may remove any scoring or evaluation I contributed.**

_____

Signature

_____

Printed Name

_____

Title (Include Procurement Certification status, as applicable)

_____

Agency

_____

Date

Revised 8/2015

APPENDIX 7B

DISCLOSURE STATEMENT FOR PURCHASING PERSONNEL

INSTRUCTIONS

1. The disclosure statement must be submitted by purchasing personnel prior to the award of any major contract.
2. This statement must be submitted even if you answer "no" to questions 1 and 2 in part 2.
3. A copy of this statement should be submitted to the administrative head of the state agency.
4. A new or amended statement must promptly filed with the parties listed in step 3 of these instructions whenever there is new information to report under Texas Government Code, Section 2262.004.

PART 1: GENERAL INFORMATION

Name of business entity being considered for award of a major contract:

_____

Filer's Address: _____

City: _____ State: _____ Zip: _____ Phone: _____

PART 2: DISCLOSURES

Definition: (Texas Government Code, Section 2262.004) Purchasing personnel *includes an employee of a state agency who makes decisions on behalf of the state agency or recommendations regarding: (A) contract terms or conditions on a major contract; (B) who is to be awarded a major contract; (C) preparation of a solicitation for a major contract; or (D) evaluation of a bid or proposal.*

A major contract is a contract with a value of at least $1million. (Texas Government Code, Section 2262.001(4))

Disclosure requirements for purchasing personnel of a state agency. (Texas Government Code, Section 2262.004)

Printed Name: _____ Job Title: _____

Purchasing personnel of a state agency must disclose information regarding certain relationships with, and direct or indirect pecuniary interests in, any party to a major contract with the state agency prior to the award of a major contract.

1. Do you directly or indirectly own or control more than a 10 percent interest or pecuniary interest with a value exceeding $25,000 in a business entity this is under consideration for an award of a major contract with you agency?

   ☐ No Yes If yes, please explain in detail the nature of such relationships. (Attach additional sheets as needed.)

   _____

2. Do you have a relationship with an employee, partner, a major stockholder, a paid consultant with a contract of at least $25,000 with the business entity under consideration for an award of a major contract, or other owner of the business entity that is related within a degree described by Government Code, Section 573.002?

   ☐ No ☐ Yes If yes, please explain in detail the nature of such relationships. (Attach additional sheets as needed.)

   _____

I hereby attest that all information provided above in questions 1 and 2 are complete and accurate to the best of my knowledge. I acknowledge my responsibility to submit promptly a new or amended disclosure statement to the party listed in step 3 of the instructions if any of the above information changes.

Purchasing
Personnel
Signature_____ Date _____
Printed Name:_____ Date: _____

Purchasing personnel of a state agency must disclose information regarding certain relationships with, and direct or indirect pecuniary interests in, any party to a major contract with the state agency prior to the award of a major contract.

1. Do you directly or indirectly own or control more than 10 percent interest or pecuniary interest with a value exceeding $25,000 in a business entity that is under consideration for an award of a major contract with your agency?

☐ No ☐ Yes If yes, please explain in detail the nature of such relationships. (Attach additional sheets as needed.)

_____

2. Do you have a relationship with an employee, a partner, a major stockholder, a paid consultant with a value exceeding $25,000 with the business entity under consideration for an award of a major contract, or other owner of the business entity that is related within a degree described by Government Code, Section 573.002?

☐ No ☐ Yes If yes, please explain in detail the nature of such relationships. (Attach additional sheets as needed.)

_____

I hereby attest that all information provided above in questions 1 and 2 are complete and accurate to the best of my knowledge. I acknowledge my responsibility to submit promptly a new or amended disclosure statement to the party listed in step 3 of the instructions if any of the above information changes.

Purchasing
Personnel
Signature_____Date: _____

Printed Name:_____ Date: _____

Purchasing personnel of a state agency must disclose information regarding certain relationships with, and direct or indirect pecuniary interests in, any party to a major contract with the state agency prior to the award of a major contract.

3. Do you directly or indirectly own or control more than 10 percent interest or pecuniary interest with a value exceeding $25,000 in a business entity that is under consideration for an award of a major contract with your agency?
☐ No ☐ Yes If yes, please explain in detail the nature of such relationships. (Attach additional sheets as needed.)

_____

4. Do you have a relationship with an employee, a partner, a major stockholder, a paid consultant with a value exceeding $25,000 with the business entity under consideration for an award of a major contract, or other owner of the business entity that is related within a degree described by Government Code, Section 573.002?
☐ No ☐ Yes If yes, please explain in detail the nature of such relationships. (Attach additional sheets as needed.)

_____

I hereby attest that all information provided above in questions 1 and 2 are complete and accurate to the best of my knowledge. I acknowledge my responsibility to submit promptly a new or amended disclosure statement to the party listed in step 3 of the instructions if any of the above information changes.
Purchasing Personnel
Signature _____ Date: _____

Part 3: SIGNATURE AND DATE

I hereby acknowledge receipt of the State Agency uniform nepotism Disclosure Form signed by the purchasing staff member(s) indicated above.

Administrative Head of Agency Signature: _____Date: _____
Printed Name: _____

Revised 3/1/2016

APPENDIX 8

REFERENCE CHECK FORM

Vendor Name:

Reference Name:

Company Name:

Contact Number:

Introduction: Hello, my name is **[caller's name]** with **[agency name**]. We are currently evaluating vendor proposals for **[solicitation title]** and checking vendor references. Your name and number were provided to us as a reference for **[vendor name]**. Do you have a few minutes to answer some questions?

1. How long have you used this particular vendor in a consulting capacity?

2. How many different projects has this vendor been used on in a consulting capacity?

3. How many different consultants …

    a. Have you used in the past? or

    b. Are you currently using?

4. On a scale of one to ten, with ten being completely satisfied and one being completely unsatisfied, how would you rate the following:

	Rating
a. Overall vendor ability to provide articulate recommendations?	
b. Overall vendor ability to provide feasible and functional recommendations?	
c. Overall vendor reliability?	
d. Overall vendor ability to meet timelines or deadlines?	

e. Overall quality of vendor deliverables?

f. Overall vendor personnel experience level?

5. On a scale of one to ten, with ten being excellent and one being unsatisfactory, how would you rate the following:

Rating

a. The company's attitude toward customer service?

b. The company's ability to resolve problems?

c. The company's overall performance?

6. On a scale of one to ten, with ten being "absolutely would" and one being "absolutely would not," would you recommend this vendor to another agency or company?

Rating

7. In your opinion, what are the vendor's …

a. Strengths?

b. Weaknesses?

8. Do you have any additional comments?

Total Rating

_____

[Signature of person conducting reference checks]

Revised 8/2015

APPENDIX 9

CONTRACT TERMS

ALPHABETICAL ORDER

Information about contract terms and examples of contract provisions is provided below. The agency's attorney should be involved in the development of contracts so that required contract terms and those drafted to achieve the agency's desired outcomes, are included in the contracts.

9.1 Abandonment or Default

If the contractor defaults on the contract, [*agency name*] reserves the right to cancel the contract without notice and either re-solicit or re-award the contract to the next best responsive and responsible respondent. The defaulting contractor will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work significantly changed. The period of suspension will be determined by the agency based on the seriousness of the default.

9.2 Amendments

Except as provided in Section 11.12 of this Contract, this Contract may be amended only upon written agreement between *{Insert agency name here}* and Contractor; however, any amendment of this Contract that conflicts with the laws of the State of Texas shall be void ab initio.

9.3 Antitrust

Contractor represents and warrants that neither Contractor nor any firm, corporation, partnership, or institution represented by Contractor, or anyone acting for such firm, corporation or institution has (1) violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws; or (2) communicated directly or indirectly the Proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract.

9.4 Applicable Law; Venue

This Contract shall be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit arising under this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

9.5 Applicable Law and Conforming Amendments

Contractor must comply with all laws, regulations, requirements and guidelines applicable to a Contractor providing services to the State of Texas as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract. *{Insert agency name here}* reserves the right, in its sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for *{Insert agency name here}* or Contractor's compliance with all applicable State and federal laws, and regulations.

9.6 Assignments

Without the prior written consent of *{Insert agency name here}* Contractor may not assign this Contract, in whole or in part, and may not assign any right or duty required under it.

9.7 Buy Texas

In accordance with Texas Government Code, Section 2155.4441, the State of Texas requires that during the performance of a contract for services, Contractor shall purchase products and materials produced in the State of Texas when available at a price and time comparable to products and materials produced outside the state.

9.8 Certification Concerning Hurricane Relief

Sections 2155.006 and Section 2261.053, Texas Government Code, prohibit state agencies from awarding a contract to any person who, in the past five years, has been convicted of violating a federal law or assessed a penalty in connection with a contract involving relief for Hurricane Rita, Hurricane Katrina, or any other disaster, as defined by Section 418.004 Texas Government Code, occurring after September 24, 2005. Under Section 2155.006, Texas Government Code, the Respondent certifies that the individual or business entity named in its Proposal is no ineligible to receive the Contract and acknowledges that the Contract may be terminated and payment withheld if this certifications inaccurate.

9.9 Confidentiality and Public Information Act

Notwithstanding any provisions of this Contract to the contrary, Contractor understands that *{Insert agency name here}* will comply with the Texas Public Information Act, Texas Government Code, Chapter 552 as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. *{Insert agency name here}* agrees to notify Contractor in writing within a reasonable time from receipt of a request for information related to Contractor's work under this contract. Contractor will cooperate with *{Insert agency name here}* in the production of documents responsive to the request. *{Insert agency name here}* will make a determination whether to submit a Public Information Act request to the Attorney General. Contractor will notify *{Insert agency name here}* General Counsel within twenty-four (24) hours of receipt of any third party requests for information that was provided by the State of Texas for use in performing the Contract. This Contract and all data and other information generated or otherwise obtained in its performance may be subject to the Texas Public Information Act. Contractor agrees to maintain the confidentiality of information received from the State of Texas during the performance of this Contract, including information which discloses confidential personal information particularly, but not limited to, social security numbers.

The Comptroller of Public Accounts recommends that pursuant to SB 1368, state governmental entities include the following language in their contracts**:** "**Contractor is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the state**." In addition to this recommended language, the Comptroller also advises that in order to ***comply with the new statutory requirements***, each state governmental entity should supplement this provision with the additional terms agreed upon by the parties regarding the specific format by which the vendor is required to make the information accessible by the public.

9.10 Debts or Delinquencies to State

The Comptroller is prohibited from issuing any payment to a person or entity that has been reported as having an indebtedness or delinquency to the state. Contractor agrees that, to the extent Contractor owes any debt or delinquent taxes to the State of Texas, any payments or other amounts Contractor is otherwise owed under this Contract shall be applied toward the debt or delinquent taxes until the debt or delinquent taxes are paid in full. Contractor agrees to comply with all applicable laws regarding satisfaction of debts or delinquencies to the State of Texas.

9.11 Deceptive Trade Practices; Unfair Business Practices

Contractor represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Tex. Bus. & Com. Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit and that Contractor has not been found to be liable for such practices in such proceedings. Contractor certifies that it has no officers who have served as officers of other entities who have been the subject allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

9.12 Default

If Contractor is found to be in default under any provision of this Contract, *{Insert agency name here}* may cancel the Contract without notice and either re-solicit or award the contract to the next best responsive and responsible Respondent. In the event of abandonment or default, Contractor will be responsible for paying damages to *{Insert agency name here}* including but not limited to re-procurement costs, and any consequential damages to the State of Texas or *{Insert agency name here}* resulting from Contractor's non-performance. The defaulting Contractor will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work is significantly changed.

9.13 Dispute Resolution

The dispute resolution process provided for in Texas Government Code*,* Chapter 2260 shall be used by *{Insert agency name here}* and Contractor to resolve any dispute arising under the Contract.

The dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, to attempt to resolve a claim for breach of contract asserted by the Respondent under the Contract. If the Respondent's claim for breach of Contract cannot be resolved by the Parties in the ordinary course of business, it shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, the Respondent shall submit written notice, as required by Chapter 2260, to the Deputy Comptroller or his or her designee. The notice shall also be given to the individual identified in the Contract for receipt of notices. Compliance by the Respondent with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

The contested case process provided in Chapter 2260 is the Respondent's sole and exclusive process for seeking a remedy for an alleged breach of Contract by the {Insert agency name here} if the Parties are unable to resolve their disputes as described above.

Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civil Practices and Remedies Code. Neither the execution of the Contract by the {Insert agency name here} nor any other conduct of any representative of the {Insert agency name here} relating to the Contract shall be considered a waiver of sovereign immunity to suit.

For all other specific breach of contract claims or disputes under the Contract, the {Insert agency name here} and the Respondent shall first attempt to resolve them through direct discussions in a spirit of mutual cooperation. If the Parties' attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by the {Insert agency name here} and the Respondent within fifteen (15) days after written notice by one them demanding mediation under this Section. The Respondent shall pay all costs of the medication unless the {Insert agency name here} in its sole good faith discretion, approves its payment of all or part of such costs. By mutual agreement, the {Insert agency name here} and the Respondent may use a non-binding form of dispute resolution other than mediation. The purpose of this Section is to reasonably ensure that the {Insert agency name here} and the Respondent shall, in good faith, utilize mediation or another non-binding dispute resolution process before pursuing litigation. The {Insert agency name here} participation in, or

the results of, any mediation or other non-binding dispute resolution process under this Section or the provisions of this Section shall not be construed as a waiver by the {Insert agency name here} of (1) any rights, privileges, defenses, remedies or immunities available to the {Insert agency name here} as an agency of the State of Texas or otherwise available to the {Insert agency name here}; (2) the {Insert agency name here} termination rights; or (3) other termination provisions or expiration dates of the Contract.

Notwithstanding any other provision of the Contract to the contrary, unless otherwise requested or approved in writing by the {Insert agency name here} the Respondent shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, the Respondent may suspend performance during the pendency of such claim or dispute if the Respondent has complied with all provisions of Section 2251.051, Texas Government Code, and such suspension of performance is expressly applicable and authorized under that law.

9.14 Drug Free Work Place

Contractor represents and warrants that it shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (41 U.S.C. §§ 8101-8106.) and maintain a drug-free work environment; and the final rule, government-wide requirements for drug-free work place (grants), issued by the Office of Management and Budget (2 C.F.R. Part 182) to implement the provisions of the Drug-Free Work Place Act of 1988 is incorporated by reference and the contractor shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

2089.15 Electronic and Information Resources Accessibility Standards, As Required by 1 TAC Chapter 213 (Applicable to State Agency and Institution of Higher Education Purchases Only)

1) Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.

2) Contractor shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration “Buy Accessible Wizard” (http://www.buyaccessible.gov). Vendors not listed with the “Buy Accessible Wizard” or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the “Buy Accessible Wizard” or obtaining a copy of the VPAT is located at http://www.section508.gov/.

9.16 Eligibility

Under Texas Government Code, Section 2155.004 (relating to certain taxes), Contractor represents and warrants that Contractor is not ineligible to receive this Contract and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate. Contractor represents and warrants that it is not delinquent in the payment of any franchise taxes owed the State of Texas. Also, Texas Government Code, Section 2155.004 prohibits a person or entity from receiving a state contract if that person or entity received compensation for participating in preparing the solicitation or specifications for the Contract.

9.17 Equal Opportunity

Contractor represents and warrants that it shall not discriminate against any person on the basis of race, color, national origin, creed, religion, political belief, sex, sexual orientation, age, and disability in the performance of this Contract.

9.18 Family Code

Under Texas Family Code, Title 5, Subtitle D, Section 231.006(d), regarding child support, the bidder certifies that the individual or business entity named in this bid is not ineligible to receive the specified payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate. Furthermore, any bidder subject to Section 231.006 must include names and Social Security numbers of each person with at least 25% ownership of the business entity submitting the bid. This information must be provided prior to award.

9.19 False Statements; Breach of Representations

By signature to this Contract, Contractor makes all the representations, warranties, guarantees, certifications and affirmations included in this Contract. If Contractor signed its Proposal with a false statement or signs this Contract with a false statement or it is subsequently determined that Contractor has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, Contractor shall be in default under this Contract and *{Insert agency name here}* may terminate or void this Contract for cause and pursue other remedies available to *{Insert agency name here}* under this Contract and applicable law.

9.20 Federal, State, and Local Requirements

Contractor shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Contractor is responsible for both federal and State unemployment insurance coverage and standard Worker's Compensation Insurance coverage. Contractor shall comply with all federal and State tax laws and withholding requirements. The State of Texas shall not be liable to Contractor or its employees for any Unemployment or Workers' Compensation coverage, or federal or State withholding requirements. Contractor shall indemnify the State of Texas and shall pay all costs, penalties, or losses resulting from Contractor's omission or breach of this Section.

9.21 Felony Criminal Convictions

Contractor represents and warrants that Contractor has not and Contractor's employees have not been convicted of a felony criminal offense, or that, if such a conviction has occurred, Contractor has fully advised *{Insert agency name here}* as to the facts and circumstances surrounding the conviction.

9.22 Financial Interests; Gifts

Contractor represents and warrants that neither Contractor nor any person or entity that will participate financially in this Contract has received compensation from *{Insert agency name here}* or any agency of the State of Texas for participation in preparation of specifications for this Contract. Contractor represents and warrants that it has not given, offered to give, and does not intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to any public servant or employee in connection with this Contract.

9.23 Force Majeure

Neither Contractor nor *{Insert agency name here}* shall be liable to the other for any delay in, or failure of performance, of any requirement included in any PO resulting from this RFP caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the

causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force majeure is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

9.24 HUBs

Contractor represents and warrants that it shall comply with the Historically Underutilized Business requirements pursuant to Texas Government Code, Chapter 2261. A HUB Subcontracting Plan form must be filled out and returned with the Proposal to be considered responsive. If the Proposal does not include a HUB Subcontracting Plan, it shall be rejected as a material failure to comply with advertised specifications.

9.25 Immigration

The Contractor represents and warrant that it shall comply with the requirements of the Immigration Reform and Control Act of 1986 and 1990 regarding employment verification and retention of verifications forms for any individuals hired on or after November 6, 1986, who will perform any labor or services under the Contract and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) enacted on September 30, 1996.

9.26 INDEMNIFICATION

Acts or Omissions

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

Infringements

a) Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES from any and all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the PERFORMANCES OR ACTIONS OF VENDOR PURSUANT TO THIS CONTRACT. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. VENDOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL.

b) Vendor shall have no liability under this section if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without Vendor's written approval, (iii) any modifications made to the product by the Vendor pursuant to Customer's specific instructions, (iv) any intellectual property right owned by or licensed to Customer, or (v) any use of the product or service by Customer that is not in conformity with the terms of any applicable license agreement.

c) If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense; (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing.

Taxes/Workers' Compensation/Unemployment Insurance – Including Indemnity

1) VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, VENDOR SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF VENDOR'S AND VENDOR'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS CONTRACT. VENDOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. THE CUSTOMER AND/OR THE STATE SHALL NOT BE LIABLE TO THE VENDOR, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

2) VENDOR AGREES TO INDEMNIFY AND HOLD HARMLESS CUSTOMERS, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, AND/OR ASSIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEYS' FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION IN ITS PERFORMANCE UNDER THIS CONTRACT. VENDOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

9.27 Independent Contractor

Contractor or Contractor's employees, representatives, agents and any subcontractors shall serve as an independent contractor in providing the services under any PO resulting from this RFP. Contractor or Contractor's employees, representatives, agents and any subcontractors shall not be employees of *{Insert agency name here}.* Should Contractor subcontract any of the services required in this RFP, Contractor expressly understands and acknowledges that in entering into such subcontract(s), *{Insert agency name here}* is in no manner liable to any subcontractor(s) of Contractor. In no event shall this provision relieve bidder of the responsibility for ensuring that the services rendered under all subcontracts are rendered in compliance with this RFP.

9.28 Insurance and Other Security

Contractor represents and warrants that it will, within five (5) business days of executing this agreement, provide *{Insert agency name here}* with current certificates of insurance or other proof acceptable to *{Insert agency name here}* of the following insurance coverage:

Standard Workers Compensation Insurance covering all personnel who will provide services under this Contract;

Commercial General Liability Insurance, personal injury and advertising injury with, at a minimum, the following limits: $500,000 minimum each occurrence; $1,000,000 per general aggregate.

Contractor represents and warrants that all of the above coverage is with companies licensed in the state of Texas, with "A" rating from Best, and authorized to provide the corresponding coverage. Contractor also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least thirty (30) days prior written notice to *{Insert agency name here}*. Contractor represents and warrants that it shall maintain the above insurance coverage during the term of this Contract, and shall provide *{Insert agency name here}* with an executed copy of the policies immediately upon request.

9.29 Liability for Taxes

Contractor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, State, or local income, sales or excise taxes of Contractor or its employees. *{Insert agency name here}* shall not be liable for any taxes resulting from this Contract.

9.30 Limitation on Authority; No Other Obligations

Contractor shall have no authority to act for or on behalf of *{Insert agency name here}* or the State of Texas except as expressly provided for in this Contract; no other authority, power or use is granted or implied. Contractor may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of the State of Texas or *{Insert agency name here}*.

9.31 Merger

This Contract contains the entire agreement between Contractor and *{Insert agency name here}* and supersedes any prior understandings or oral or written agreements between *{Insert agency name here}* and Contractor on the matters contained herein. No modification, alteration, or waiver of any term, covenant, or condition of this Contract and any attachments shall be valid unless in writing and executed by *{Insert agency name here}* and Contractor.

9.32 No Conflicts

Contractor represents and warrants that Contractor has no actual or potential conflicts of interest in providing services to the State of Texas under this Contract and that Contractor's provision of services under this Contract would not reasonably create an appearance of impropriety.

9.33 No Liability Upon Termination

If this Contract is terminated for any reason, *{Insert agency name here}* and the State of Texas shall not be liable to Contractor for any damages, claims, losses, or any other amounts arising from or related to any such termination. However, Contractor may be entitled to the remedies provided in Texas Government Code, Chapter 2260.

9.34 No Waiver

Nothing in this Contract shall be construed as a waiver of the state's sovereign immunity. This Contract shall not constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas. The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas under this Contract or under applicable law shall not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel. *{Insert agency name here}* does not waive any privileges, rights, defenses, or immunities available to *{Insert agency name here}* by entering into this Contract or by its conduct prior to or subsequent to entering into this Contract.

9.35 Note to Respondent

Any terms and conditions attached to the response will not be considered unless specifically referred to on this Request for Proposal and may result in disqualification of the response.

9.36 Notices

Any written notices required under this Contract will be by either hand delivery to Contractor's office address specified on Page 1 of this Contract or by U.S. Mail, certified, return receipt requested, to *[Insert appropriate agency name and mailing address here].* Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this Section by written notification to the other party.

9.37 Partially Completed Work

No later than the first calendar day after the termination of this Contract, or at *{Insert agency name here}* request, Contractor shall deliver to *{Insert agency name here}* all completed, or partially completed, work and any and all documentation or other products and results of these services. Failure to timely deliver such work or any and all documentation or other products and results of the services shall be considered a material breach of this Contract. Contractor shall not make or retain any copies of the work or any and all documentation or other products and results of the services without the prior written consent of the *{Insert agency name here}*.

9.38 Patent, Trademark, Copyright and Other Infringement Claims

Contractor shall indemnify, save and hold harmless the State of Texas from and against claims of patent, trademark, copyright, trade secret or other proprietary rights, violations or infringements arising from the State's or Contractor's use of or acquisition of any services or other items provided to the State of Texas by Contractor or otherwise to which the State of Texas has access as a result of Contractor's performance under this Contract, provided that the State shall notify Contractor of any such claim within a reasonable time of the State's receiving notice of any such claim. If Contractor is notified of any claim subject to this section, Contractor shall notify *{Insert agency name here}* of such claim within five (5) business days of such notice. No settlement of any such claim shall be made by Contractor without *{Insert agency name here}* prior written approval. Contractor shall reimburse the State of Texas for any claims, damages, losses, costs, expenses, judgments or any other amounts, including, but not limited to, attorneys' fees and court costs, arising from any such claim. Contractor shall pay all reasonable costs of the State's counsel and shall also pay costs of multiple counsel, if required to avoid conflicts of interest. Contractor represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

9.39 Payments

Prior to authorizing payment to Contractor, *{Insert agency name here}* shall evaluate Contractor's performance using the performance standards set forth in all documents constituting this Contract.

Contractor shall provide invoices to *{Insert agency name here}* for Commodities/Services provided/performed. Invoices must be submitted not later than the 15th day of the month after the Services are completed. No payment whatsoever shall be made under this contract without the prior submission of detailed, correct invoices. Subject to the foregoing, *{Insert agency name here}* must make all payments in accordance with the Texas Prompt Payment Act, Texas Government Code, Chapter 2251. Payments under this Contract are subject to the availability of appropriated funds. Contractor acknowledges and agrees that payments for services provided under this Contract are contingent upon *{Insert agency name here}* receipt of funds appropriated by the Texas Legislature.

9.40 Prohibited Use of Appropriated or other Funds Under Control of State Agency; Lobbying

The Contractor represents and warrants that ordering entities' payments to the Contractor and Contractor's receipt of appropriated or other funds under any of this or any resulting agreement are not prohibited by Texas Government Code, Section 556.005 or Section 556.008.

9.41 Severability Clause

In the event that any provision of this Contract is later determined to be invalid, void, or unenforceable, then the remaining terms, provisions, covenants, and conditions of this Contract shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated.

9.42 Signatories

The undersigned signatories represent and warrant that they have full authority to enter into this Contract on behalf of the respective parties.

9.43 Strict Compliance

Time is of the essence in the performance of this Contract. Contractor shall strictly comply with all of the deadlines, requirements, and Standards of Performance for this Contract.

9.44 Substitutions

Substitutions are not permitted without written approval of {Insert agency name here}

9.45 Supporting Documents, Retention; Right to Audit; Independent Audits

Contractor shall maintain and retain supporting fiscal and any other documents relevant to showing that any payments under this Contract funds were expended in accordance with the laws and regulations of the State of Texas, including but not limited to, requirements of the Comptroller of the State of Texas and the State Auditor. Contractor shall maintain all such documents and other records relating to this Contract and the State's property for a period of seven (7) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. Contractor shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the "Work" as defined in paragraph 11.30 of this Contract. Contractor and the subcontractors shall provide the State Auditor with any information that the State Auditor deems relevant to any investigation or audit. Contractor must retain all work and other supporting documents pertaining to this Contract, for purposes of inspecting, monitoring, auditing, or evaluating by *{Insert agency name here}* and any authorized agency of the State of Texas, including an investigation or audit by the State Auditor.

Contractor shall cooperate with any authorized agents of the State of Texas and shall provide them with prompt access to all of such State's work as requested. Contractor's failure to comply with this Section shall constitute a material breach of this Contract and shall authorize the *{Insert agency name here}* and the State of Texas to immediately assess appropriate damages for such failure. Pursuant to Texas Government Code, Section 2262.154.the acceptance of funds by Contractor or any other entity or person

directly under this Contract, or indirectly through a subcontract under this Contract, shall constitute acceptance of the authority of the State Auditor to conduct an audit or investigation in connection with those funds. Contractor acknowledges and understands that the acceptance of funds under this Contract shall constitute consent to an audit by the State Auditor, Comptroller or other agency of the State of Texas. Contractor shall ensure that this paragraph concerning the State's authority to audit funds received indirectly by subcontractors through Contractor and the requirement to cooperate is included in any subcontract it awards. Furthermore, under the direction of the legislative audit committee, an entity that is the subject of an audit or investigation by the State Auditor must provide the State Auditor with access to any information the State Auditor considers relevant to the investigation or audit.

9.46 Survival of Terms

Termination of the Contract for any reason shall not release the Respondent from liability or obligation set forth in the Contract that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including the provisions regarding confidentiality, indemnification, transition, records, audit, property rights, dispute resolution, invoice and fees verification.

9.47 Term and Termination

This Contract shall become effective on the date signed by the appropriate official of *{Insert agency name here}* and shall expire on _____unless otherwise sooner terminated as provided in this Contract. Notwithstanding the termination or expiration of this Contract, the provisions of this Contract regarding confidentiality, indemnification, transition, records, right to audit and independent audit, property rights, dispute resolution, invoice and fees verification, and default shall survive the termination or expiration dates of this Contract. *{Insert agency name here}* may, in its sole discretion, terminate this Contract upon thirty (30) days' written notice to Contractor. Such notice may be provided by facsimile or certified mail; return receipt requested and is effective upon Contractor's receipt.

(a) Convenience

{Insert agency name here} may, in its sole discretion, terminate this Contract upon thirty (30) days' written notice to Contractor. Such notice may be provided by facsimile or certified mail return receipt requested and is effective upon Contractor's receipt. In the event of such termination, the Respondent shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination. Customers shall be liable only for payments for any goods or services ordered from the Respondent before the termination date.

(b) Cause/Default

If the Respondent fails to provide the goods or services contracted for according to the provisions of the Contract, or fails to comply with any terms or conditions of the Contract. {Insert agency name here} may, upon written notice of default to the Respondent, immediately terminate all or any part of the Contract. Termination is not an exclusive remedy, but will be in addition to any other rights and remedies as provided in equity, by law or under the Contract. {Insert agency name here} may exercise any other right, remedy, or privilege which may be available to it under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the Contract. The exercise of any of the foregoing remedies will not constitute a termination of the Contract unless {Insert agency name here} notifies the Respondent in writing prior to the exercise of such remedy. The Respondent shall be liable for all costs and expenses, including court costs, incurred by {Insert agency name here} with respect to the enforcement of any of the remedies listed herein.

(c) Rights upon Termination or Expiration

In the event that the Contract is terminated for any reason, or upon its expiration, the {Insert agency name here} and Customers shall retain ownership of all associated work products and documentation obtained from the Respondent under the Contract.

9.48 Testing and Inspection

{Insert agency name here} may test and inspect goods and services purchased under the Contract to ensure compliance with the specifications of this RFP and the Contract. The {Insert agency name here} may also test and inspect goods and services before they are purchased under the Contract.

Authorized {Insert agency name here} personnel shall have access to the Respondent's place of business for the purpose of inspecting the goods. To the extent practical, the {Insert agency name here} inspections will not disrupt the Respondent's daily operations. Tests shall be performed on samples submitted with the Proposal or on samples taken from regular shipments. All costs of testing and inspection shall be borne by the Respondent. In the event the goods tested fail to meet or exceed all conditions and requirements of the RFP and Contract, the goods will be rejected in whole or in part, at the State's option, and returned to the Respondent or held for disposition at the Respondent's expense. Latent defects may result in cancellation of the Contract at no expense to the state.

If material fails to meet specifications, the Respondent will be notified by fax/mail or e-mail. The Respondent will have ten (10) working days after receipt of the notification to remove the rejected material from state property. Material will be removed at the Respondent's expense. Material not removed in the allotted time period will be disposed by the Customer. The Respondent will be charged for all disposable expenses conducted by the Customers.

9.49 Work Made for Hire

For the purposes of this Contract, the term "Work" is defined as all reports, statistical analyses, work papers, work products, materials, approaches, designs, specifications, systems, documentation, methodologies, concepts, research, materials, intellectual property or other property developed, produced, or generated in connection with this Contract. All work performed pursuant to this Contract is made the exclusive property of *{Insert agency name here}*. All right, title and interest in and to said property shall vest in *{Insert agency name here}* upon creation and shall be deemed to be a work for hire and made in the course of the services rendered pursuant to this Contract. To the extent that title to any such work may not, by operation of law, vest in *{Insert agency name here}*, or such work may not be considered a work made for hire, all rights, title and interest therein are hereby irrevocably assigned to *{Insert agency name here}*. *{Insert agency name here}* shall have the right to obtain and to hold in its name any and all patents, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. Contractor must give *{Insert agency name here}* and/or the State of Texas, as well as any person designated by *{Insert agency name here}* and/or the State of Texas, all assistance required to perfect the rights defined herein without any charge or expense beyond those amounts payable to Contractor for the services rendered under this Contract.

Affirmation Clauses

These clauses are usually included in the Execution of Proposal (see Appendix 1) which is a part of the solicitation document. If the solicitation document does not contain an Execution of Proposal, then these clauses should be included in the contract document. All of these provisions are not required for every type of contract. Agencies should evaluate each of the following provisions for applicability to individual procurements.

By signature hereon, the respondent certifies that:

All statements and information prepared and submitted in the response to this RFP are current, complete and accurate.

He/she has not given, offered to give, not intends to give at any time hereafter, any economic opportunity, future employment, gift, loan gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response. lxxxv

Failure to sign the Execution of Proposal or signing it with a false statement shall void the submitted offer or any resulting contracts.

Neither Respondent nor firm, corporation, partnership, or institution represented by Respondent or anyone acting for such firm, corporation, or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated the contents of this Proposal either directly or indirectly to any competitor or any other person engaged in the same line of business during the procurement process for this RFP.

When a Texas business address show hereon that address is, in fact, the legal business address of Respondent and Respondent qualifies as a Texas Resident Bidder under Texas Administrative Code, Title 34, Part 1, Chapter 20.

Under Texas Government Code, 2155.004, a state agency may not accept a bid or award a contract that includes proposed financial participation by a person who received compensation from the agency to participate in preparing the specifications or request for proposals on which the bid or contract is based. If the Respondent is not eligible, then any contract resulting from this RFP shall be immediately terminated. Furthermore, “under Section 2155.004, Texas Government Code, the vendor [Respondent] certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.”

Under Family Code § 231.006, relating to child support obligations, Respondent and any other individual or business entity named in this solicitation are eligible to receive the specified payment and acknowledge that this contract may be terminated and payment withheld if this certification is inaccurate.

Any Proposal submitted under this RFP shall contain the names and social security numbers of person or entity holding at least a twenty-five percent (25%) ownership interest in the business entity submitting the Proposal.

Name:	**Social Security Number:**
Name:	**Social Security Number:**
Name:	**Social Security Number:**

In accordance with Texas Government Code Section 669.003 (relating to contracting with executive head of a state agency), by signature hereon, Respondent certifies that it:

> (A)(1) is not the executive head of the agency contracting herein; (2) was not at any time during the past four years the executive head of the agency contracting herein and (3) does not employ a current or former executive head of a state agency; or
>
> (B) Respondent and the agency contracting herein have complied with the requirements of the above referenced statute concerning board approval and notice to the Legislative Budget Board.

Respondent acknowledges that this Contract may be terminated at any time, and payments withheld, if this certification is false.

Respondent agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas.

Respondent agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas.

CPA is federally mandated to adhere to the directions provided in the President's Executive Order (EO) 13224, Executive Order on Terrorist Financing - Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross-referencing respondents/vendors with the Federal General Services Administration's System for Award Management (SAM), https://www.sam.gov, which is inclusive of the United States Treasury's Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

Respondent certifies that the responding entity and its principals are eligible to participate in this transaction and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity and the Respondent is in compliance with the State of Texas statutes and rules relating to procurement and that Respondent is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at https://www.sam.gov.

Under Section 2155.006(b) of the Texas Government Code, a state agency may not accept a bid or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five year period preceding the date of the bid or award, has been: (1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005. Under Section 2155.006 of the Texas Government Code, the bidder certifies that the individual or business entity named in this bid is not ineligible to receive the specified contract and acknowledges that any contract resulting from this IFB may be terminated and payment withheld if this certification is inaccurate.

Pursuant to Section 2262.154of the Texas Government Code, the state auditor may conduct an audit or investigation of the vendor or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the Respondent or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Respondent or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. Respondent will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the vendor and the requirement to cooperate is included in any subcontract it awards.

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APPENDIX 10

BEST VALUE – RESPONDENT QUESTIONNAIRE

Respondents must complete all of the following blanks and include all required attachments in Respondent's Offer AT THE TIME OF THE INITIAL SUBMISSION OF THE OFFER TO Agency.

A. Respondent's Contact Person. Respondent must list the name, title, email address of business, phone, number , fax number and email address of the individual who will be the contact person for the term of any PO resulting from this RFP.

Name: _____

Title: _____

E-mail Address of Business: _____

Telephone: _____

Fax: _____

Email Address of Contact: _____

B. References. Respondent must provide a list of **four (4)** state agencies, corporations or other entities other than agency for which Respondent has provided the requested or similar items in the RFP during the past three (3) years. Respondent must include dates when requested or similar items in the RFP were provided, names, telephone numbers and email addresses of state agency's or firm's contact person. If none, specify none.

This information will be used in evaluating Respondent's references, Respondent's prior performance and other indicators of Respondent's probable performance under any PO resulting from this RFP.

(1) State Agency or Other Entity: _____

Date Item Provided: _____

Name of Contact:_____

Telephone Number of Contact: _____

Email Address of Contact: _____

(2) State Agency or Other Entity: _____

Date Item Provided: _____

Name of Contact: _____

Telephone Number of Contact:_____

Email Address of Contact:_____

(3) State Agency or Other Entity:_____

Date Item Provided:_____

Name of Contact: _____

Telephone Number of Contact:_____

Email Address of Contact:_____

(4) State Agency or Other Entity:_____

Date Item Provided:_____

Name of Contact: _____

Telephone Number of Contact:_____

Email Address of Contact:_____

C. Cancellations or Terminations. Respondents must list **all** contracts or purchase orders that Respondent executed or accepted within the last **three (3) years** and which were canceled or terminated prior to completion by any state agency or other entity with which Respondent contracted. For each such contract or purchase order, Respondent must include a detailed explanation for the cancellation or termination and final resolution of the matter. Include the names and telephone numbers of each such state agency's or firm's contact person. If none, specify none.

This information will be used in evaluating Respondent's references, Respondent's prior performance and best value criteria such as other indicators of Respondent's probable performance under any PO resulting from this RFP.

_____

_____

_____

D. Profile. Respondent must include the following profile that:

(a) describes the general nature of previous similar work performed by Respondent, particularly work in the last three (3) years;

_____

_____

_____

(b) describes the size and scope of all operations, including number of Respondent's employees and years in business;

_____

_____

_____

(c) describes Respondent's prior contracting experience with state agencies and similar entities; and

_____

_____

_____

(d) any other information Respondent believes is pertinent to this RFP.

_____

_____

_____

E. Personnel. Respondent must provide in detail the qualifications, education, training, experience and certifications of all Respondent's employees who will or may provide the items under any PO resulting from this RFP. Respondent must provide this information for each such employee. If additional pages are required, use this format on any additional pages.

Employee's Name:_____

Qualifications:_____

Education:_____

Training:_____

Experience:_____

Certifications:_____

Licenses:_____

Employee's Name:_____

Qualifications:_____

Education:_____

Training: _____

Experience: _____

Certifications: _____

Licenses:_____

Employee's Name:_____

Qualifications:_____

Education:_____

Training:_____

Experience:_____

Certifications:_____

Licenses:_____

F. Narrative. Respondents must submit a detailed narrative explanation of how the offered items will meet the requirements of (Section of RFP that details specific requirements). If agency requires a copy of this narrative, it must be submitted in Microsoft Word format.

_____

_____

_____

_____

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APPENDIX 11

SAMPLE CONTRACT MONITORING SHEET

DRAFT – SAMPLE CONTRACT MONITORING WORKSHEET To be Included in Contract Monitoring Binder; References to Tabs are to Location in Binder			***Division: Information Services Division***						
Contractor Type of Contract	***Specific Monitoring Activities to Be Performed***	***Performance Method including information sources to be used***	***Responsible Individual for Each Monitoring Activity***	***Monitoring Activity Frequency***	***Monitoring Activity Documentation Method***	***Results of Monitoring Activity Communicated to***	***Results of Monitoring Used to (include follow up requirements)***	***Communicated to***	***Use***
Acme Consultants, PC; Consulting Services								*Board, Investment Committee,*	*Realloc-ate funds to*
	Review of Consultant's Quarterly Draft Reports for Contract Compliance	*Compare Draft Report to Contract requirements*	*Jane Doe*	*Quarterly*	*E-mail report*	*Betty Jo, IT Div Manager*	*Routine status reports by Betty Jo, IT Div Manager, to Exec Management; Acceptance or rejection of draft report deliverables as provided in Contract; Review milestone invoices prior to approval for payment; Require redelivery of draft report deliverables; Terminate Consultant for nonperformance; Solicit replacement services*		Revised 8/2015

APPENDIX 12

BAFO EVALUATION EXAMPLE

Evaluation Results

Cost - Score Calculation Points awarded based on the least expensive awarded the maximum points and other offers based on difference between their offer price and low offer. (See breakout of cost in attached schedules.)

Acme Project Evaluation Matrix – EXAMPLE

RFO Evaluation Criteria [Section A, item 20 of RFO]	Weight	Max Points	Company A	Company B
Costs	30	30	22.5	25
Qualifications & Methodology (Indicators of Probable Vendor Performance)	30			
Experience [Section C, Parts 1 through 6 of RFO and Appendix A of Offer]	50.0%	15	12	10.5
Proposed Work plan and Approach [Section B, items 8 through 20 of RFO and Appendix B of Offer]	25.0%	7.5	6	5.25
Personnel [Section C, items 7 through 10 of RFO and Appendix C of Offer]	25.0%	7.5	5.25	5.63
		30	23.25	21.38
Technical Functionality	40			
Minimum Functions [Section B, items 1 through 20 of RFO and Appendix D of Offer]	75.0%	30	21	24
Additional Functions [Section B, items 21 through 40 of RFO and Appendix D of Offer]	25.0%	10	7	8
		40	28	32
Total	100%	100	74	78

Costs				**Vendor Response / Evaluation**		
				Company A	**Company B**	
Functions						
Criteria		**Weight**				
Costs	**30**	**Max**	**30%**			Lowest Cost
Score						
Minimum Functions [Section B, items 1 through 20 of RFO and Appendix D of Offer]			Cost	$300,000	$200,000	200000
	75.0%	22.5	Score	15	22.5	
Additional Functions [Section B, items 21 through 40 of RFO and Appendix D of Offer]			Cost	$50,000	$150,000	**50000**
	25.0%	7.5	Score	7.5	2.5	
		Score		**22.5**	**25**	

				Vendor Response/Evaluation	
				Company A	Company B
	Max Points	30			
Experience	50.0%	15.0	Rating	8	7
Proposed Work Plan	25.0%	7.5	Score	12	10.5
			Rating	8	7
			Score	6	5.25
Personnel	25.0%	7.5	Rating	7	5.25
			Score	5.25	7.5
			Total Points	23.25	21.38

Notes:

Rating From 1 to 10, 10 reflecting highest / best possible

Score Allocated points awarded based on rating (10 rating receives maximum score)

Technical Functionality

				Vendor Response / Evaluation	
				Company A	Company B
	Max Points	40			
Minimum Functions	75.0%	30.0	Rating	7	8
			Score	21	24
Additional Functions	25.0%	10.0	Rating	7	8
		0	Score	7	8
			Total Points	28	32

Notes:

Rating From 1to 10, 10 reflecting highest / best possible

Score Allocated points awarded based on rating (10 rating receives maximum score)

Evaluation Rating Notes (supporting comment for rating)

Vendor 1

Vendor 2

Company A

Ability	Rating	Issues/ Questions
Experience	8	Quality of references and past projects relative RFO, Any Agency State Experience?
Proposed Work plan	8	Is work plan reasonable, include appropriate staffing and clearly defined Agency roles, etc…? Is solution proposed to be provided within the XX day requirement? Does it include the transition out plan?
Personnel	7	Are proposed staff qualified with demonstrated relevant experience? Does the vendor reflect the ability to maintain a skilled workforce?

Functionality		Issues/ Questions
Minimum Functions	7	Are minimum functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Additional Functions	7	Are all functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Reference Notes:		Any exceptions taken to indemnification, limit of liability, change of ownership, arbitration, termination, effects of termination, insurance and term? Added support and software license agreements that need to be reviewed? HUB subcontracting proposed? Bond Information supplied? CISV?

Company B

Ability	Rating	Issues/ Questions
Experience	7	Quality of references and past projects relative RFO, Any Agency / State Experience?
Proposed Work plan	7	Is work plan reasonable, include appropriate staffing and clearly defined CPA roles, etc…? Is solution proposed to be provided within the XX day requirement? Does it include the transition out plan?
Personnel	7.5	Are proposed staff qualified with demonstrated relevant experience? Does the vendor reflect the ability to maintain a skilled workforce?

Functionality		Issues/ Questions
Minimum Functions	8	Are minimum functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Additional Functions	8	Are all functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Reference Notes:		Any exceptions taken to indemnification, limit of liability, change of ownership, arbitration, termination, effects of termination, insurance and term? Added support and software license agreements that need to be reviewed? HUB subcontracting proposed? Bond Information supplied? CISV?

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APPENDIX 13

RFP BID EVALUATION SCORE TABULATION SHEET

Total scores:							
	Bidder A	Bidder B	Bidder C	Bidder D	Bidder E	Bidder F	Bidder G
Price Points + Technical Average							

value - 60%	**Prices:**							
		Bidder A (low)	Bidder B (low)	Bidder C (low)	Bidder D (low)	Bidder E (low)	Bidder F (low)	Bidder G (low)
	prices =	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
	points =							
evaluator	**Technical Scores:**							
max score per item	10 item 1							
	15 item 2							
	10 item 3							
	5 item 4							
	0 unassigned							
	0 unassigned							
	40 points =	0	0	0	0	0	0	0
evaluator	**scored items:**							
max score per item	10 item 1							
	15 item 2							
	10 item 3							
	5 item 4							
	0 unassigned							
	0 unassigned							
	40 points =	0	0	0	0	0	0	0

evaluator	**scored items:**								
max score per item	10	item 1							
	15	item 2							
	10	item 3							
	5	item 4							
	0	unassigned							
	0	unassigned							
	40	points =	0	0	0	0	0	0	0
	Evaluator Totals								
	evaluator		0	0	0	0	0	0	0
	evaluator		0	0	0	0	0	0	0
	evaluator		0	0	0	0	0	0	0
		Totals =	0	0	0	0	0	0	0
		Technical Average Score	0	0	0	0	0	0	0

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APPENDIX 14

SAMPLE EXECUTIVE APPROVAL MEMO

DATE:

TO: [Name of Executive]

THROUGH: [Name of Division Director]

FROM: [Name of Project Manager]

SUBJECT: Request for Executive Approval To Renew Contract with (name of Contractor)

Background and Specific Request paragraphs;

Include background about purpose and nature of contract, services performed to date, highlights, note any concerns, name of contractor, date contract expires unless renewed (such as 8/31/04), period of renewal requested (such as 9/1/04 through 8/31/05), amount of $ for period through expiration date (8/31/04, for example) and amount of $ for the renewal period (such as 9/1/04 through 8/31/05). Make reference to the completed and approved purchase requisition if one is required.

State that the renewal period was provided for in the corresponding RFP and therefore renewal is an option without having to resolicit competitive proposals for this renewal period.

State the next estimated date that executive approval will be requested to issue a new solicitation for the contracted services (when either it is preferred that the services be opened to competition or when the RFP renewal options run out).

State how the renewal is in compliance with the Contracts Management Guide.

Include mandatory paragraph about contract monitoring, **such as:**

[Name of using division] has monitored the contractor's performance against the contract and has attached the updated contract monitoring schedule for your review.

The [name of using division] believes that the contractor is in substantial compliance with all requirements of the contract and therefore recommends renewal.

[Name of Executive]
Approved:_____ Disapproved:_____

Let's Discuss:_____

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APPENDIX 15

CONTRACT MANAGEMENT BEST PRACTICES MATRIX

CMG – Contract Management Guide, TAC – Texas Administrative, Code TGC – Texas Government Code, TPM – Texas Procurement Manual

COMPONENT	POOR	AVERAGE	BEST PRACTICE	REFERENCES
Processes	• No standard processes for contracting or compliance management • Results in labor intensive processes, duplication of effort, and poorly written solicitations and contracts • No contract or solicitation document templates. Every contract or solicitation document looks different • No formal, repeatable process for consistent solicitation development • Contract Managers not involved from "cradle to grave" • Contract Management Guide is ignored or not consulted • No effort to capture "lessons learned" and "best practices" • No structured business planning process to determine sourcing and re-bid strategy • No contract processes that overlap with existing project management practices are defined	• Contract processes are defined at the division level, but are sporadically followed • Sporadic compliance enforcement • Contract templates utilized sporadically or limited availability of templates • Limited formal, repeatable process for consistent solicitation development • Contract managers assigned after award is made • Contract Management Guide is used sporadically to address specific questions or concerns • Undocumented "lessons learned" and "best practices" incorporated into processes • Limited planning to determine solicitation efforts, re-bid strategies • Contract processes that overlap with existing project management practices are defined, but are sporadically followed	• Contracting process standardized agency-wide • Proactive compliance enforcement • Formal templates utilized for all solicitations and contracts • Formal, repeatable process (e.g., project management methodology) for consistent solicitation development • Contract managers are involved in writing solicitation, negotiating contract, managing contract and contract closeout • The Contract Management Guide serves as a roadmap to guide the contracting process • Active collection of "lessons learned" and "best practices" are leveraged for continuous improvement • Active, formal business planning process • Standardized agency-wide contracting process is comprehensively integrated with existing standardized agency-wide project management practices	**1**. CMG Ch.1,p.1,2, CMG Ch.7,p.4, Post Award Conf. Agenda, CMG Ch.2,p.9,10, Procurement Lead Time, TGC Section 2262.051 (h). Contract Management Guide; Rules, TGC Section 2262.051(f) Contract Management Guide; Rules, TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter G: Contract Procedures, TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter C: Procurement , TPM Sect.2.4, Selecting a Procurement Method, **2**. TGC Section 2262.052 (a) Compliance With Guide **3**. CMG Intro.,p.5, Contract Mgt. Framework, Ch.2,p.1, Planning, CMG Ch.8,p.1, Contract Close Out, CMG Ch.7,p.22,23, Contract Admin. File., CMG Ch.3,p.15, Final Acceptance, TGC Section 2262.001(3) Definitions **4**. CMG Ch.7, p.2,3, Planning, TGC Section 2262.051(c). Contract Management Guide; Rules, TGC Section 2262.053. Training, CMG Ch.8,p.1, Contract Close Out, CMG Ch.7,p.22,23, Contract Admin. File., CMG Ch.3,p.15, Final Acceptance **5**. CMG Introduction,p.1,2, TGC Section 2262.051(a) Contract Management Guide; Rules.

Organization	• No structured contract management group • Contract decisions made and contracts managed by divisions/personnel "not in the know" • No coordination between divisions involved in the procurement and contracting process • Supporting team members (financial, legal, and purchasing, etc.) are not available to assist the contract manager • No involvement of the end user/customer as subject matter expert during solicitation requirements gathering • No executive support and involvement	• Contract managers assigned not always the person with the expertise or knowledge • Contracting decisions coordinated at division level, but not consistently • Sporadic coordination between contract manager, legal, procurement, etc. • Supporting team members (financial, legal, and purchasing, etc.) for any given contract assigned "ad hoc" • Limited involvement of the end user/customer as subject matter expert during solicitation requirements gathering • Executive support but limited involvement	• Contract managers within each division possess technical and/or programmatic expertise and knowledge or have the expertise and knowledge readily available to them • Contracting decisions involve all relevant parties • Coordination and input from all relevant divisions to minimize risk and maximize compliance • Contract management team members remain engaged through entire process – same staff assigned • Active involvement of the end user/customer as subject matter expert during solicitation requirements gathering • Executive support and active involvement	**1**. CMG Ch.2,p.2, Contract Mgt., TGC Section 2262.053 (A) Training, WOSG State Purchasing **2**. CMG Ch.2,p.2, Contract Mgt., CMG Ch.2,p.4, Communications Plan, CMG Ch.2,p.8, Research, CMG Ch.3,p.9, Agency's Role, CMG Ch.3,p.11, Contractor Qualifications, Ch.4,p.6, Communication w/Respondents, **3**. CMG Ch.2,p.8, Research, Ch.2,p.2, Risk Mgt., **4**. CMG Ch.2.,p.2, General Planning, Contract Mgt., CMG Ch.4,p.13, Evaluation & Award, Ch.2,p.7, Needs Assessment.
Technology	• No contract repository or very basic automated folders for contract storage • Manual compliance reviews • Developing high level reports with quality contract information is nonexistent or is very labor intensive	• Contracts repository supported at division level by basic storage system with little to no reporting capabilities • Limited ability to track compliance • High level reports have to be manually created from contract status reports or contract repository	• Contract automation system that is searchable and allows for the uploading, monitoring and automated reporting of contracts • Independent and formal mechanisms in place to track compliance for contract managers • Amendments can be approved, uploaded, and tracked online	http://www.window.state.tx.us/procurement/pub/ autopurch/cp/, TPM 2.31, Electronic State Business Daily (ESBD), TPM Sec.2.33, Centralized Master Bidders List (CMBL), WOSG, State Purchasing, Publications, Manuals and Reference Guides, On Line Purchasing System, Contract System, WOSG, State Purchasing, Publications, Reports, **2**. CMG Ch.7, p.15, Substantive Changes, WOSG State Purchasing
Performance Metrics	• No involvement from contract manager or custodial division when developing deliverables/statement of work • Poorly written, unclear or immeasurable deliverables and unclear association performance metrics and remedies or incentives • Compliance and performance measured sporadically or inconsistently	• Deliverables/statement of work developed by Legal or Procurement with minimal input from contract manager or custodial division • Unclear distinction between specifications, requirements and deliverables and performance metrics and associated remedies or incentives • Compliance and performance measured quarterly but more than monthly	• Managing division and/or contract manager solely responsible for developing deliverables with input from Legal, Procurement, etc. • Clear distinction of well-developed deliverables and performance metrics and associated remedies or incentives • Compliance and performance measured consistently at least monthly	**1**. CMG Ch.3,p.14, Reporting, p.15, Final Acceptance, Ch.3,p.4, Elements of a Deliverable, CMG Ch.3,p.9, Established Standards **2**. CMG Ch.8,p.1, Contract Close Out, CMG Ch.7,p.22,23, Contract Admin. File., CMG Ch.3,p.15, Final Acceptance **3**. CMG Ch.7,p.2, Contract Mgr. Responsibilities, CMG Ch.7,p.6-12, Monitoring Performance, CMG Ch.3,p.14, Monitoring,

Vendor Relations	• Improper or excessive communication with vendors immediately preceding and during an active solicitation phase • Little to no communication between contract manager and vendor during an active contract • No clear lines of communication of contract issues or dispute resolution	• Communication with vendors during the solicitation phase • Sporadic communication between contract manager and vendor • Contract issues improperly reported and/or resolution sporadically enforced	• Properly routed communication with potential vendors (i.e., through the purchaser) during the active solicitation phase • Frequent communication between contract manager and vendor pertaining to all aspects of contract, including issues, technical assistance and overall progress of the contract • Dispute resolution or contract issue procedures clearly defined • Advanced notice of upcoming solicitation posted to the Electronic State Business Daily (ESBD)	**1**. CMG Ch.7,p.12, Reporting, TPM Sec.2.50, Vendor Performance, WOSG State Purchasing Vendor Performance, **2**. CMG Ch.7,p.17, Dispute Resolution, TGC Chapter 2260 Resolution Of Certain Contract Claims Against The State, , TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter G: Contract Procedures
Fiscal	• Contract manager has little or no fiscal oversight capabilities • No contract manager record of payments made • No communication between Accounts Payable and Contract manager	• Contract manager approves payments • Contract manager keeps copies of approved invoices in desk file • Only communicates with Accounts Payable when there's a problem	• Contract manager approves all invoices, budget changes or fiscal amendments • Contract manager keeps a running payment log of all payments and what deliverables are covered by each payment • Contract manager routinely interacts with Accounts Payable regarding all fiscal contract matters, disputes, non-payment, etc.	**1**. CMG Intro.p.1, Purpose, CMG Ch.7,p.2, Contract Mgr. Resp., CMG Ch.7,p.8, Expenditure Document Review, CMG Ch.7,p.15,16, Substantive Changes, CMG Ch.7,p.13, Payment Approval, TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter D: Payments **2**. CMG Ch.3,p.14, Reporting, p.15, Final Acceptance, TPM Sec. 2.57, USAS Requirements, **3**. CMG Ch.7,p.13, Payment Approval, TPM 2.54, Late Pmts., TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter D: Payments
Legal	• Statutorily mandated terms and conditions are not present	• Some statutorily mandated terms and conditions are not present or regularly updated	• All statutorily mandated terms and conditions are present and regularly reviewed and updated by relevant staff	**1**. CMG Ch.1,p.1, CAT Review of Major Contracts, CMG Ch.3,p.15, Additional Issues to Consider, CMG Ch.6,p.6, Legal Elements of a Contract, CMG Ch.6,p.12,13, Contract Terms, TGC Section 2262.051(f). Contract Management Guide; Rules

Training	• Contract manager and/or purchasing staff do not have statutorily mandated training	• Purchasing staff has statutorily mandated certification (i.e., CTP, CTPM), but contract managers are not certified CTCMs	• Contract managers hold CTCM certification and purchasing staff holds CTP or CTPM certification	**1**.TPM Sec.1.1,Training & Certification, p.4, WOSG web site http://www.window.state.tx.us/procurement/prog/training-cert/cmt/training/requirements/, TGC Section 2155.078. Training And Certification Of State Agency Purchasing Personnel And Vendors, TGC Section 2262.053. Training, TPM Sec.1.1, Contract Mgr. Training **2**.TPM Sec.1.1,Training & Certification, p.3, WOSG web site http://www.window.state.tx.us/procurement/prog/training-cert/purchtrn_cert/training/training-and-certification-requirements-for-procurement-personnel/, TGC, Section 2155.078. Training And Certification Of State Agency Purchasing Personnel And Vendors, TPM Sec.1.1, Certified Texas Procurement Manager (CTPM)

Revised 8/2015

Contract Management Guide Technology Addendum

Department of Information Resources (DIR) Cooperative Contracts

The 79th Texas Legislature passed and the Governor signed legislation, H.B. 1516 that requires DIR to negotiate favorable prices for IT commodity items based on aggregate demand. IT commodity items include commercially available hardware, software, and technology services that are generally available to businesses or the public. The law further requires state agencies to buy through these contracts unless they obtain a formal exemption from DIR. This legislation should provide additional savings to other governmental entities in Texas, such as counties, cities and school districts that use DIR cooperative contracts because doing so makes good business sense.

Planning and purchasing commodity items through DIR contracts enables DIR to leverage the purchasing power of all state agencies when negotiating contracts with the vendor community. Aggregating the state's commodity purchases through common contract vehicles results in (1) reduced information technology costs, (2) decreased administrative costs, (3) maximized value, (4) common IT procurement processes, and (5) an advocate on an enterprise level.

The Cooperative Contract Program (Co-op Contracts) connects eligible customers with vendors offering deep discounts on technology products and services. All Cooperative contracts have been competitively bid in compliance with Texas state requirements. Pricing applies to all eligible public entities, regardless of the size of the office or quantity of the order. Customers may further negotiate better pricing for volume purchases and otherwise tailor the purchase through customized statements of work and service level agreements, according to individual customer needs, budgets, and projects.

Purchasing from DIR Contracts

Prior to purchasing an IT commodity item from a DIR contract, follow applicable statutes, as required, for purchasing from the Council on Competitive Government (CCG), Texas Industries for the Blind and Handicapped (TIBH), and Texas Correctional Industries (TCI) ("Set-aside Purchases").

Step 1: Identify the Technology Need
Identify the technology needs by product type, brand name, vendor name or commodity code.

Step 2: Search the DIR Website for Products and Services
There are multiple ways to find the items needed using the DIR website search. For example, customers can search by brand, keyword, contract number, product type, or commodity code. Each search will result in available contracts, if any, and include available products and services, brands, vendors/resellers, if any, and Historically Underutilized Businesses (HUBs), if any.

State Agencies only – If a state agency search produces results, they are required to purchase through the DIR contracts listed or obtain an exemption to purchase outside of the Co-op Contracts program.

Senate Bill 20, 84R (SB 20) requires state agencies to obtain a request for pricing from DIR vendors based on the expected dollar value of the contract award. Please note, the following threshold requirements are for state agencies only, excluding institutions of higher education:

• For a contract with a value of no more than $50,000, the agency may directly award a contract to DIR Cooperative Contracts vendor(s) or reseller(s).

• For a contract with a value of more than $50,000 but not more than $150,000, the agency must submit a request for pricing to at least three vendors or resellers included in the category to which the contract relates or all vendors in the category.

• For a contract with a value of more than $150,000 but not more than $1 million, the agency must submit a request for pricing to at least six vendors or resellers included in the category to which the contract relates or all vendors in the category if the category has fewer than six vendors.

• For a contract that exceeds $1 million, the agency may not enter into a contract through the DIR Cooperative Contracts program to purchase a commodity item. RFO solicitations greater than $10 million in value must be submitted to the Contract Advisory Team (CAT) for review. Electronic submission is required by accessing the CATRAD (Contract Advisory Team Review and Delegation) system on CPA Web Application Portal https://portal.cpa.state.tx.us/.

Step 3: Order

Each contract page contains vendor contact information, contract terms and conditions, a list of approved resellers (if any), and ordering instructions. Customers work directly with the vendor to finalize their purchase. Customers should request a quote* and then issue a purchase order directly to the vendor. When they receive the invoice from the vendor, customers pay the vendor directly.

Customers shall include the DIR contract number on the purchase order.

(*NOTE: State agency customers requesting a quote must follow the SB20 threshold requirements when obtaining quotes through the DIR Cooperative Contracts.)

Statement of Work Review and Approval

Senate Bill 20, 84R (SB 20) requires state agencies to submit Statements of Work (SOW) greater than $50,000 but no more than $1,000,000 to DIR for defined services beginning September 1, 2015. DIR contracts requiring SOWs include but are not limited to: Deliverables-Based Information Technology Services (DBITS), Managed Services for Information Technology, IT Security Services, and Cloud Services (if customers complete a SOW). DIR must review each SOW prior to submission to the vendor(s) and then sign each SOW before final execution. Managed Services for Telecommunications contracts have a separate review process for SOW approval, but will not require DIR signature for executing the SOW.

The requirement to submit a Statement of Work is limited to state agencies, excluding institutions of higher education.

This is the process for SOW review and approval:

1. Agencies will submit draft SOWs to DIR for review before issuing SOWs to vendor(s).
2. DIR will review the SOWs and consult with the agency as necessary to ensure the scope of the SOW is within the scope of the Master Contract/s being solicited.
3. DIR will respond via email with comments/findings/determination.
4. Once approved, the agency will submit the SOW to vendors.
5. The agency will evaluate responses and negotiate the final version of the SOW for award.
6. The agency and vendor will execute their portions of the final SOW.
7. The agency must send the signed version of the SOW to DIR for review.
8. DIR will review the final negotiated SOW to ensure it is still within the original scope and, when so, will execute the SOW and return to the agency.
9. Once executed, the agency must post the SOW on its website.

The review of the draft SOW will take thirty (30) business days or less provided all information is received. There is also an expedited process for draft SOWs.

DIR will sign final SOWs in three (3) business days if the SOW has not changed from the previously reviewed submission.

Deliverables Based IT Services (DBITS) Contracts

To support Customers in acquiring resources for information technology projects, DIR has established Deliverables Based IT Services (DBITS) Contracts that prequalify vendors to respond to SOWs across the following technology categories:

- Application Development
- Application Maintenance and Support
- Business Intelligence (BI) and Data Warehouse
- Enterprise Resource Planning (ERP)
- Independent Verification and Validation (IV&V)
- Information Technology Assessments and Planning
- Project Management
- Service Oriented Architecture (SOA)
- Technology Upgrade/Migration and Transformation

DBITS Contracts include a method to initiate work requests into the vendor pool through a Statement of Work (SOW) template (Appendix C of the Contracts). A SOW is a formal document that captures and defines the work that must be performed to meet a customer's needs and provides a commitment for all parties involved in a project.

DIR customers can also use the information provided for DBITS SOWs to develop SOWs for other types of contracts.

Process to Use a DBITS Contract - Overview

Customers should negotiate pricing of deliverables directly with vendor. The customer and the vendor(s) may work together to improve the SOW upon award, but a vendor cannot write or help write an SOW and then bid on that SOW against other vendors. The customer may negotiate the terms and conditions of a SOW to suit their business needs, as long as the SOW terms and conditions do not conflict with or weaken the terms of the Contract. A vendor may only provide services in awarded Technology Categories. In order to be awarded a Purchase Order, the vendor must respond, in writing, to an SOW for services as issued by customers, consistent with the Terms and Conditions of the Contract. The vendor may begin work ONLY after receiving: 1) a SOW signed by authorized representatives of both the customer and the vendor; and 2) a Purchase Order. The value of any one SOW may not exceed $10 million* including all extensions, renewals and change orders. A customer ***cannot*** divide up projects exceeding $10 million* into smaller SOW projects in an effort to use a DBITS Contract. A Customer cannot purchase hardware or software products and related services through any DBITS contract. Any products needed to deliver final services must be procured through another contract vehicle. Examples of such products include: Software as a Service (SaaS), subscriptions, annual license maintenance and support, and web hosting.

*Please note: For state agency customers (not including institutions of higher education), the total value of a DBITS SOW cannot exceed $1 million. In addition, DIR must review, approve and sign all SOWs greater than $50,000.

Minimum suggested items in the Statement of Work template include:

- Scope of project
- Roles and responsibilities

- Detailed description of deliverables
- Acceptance criteria, including testing or period of review
- Project completion criteria
- Project schedules to be achieved by Vendor
- Performance and service levels
- Price and payment schedules/milestones
- Assumptions

Additional Considerations include:

- Submission/format
- Reports and meetings
- Period of performance
- Customer furnished equipment and workspace
- Additional terms and conditions

Suggestions for Writing an Effective Deliverable

A deliverable should be related to the project objectives; provide unambiguous and sufficient detail so that it can be differentiated from a related deliverable; describe a standard for performance in a way that enables it to be tested to verify that it meets the standard; provide a means to trace its requirements and to monitor and ensure its quality throughout the project lifecycle; enable an acceptance process; and be tied to a compensation structure that is consistent with the work performed.

Integrate Management Practices

Depending on the size of the effort, a DBITS Statement of Work may represent the entire project or it may be a component of a larger project. Ensuring that information, such as scope, schedule, and roles and responsibilities, is consistently presented across both project and Contract deliverables will facilitate successful outcomes. Involving all stakeholders, including Information Technology, Business Lines, Contracts and Legal departments will ensure that the SOW meets the project and agency objectives. Soliciting input from state oversight entities, such as the Quality Assurance Team, and reviewing the state's Contract Management Guide will facilitate compliance.

Submitting a SOW to the Vendor Pool

Customers should send the Statement of Work to at least the minimum number of Vendors required in SB 20 that offer services in the Technology Category requested. If a Customer is not familiar with the vendors in the vendor pool for the Technology Category, it is recommended the SOW be sent to all vendors in the Technology Category. The Customer should document how many vendors received the SOW and how many responded. The goal is to ensure competition and provide the Customer the greatest opportunity at executing their SOW at the best possible price. It is important that customers be able to demonstrate how they have obtained best value through issuance and award of the SOW.

Texas Government Code (TGC) Chapter §2157.003 defines best value as the lowest overall cost of an automated information system. In determining the lowest overall cost for a purchase or lease of an automated information system, agencies should consider the following eight (8) factors:

The purchase price;
The compatibility to facilitate the exchange of data;
The capacity for expanding and upgrading to more advanced levels of technology;
Quantitative reliability factors;
The level of training required to bring persons using the system to a stated level of proficiency;
The technical support requirements for the maintenance of data across a network platform and the management of the network's hardware and software;
The compliance with applicable department statewide standards validated by criteria adopted by the department by rule; and
Applicable factors listed in TGC Sections §2155.074 and §2155.075.

Other Important Considerations for Best Value Determinations:

Installation costs;
Life cycle costs;
The quality and reliability of the goods and services;
Delivery terms;
Indicators of probable vendor performance such as past performance, the contractor's financial status and ability to perform, the contractor's experience or demonstrated capability, and the contractor's ability to provide reliable maintenance agreements and support;
The cost of employee training associated with a purchase;
The effect of a purchase on agency productivity; and
The contractor's anticipated economic impact to the state or a subdivision of the state, including potential tax revenue and employment.

Evaluating Responses

Customers should detail in the SOW the criteria they will use to evaluate vendor responses. Customers should document the evaluation scores and award decision. Awards should be based on best value to the Customer. Customers have the ability to evaluate and select the vendor providing the best solution for the best value.

Negotiating with the Vendor

The Customer should negotiate pricing of deliverables directly with the Vendor. The Customer and Vendor may work together to improve the SOW, however, the Customer needs to ensure that the Vendor is not making changes to SOW elements meant to be used to manage the relationship later. The Customer may negotiate the terms and conditions of an SOW to suit their business needs, however, negotiated terms and conditions MUST NOT conflict with or weaken the terms of the DBITS Contract. For example, rather than rewriting the invoice and payment instructions, the customer should reference the section on payment and invoicing in the DIR contract.

Awarding and Initiating Work

In order to be awarded a Purchase Order, the Vendor must respond, in writing, to the SOW for services as issued by customers, consistent with the Terms and Conditions of the Contract. The vendor may begin work ONLY after receiving an SOW signed by authorized representatives of both the Customer and the Vendor and a Purchase Order from the Customer. The value of any one SOW may not exceed $10 million* including all extensions, renewals and change orders.

*Please note: For state agency customers (not including institutions of higher education), the total value of a DBITS SOW cannot exceed $1 million. In addition, DIR must review, approve and sign all SOWs greater than $50,000.

Monitoring Responsibilities

One responsibility of the contract manager is to develop and monitor the project schedule, including the achievement of major milestones and overall project pace. Budget review is also key. The contract manager should view cost variances (% of budget vs % completion). It is extremely important to track the quality of vendor performance against agreed specifications and delivery. Finally, the contract manager should perform regular risk reviews to identify outstanding actions, reassess risk probability and impact, remove risks that have passed, and identify any new risks that have surfaced.

Documenting Vendor Performance

Documenting Vendor performance is extremely important, particularly in the event that a customer encounters problems with a deliverable or with Vendor performance in general. Documentation will be required if a customer decides that payment should be withheld. There are numerous ways to document Vendor performance, including:

- Observational record
- Compliance record
- Discrepancy record
- Summary evaluation record
- Contractor status report
- Surveys

For all Purchase Orders exceeding $25,000, state agencies must report Vendor performance to the Texas Comptroller's Office in the Vendor Performance Tracking System *(*TGC §2262.055 and 34 TAC *§20.108).* The Comptroller's Office instructs agencies that Vendor performance should be reported within 30 days of the end of the performance period or the occurrence of a specific incident that warrants reporting.

Verbal Change Orders are Unenforceable

It is important to not introduce additional risk through unintentional actions that may affect the SOW. Retain the power of the SOW by adhering to, and managing the provisions of the SOW. Document all items and issues that might impact the project scope of work and the integrity of the original SOW. Manage and control items and issues through formal change management processes.

Statement of Work Changes

It is the responsibility of the contract manager to manage the SOW. Even with good contract management skills, changes may be necessary over the course of delivery. Change orders typically represent instructions from the customer to the vendor to change tasks, standards or methods (although both parties can seek to initiate a change order). An amendment to an SOW must specify that it holds the highest order of precedence in that SOW. Formal Changes are changes to the original SOW resulting from the contract manager's actions or directions that impact the cost or schedule for performance. Often referred to as an Amendment, a Formal Change is within the scope of the original SOW. The ability to make a change should be documented in the SOW, noting the types of changes the Contract Manager can direct, the procedures for ordering changes, and the provisions for equitable

adjustment to the SOW amount, or period of performance if there is a resultant change in cost or schedule.

Deliverable Acceptance

If deliverables do not meet documented quality standards, the Customer does not have to accept them. Vendor has to remedy identified defects. Since payments are tied to acceptance, then the Customer does not pay until they are accepted. The Customer should not withhold approval without reason, but should be clear that deliverables acceptance is based on meeting the requirements and standards specified in the SOW.

Managing Issues and Disputes

The effectiveness with which issues and disputes managed is tied to the extent to which they were addressed in the planning phase. When issues or disputes arise, a customer must act expediently to address them. Some issues are simple and can be dealt with directly by the project lead, in consultation with the contract manager. Other issues may be more complicated and require escalation. The Customer should always seek the most effective way to address the issue and get project performance back on track. To dispute payment of invoices, Customers should refer to Chapter 2251, Texas Government Code.

Developing a Corrective Action Plan

If quality suffers and the project quality does not meet expectations, the customer can require the vendor to develop a Corrective Action Plan. The customer can identify deficiencies or lack of alignment with the SOW that require formal documentation. The vendor should describe the corrective actions that will take place, and the Corrective Action Plan is incorporated into the SOW. The Customer then uses it to capture and track milestones.

Termination

In extreme cases it is sometimes necessary to end a SOW before the period of performance ends. The premature ending is referred to as Termination and can take several forms. Two of these include Termination for Convenience and Termination for Cause. Termination should begin only after sufficient consideration and consultation, as the consequences for both parties can be substantial.

Termination for Convenience

Termination for Convenience is a provision of the Contract that allows the Customer to end the SOW at its discretion with no cause. It is not intended as a reflection of the vendor's performance. This is typically done when the scope of the project changes and future work is no longer required.

Termination for Cause

Termination for Cause is a provision of the Contract that allows either party the right to cancel the SOW due to failure of the other party to execute to SOW requirements. If initiated by the Customer, Termination for Cause requires the Customer to demonstrate that the vendor will be unable to cure the performance issues identified.

Issue Escalation*

The customer should attempt to resolve the problem by working with the vendor's on-site supervisor/ lowest possible management level. The customer contacts the vendor higher level off-site manager to resolve the performance issue or a meeting is convened with the customer, vendor, contract manager,

purchaser, and others as required. If the problem is severe enough, legal representation may be necessary. Action is taken in accordance with SOW provisions and applicable laws. Examples include invoking financial penalties, service credits, per the SOW. Further actions may include DBITS Contract provisions, such as a Notice to Cure. The contract manager working with purchaser and Legal initiate steps toward SOW Termination. The customer may notify DIR to help validate that the customer is invoking appropriate methods for terminating the SOW under the Contract.

*In accordance with TGC §2262.055, for Purchase Orders exceeding $25,000, a state agency must report vendor performance in the Comptroller's Vendor Performance Tracking System, and should report this information within 30 days of a specific incident that warrants reporting.

Other Resources

The Texas Procurement and Support Services Division (TPASS) of the Texas Comptroller of Public Accounts Contract Management Guide provides best practices for contract management, including purchasing payment methods, performance monitoring, conducting risk analysis and change management. It also offers recommendations for improvement existing Contract management processes and practices.

For major information resources projects, DIR has developed the Texas Project Delivery Framework, which establishes a consistent, statewide method for project selection, control, and evaluation based on alignment with business goals and objectives. It also ensures that state agency heads have the tools and information to guide technology deployment towards the right business outcome.

Cloud Services

Cloud computing delivers managed information technology (IT) services. This approach provides convenient, on-demand delivery of information, as well as IT flexibility, efficiency, and cost savings for government. Texas agencies and institutions for higher education (agencies) are authorized and encouraged to consider cloud services for information resource projects. The 83rd Legislature, through passage of House Bill 2422 (Gonzalez), authorized state agencies to consider cloud services for major information resource projects.

Although cloud services are relatively new in the public sector, the model has been tested and is sufficiently mature to be adopted by Texas agencies (see Lessons Learned: Pilot Texas Cloud Offering). DIR has developed tools and resources for agencies to evaluate cloud solutions and determine benefits and appropriateness of such solutions, including the Texas Cloud Services Guide.

Cloud services can be highly beneficial when properly implemented in appropriate circumstances, but they are not the answer to every IT need. Cloud services can pose their own special risks, as can any powerful and innovative service delivery model. Agencies should always examine all the issues relevant to their data and circumstances before determining whether and how to implement a cloud solution.

Information Technology Staffing Augmentation Contracts (ITSAC)

IT Staffing Services contracts provide for temporary IT staffing augmentation services on an hourly basis.

IT Staffing Services contracts do not provide for deliverables-based, outsourced systems integration or application development projects, requiring acceptance of a Statement of Work or authorization for payment of milestone tasks. Agencies should proceed with those procurements through DIR's Deliverables-Based IT Services contracts.

For State Agencies Only: SB 20 does not require state agencies to obtain DIR's signature on a resulting Purchase Order when using an IT Staffing Services contract. There are two processes to procure IT Staffing Services, the Competitive Solicitation Process and the Best Value Process:

- For the Best Value Process, the SB 20 threshold requirements apply to IT Staffing Services contracts; however, state agencies are still required to obtain a quote from two ITSAC vendors (including one quote from the Texas Industries for the Blind and Handicapped) to fulfill the $50,000 or less requirement.
- For the Competitive Solicitation Process, DIR will solicit responses from all ITSAC vendors for a selected labor category. This process will ensure that state agencies will have met all pricing request threshold requirements of SB 20.

Step-by-step instructions for the Competitive Solicitation Process and the Best Value Process are located on the DIR website.

Exemption Guidelines

Exemption Guidelines for IT Commodity Items through DIR Cooperative Contracts (State Agencies only):

1. **Search the DIR Website:** If the IT commodity item is not available on DIR contracts, the state agency shall print the page showing that it received no search results to include in the procurement file. Next, the state agency shall review the list of current blanket exemptions to determine if there is a blanket exemption that applies to the IT commodity to be procured.

2. **Review Blanket Exemptions:** DIR establishes blanket exemptions allowing state agencies to procure certain IT commodities without using a DIR contract. If a state agency decides to proceed with its IT commodity procurement under a blanket exemption, the procurement must be made in accordance with the exact scope, terms, and requirements specified in the Cooperative Contracts Blanket Exemptions.

3. **Submit a one-time exemption request and obtain approval from DIR if**:
   - (1) a Cooperative Contract does not exist to meet a state agency's needs; and
   - (2) a blanket exemption does not exist, or if the scope, terms, and requirements of an existing blanket exemption do not meet the state agency's needs
   - (3) then the state agency must request a one-time exemption to perform their own procurement by completing and submitting an electronic Exemption Request form http://dir.force.com/ExemptionRequest.
   - For more information about the exemption process, please visit the DIR website.

DIR Enterprise Contracts

Data Center Services Contracts

In 2005, the 79th Texas Legislature passed House Bill 1516[4] directing DIR to establish a consolidated data center, by which DIR would offer consolidated data center services to state agencies. The DCS program currently has three contracts:

- A multi-sourcing service integrator to administer and coordinate services on behalf of DCS customers.
- One service provider providing service for four service components: Server, Mainframe, Network, and Data Center Operations.
- One service provider providing service for the Print/Mail Service Component.

The current DCS contracts were awarded in 2011 and are available online at DIR's website.

[4] Codified under Texas Government Code, Chapter 2054, Subchapter L Statewide Technology Centers.

DIR-DCS-MSI-MSA-001
Capgemini is the Data Center Services (DCS) Multi-Sourcing Integrator (MSI). Capgemini's role is to integrate and manage the services of the Service Component Providers for the five DCS technology services: Server, Mainframe, Network, Data Center and Print/Mail. Capgemini also provides service level management, service desk support, program management, business continuity, disaster recovery testing and planning, and financial management. Texas State Agencies and local governments are eligible customers for the DCS program which enables them to access data center computing as a managed services. DCS Customer are able to pay for the amount of services used, rather than owning hardware, software, and hiring staff to operate and maintain IT infrastructure at an individual agency level.

DIR-DCS-SCP-MSA-002
Xerox State and Local Solution, Inc. (XSLS) is one of the Data Center Services (DCS) Service Component Provider (SCP). XSLS delivers infrastructure services for mainframes, servers, networks and data center operations. Texas State Agencies and local governments are eligible customers for the DCS program which enables them to access data center computing as a managed services. DCS Customers are able to pay for the amount of services used, rather than owning hardware, software, and hiring staff to operate and maintain IT infrastructure at an individual agency level.

DIR-DCS-SCP-MSA-003
Xerox Corporation is one of the Data Center Services (DCS) Service Component Provider (SCP). Xerox provides bulk printing and mailing services. Texas State Agencies and local governments are eligible customers for the DCS program which enables them to access data center computing as a managed services. DCS Customers are able to pay for the amount of services used, rather than owning hardware, software, and hiring staff to operate and maintain IT infrastructure at an individual agency level.

Texas.gov

Texas.gov is a public/private partnership between DIR and Texas NICUSA, LLC. The program offers payment processing, custom application development, operational and infrastructure support, customer service, marketing, and analytic reporting. Additionally, the Texas Veterans Portal and Texas Open Data Portal are operated through the Texas.gov program. To participate as a customer and use Texas.gov services, three party Customer Agreements are executed between the customer, Texas NICUSA, and DIR. Only Texas state agencies and other entities defined as customers in the Master Agreement may be eligible to participate. There are no resellers for this program.

TEX-AN NG/ Telecommunication Contracts

The DIR TEX-AN NG contracts operate on an Enterprise level. This means the firm-fixed rates for services are standard across all customer entities and require vendors to provide services to eligible customers at the rate negotiated and stated in the contract. DIR also administers a Customer Command and Control (C3) portal where customers can review and validate TEX-AN pricing, and in some cases compare pricing across all TEX-AN vendors. For access to the portal, email c3admin@dir.texas.gov to set up an account. These contracts provide some services directly from the vendor with services ordered, managed and billed by DIR.

In addition to the TEX-AN NG contracts, DIR also provides wireless services, conferencing services and telecom managed services within its Telecommunications portfolio. The wireless service contracts and conferencing contracts operate much like the DIR Co-Op contracts, where the customer identifies the vendor they would like to use and submits a purchase order directly to the vendor. The telecom managed services contracts operate much like the DBITS contracts in that the customer develops a SOW sends it to DIR contracted vendors. To obtain "best value" for the state, customers using the telecom managed services contracts should submit the SOW to a minimum of three (3) telecom managed services vendors. Vendors are required to submit all telecom managed services SOW's to DIR for approval prior to finalizing

with customer and prior to conducting any work. Telecom managed services SOW's should be sent to telemanagedservices@dir.texas.gov for review and approval. **Texas Project Delivery Framework**

As defined by Texas Government Code, Section 2054.003(10):

- *A major information resources project is any IR technology project identified in a state agency's biennial operating plan whose development costs exceed $1 million and that:*
- requires one year or longer to reach operations status
- involves more than one state agency; OR
- substantially alters work methods of state agency personnel or the delivery of services to clients, It also includes any IR technology project designated by the legislature in the General Appropriations Act as a major IR project.

The Texas Project Delivery Framework (Framework) establishes a consistent, statewide method for major IR project selection, control, and evaluation based on alignment with business goals and objectives. The Framework is required for major IR projects as defined above. Agencies may contact DIR by emailing projectdelivery@dir.texas.gov to request consultation on applicability of Framework requirements. Refer to the DIR website for detailed information regarding Framework guidance and tools for technology-based procurement projects.

One of the Framework components is Solicitation and Contracting. The Solicitation and Contracting includes development and management of technology-based solicitations and contracts. The Solicitation and Contracting activities and the Project Planning activities work in conjunction with the practices described in the Guide.

A Project Plan (Framework tool) must be finalized, approved at the agency level, and submitted to the Quality Assurance Team (QAT) prior to spending more than 10 percent (10%) of the funds allocated to a project and/or prior to issuance of a vendor solicitation for the project. Agencies must use the Project Plan to document planning, management, and control activities that support the project from start-up through closure.

The Acquisition Plan is a subset of the Project Plan and describes the activities to acquire goods and/or services from outside the organization. The Acquisition Plan addresses activities for solicitation planning, solicitation development and posting, source selection, contract award, contract management, and contract closeout. As a subset of project management activities defined in the Project Plan, managing a technology-based procurement project relies on activities (e.g., risk management, change control, project monitoring, and performance management).

An Acquisition Plan must be finalized, approved at the agency level, and submitted to the Quality Assurance Team (QAT) prior to issuance of a solicitation for the project. The agency head must approve contract amendment and change orders if the amendment or change order changes the contract amount above 10 percent or significantly changes the contract completion date as determined by the QAT. The Contract Amendment and Change Order Approval are used to approve funding for contract amendment and change orders.

Conclusion

DIR makes frequently updates to its website in response to changes in legislation, policies and procedures, and new contract initiatives. Please visit the DIR website for the most current information or contact DIR with any questions or concerns at (512) 475-4700.

ESSENTIAL CLAUSES AND PROVISIONS

Abandonment or Default

If the contractor defaults on the contract, [*agency name*] reserves the right to cancel the contract without notice and either re-solicit or re-award the contract to the next best responsive and responsible respondent. The defaulting contractor will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work significantly changed. The period of suspension will be determined by the agency based on the seriousness of the default.

Affirmation Clauses

These clauses are usually included in the Execution of Proposal (see **Appendix 1**) which is a part of the solicitation document. If the solicitation document does not contain an Execution of Proposal, then these clauses should be included in the contract document. All of these provisions are not required for every type of contract. Agencies should evaluate each of the following provisions for applicability to individual procurements.

By signature hereon, the respondent certifies that:

All statements and information prepared and submitted in the response to this RFP are current, complete and accurate.

He/she has not given, offered to give, not intends to give at any time hereafter, any economic opportunity, future employment, gift, loan gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response.[lxxv]

Failure to sign the Execution of Proposal or signing it with a false statement shall void the submitted offer or any resulting contracts.

Neither Respondent nor firm, corporation, partnership, or institution represented by Respondent or anyone acting for such firm, corporation, or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated the contents of this Proposal either directly or indirectly to any competitor or any other person engaged in the same line of business during the procurement process for this RFP.

When a Texas business address show hereon that address is, in fact, the legal business address of Respondent and Respondent qualifies as a Texas Resident Bidder under Texas Administrative Code, Title 34, Part 1, Chapter 20.

Under Texas Government Code, 2155.004, a state agency may not accept a bid or award a contract that includes proposed financial participation by a person who received compensation from the agency to

participate in preparing the specifications or request for proposals on which the bid or contract is based. If the Respondent is not eligible, then any contract resulting from this RFP shall be immediately terminated. Furthermore, "under Section 2155.004, Texas Government Code, the vendor [Respondent] certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate."

Under Family Code § 231.006, relating to child support obligations, Respondent and any other individual or business entity named in this solicitation are eligible to receive the specified payment and acknowledge that this contract may be terminated and payment withheld if this certification is inaccurate.

Any Proposal submitted under this RFP shall contain the names and social security numbers of person or entity holding at least a twenty-five percent (25%) ownership interest in the business entity submitting the Proposal.

Name:	**Social Security Number:**
Name:	**Social Security Number:**
Name:	**Social Security Number:**

In accordance with Texas Government Code Section 669.003 (relating to contracting with executive head of a state agency), by signature hereon, Respondent certifies that it:

(A) (1) is not the executive head of the agency contracting herein;
(2) was not at any time during the past four years the executive head of the agency contracting herein; and (3) does not employ a current or former executive head of a state agency; or
(B) Respondent and the agency contracting herein have complied with the requirements of the above referenced statute concerning board approval and notice to the Legislative Budget Board.

Respondent acknowledges that this Contract may be terminated at any time, and payments withheld, if this certification is false.

Respondent agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas.

{Insert agency name here} is federally mandated to adhere to the directions provided in the President's Executive Order (EO) 13224, Executive Order on Terrorist Financing – Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross referencing respondents/vendors with the Federal General Services Administration's Excluded Parties List System (EPLS), http://www.epls.gov, which is inclusive of the United States Treasury's Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

Respondent certifies that the responding entity and its principals are eligible to participate in this transaction and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity and that Respondent is in compliance with the State of Texas statutes and rules relating to procurement and that Respondent is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at http://www.epls.gov.

Under Section 2155.006(b) of the Texas Government Code, a state agency may not accept a bid or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five year period preceding the date of the bid or award, has been: (1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005. Under Section 2155.006 of the Texas Government Code, the bidder certifies that the individual or business entity named in this bid is not ineligible to receive the specified contract and acknowledges that any contract resulting from this IFB may be terminated and payment withheld if this certification is inaccurate. Pursuant to Section 2262.154of the Texas Government Code, the state auditor may conduct an audit or investigation of the vendor or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the Respondent or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Respondent or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. Respondent will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the vendor and the requirement to cooperate is included in any subcontract it awards.

Antitrust

Neither Respondent nor firm, corporation, partnership, or institution represented by Respondent or anyone acting for such firm, corporation, or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated the contents of this Proposal either directly or indirectly to any competitor or any other person engaged in the same line of business during the procurement process for this RFP.

Applicable Law; Venue

This Contract shall be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit arising under this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

Buy Texas

In accordance with Texas Government Code, Section 2155.4441, the State of Texas requires that during the performance of a contract for services, Contractor shall purchase products and materials produced in the State of Texas when available at a price and time comparable to products and materials produced outside the state.

Confidential Information (Essential for Client Services)

Notwithstanding any provisions of this Contract to the contrary, Contractor understands that *{Insert agency name here}* will comply with the Texas Public Information Act, Texas Government Code, Chapter 552 as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. *{Insert agency name here}* agrees to notify Contractor in writing within a reasonable time from receipt of a request for information related to Contractor's work under this contract. Contractor will cooperate with *{Insert agency name here}* in the production of documents responsive to the request. *{Insert agency name here}* will make a determination whether to submit a Public Information Act request to the Attorney General. Contractor will notify *{Insert agency name here}* General Counsel within twenty-four (24) hours of receipt of any third party requests for information that was provided by the State of Texas for use in performing the Contract. This Contract and all data and other information generated or otherwise.

The Comptroller of Public Accounts recommends that pursuant to SB 1368, state governmental entities include the following language in their contracts**:** "**Contractor is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the state**." In addition to this recommended language, the Comptroller also advises that in order to ***comply with the new statutory requirements***, each state governmental entity should supplement this provision with the additional terms agreed upon by the parties regarding the specific format by which the vendor is required to make the information accessible by the public.

Dispute Resolution

The dispute resolution process provided for in Texas Government Code*,* Chapter 2260 shall be used by *{Insert agency name here}* and Contractor to resolve any dispute arising under the Contract.

The dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, to attempt to resolve a claim for breach of contract asserted by the Respondent under the Contract. If the Respondent's claim for breach of Contract cannot be resolved by the Parties in the ordinary course of business, it shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, the Respondent shall submit written notice, as required by Chapter 2260, to the Deputy Comptroller or his or her designee. The notice shall also be given to the individual identified in the Contract for receipt of notices. Compliance by the Respondent with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

The contested case process provided in Chapter 2260 is the Respondent's sole and exclusive process for seeking a remedy for an alleged breach of Contract by the {Insert agency name here} if the Parties are unable to resolve their disputes as described above.

Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civil Practices and Remedies Code. Neither the execution of the Contract by the {Insert agency name here} nor any other conduct of any representative of the {Insert agency name here} relating to the Contract shall be considered a waiver of sovereign immunity to suit.

For all other specific breach of contract claims or disputes under the Contract, the {Insert agency name here} and the Respondent shall first attempt to resolve them through direct discussions in a spirit of

mutual cooperation. If the Parties' attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by the {Insert agency name here} and the Respondent within fifteen (15) days after written notice by one them demanding mediation under this Section. The Respondent shall pay all costs of the medication unless the {Insert agency name here} in its sole good faith discretion, approves its payment of all or part of such costs. By mutual agreement, the {Insert agency name here} and the Respondent may use a non-binding form of dispute resolution other than mediation. The purpose of this Section is to reasonably ensure that the {Insert agency name here} and the Respondent shall, in good faith, utilize mediation or another non-binding dispute resolution process before pursuing litigation. The {Insert agency name here} participation in, or the results of, any mediation or other non-binding dispute resolution process under this Section or the provisions of this Section shall not be construed as a waiver by the {Insert agency name here} of (1) any rights, privileges, defenses, remedies or immunities available to the {Insert agency name here} as an agency of the State of Texas or otherwise available to the {Insert agency name here}; (2) the {Insert agency name here} termination rights; or (3) other termination provisions or expiration dates of the Contract.

Notwithstanding any other provision of the Contract to the contrary, unless otherwise requested or approved in writing by the {Insert agency name here} the Respondent shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, the Respondent may suspend performance during the pendency of such claim or dispute if the Respondent has complied with all provisions of Section 2251.051, Texas Government Code, and such suspension of performance is expressly applicable and authorized under that law.

Force Majeure

Neither Contractor nor *{Insert agency name here}* shall be liable to the other for any delay in, or failure of performance, of any requirement included in any PO resulting from this RFP caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force majeure is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

Funding Out Clause

Short version

This contract is contingent upon the continued availability of funding. If funds become unavailable through lack of appropriations, legislative or executive budget cuts, amendment of the Appropriations Act, state agency consolidations, or any other disruptions of current appropriations, provisions of the Termination Article shall apply.

In addition, state agencies are prohibited from incurring obligations in excess of amounts lawfully appropriated by the Texas Legislature over the course of a biennium. See Excess Obligations.

(http://www.window.state.tx.us/procurement/pub/manual/2-24.pdf)

Long version

All obligations of the [agency] and Customers are subject to the availability of legislative appropriations, and for Customers expending federal funds, to the availability of the federal funds applicable to the Contract. The respondent acknowledges that the ability of the [agency] and the Customers to make payments under the Contract is contingent upon the continued availability of funds. The Respondent further acknowledges that funds may not be specifically appropriated for the Contract and the [agency] or Customers continual ability to make payments under the Contract is contingent upon the funding levels appropriated to the agency or Customer. The [agency] and the Customers will use all reasonable efforts to ensure that such funds are available. The Respondent agrees that if future levels of funding for the [agency] or a Customer are not sufficient to continue operations without any operational reductions, the [agency] or the Customer, in its discretion, may terminate the Contract or a pending order under the Contract, either in whole or in part or that appropriate state officials eliminated to agency or agency Customers. In the event of such termination, the [agency] or the Customer will not be considered to be in default or breach under the Contract, not shall it be liable for any further payments ordinarily due under the Contract, nor shall it be liable for any damages or any other amounts which are caused by or associated with such termination. The [agency] and the Customer shall make best efforts to provide reasonable written advance notice to the Respondent of any such Contract or order termination. In the event of such a termination, the Respondent shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination, either on the particular order if an order is being terminated, or the Contract, if the Contract is being terminated. The [agency] or the Customer shall be liable for payments limited only to the portion of work the [agency] or the Customer authorized in writing and which the Respondent has completed, delivered to the [agency] or Customer, and which has been accepted by the [agency] or Customer. All such work shall have been completed, per the Contract requirements, prior to the effective date of termination.

Indemnification/Damage Claims

Acts or Omissions

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

Infringements

a) Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES from any and all third party claims involving infringement of United States patents, copyrights,

trade and service marks, and any other intellectual or intangible property rights in connection with the PERFORMANCES OR ACTIONS OF VENDOR PURSUANT TO THIS CONTRACT. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. VENDOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL.

b) Vendor shall have no liability under this section if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without Vendor's written approval, (iii) any modifications made to the product by the Vendor pursuant to Customer's specific instructions, (iv) any intellectual property right owned by or licensed to Customer, or (v) any use of the product or service by Customer that is not in conformity with the terms of any applicable license agreement.

c) If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense; (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing.

Taxes/Workers' Compensation/Unemployment Insurance – Including Indemnity

1) VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, VENDOR SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF VENDOR'S AND VENDOR'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS CONTRACT. VENDOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. THE CUSTOMER AND/OR THE STATE SHALL NOT BE LIABLE TO THE VENDOR, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

2) VENDOR AGREES TO INDEMNIFY AND HOLD HARMLESS CUSTOMERS, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, AND/OR ASSIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEYS' FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION IN ITS PERFORMANCE UNDER THIS CONTRACT. VENDOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

Independent Contractor

Contractor or Contractor's employees, representatives, agents and any subcontractors shall serve as an independent contractor in providing the services under any PO resulting from this RFP. Contractor or Contractor's employees, representatives, agents and any subcontractors shall not be employees of *{Insert agency name here}.* Should Contractor subcontract any of the services required in this RFP, Contractor expressly understands and acknowledges that in entering into such subcontract(s), *{Insert agency name here}* is in no manner liable to any subcontractor(s) of Contractor. In no event shall this provision relieve bidder of the responsibility for ensuring that the services rendered under all subcontracts are rendered in compliance with this RFP.

Ownership/Intellectual Property, including Rights to Data, Documents and Computer Software

For the purposes of this Contract, the term "Work" is defined as all reports, statistical analyses, work papers, work products, materials, approaches, designs, specifications, systems, documentation, methodologies, concepts, research, materials, intellectual property or other property developed, produced, or generated in connection with this Contract. All work performed pursuant to this Contract is made the exclusive property of *{Insert agency name here}*. All right, title and interest in and to said property shall vest in *{Insert agency name here}* upon creation and shall be deemed to be a work for hire and made in the course of the services rendered pursuant to this Contract. To the extent that title to any such work may not, by operation of law, vest in *{Insert agency name here}*, or such work may not be considered a work made for hire, all rights, title and interest therein are hereby irrevocably assigned to *{Insert agency name here}*. *{Insert agency name here}* shall have the right to obtain and to hold in its name any and all patents, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. Contractor must give *{Insert agency name here}* and/or the State of Texas, as well as any person designated by *{Insert agency name here}* and/or the State of Texas, all assistance required to perfect the rights defined herein without any charge or expense beyond those amounts payable to Contractor for the services rendered under this Contract.

Contractor shall maintain and retain supporting fiscal and any other documents relevant to showing that any payments under this Contract funds were expended in accordance with the laws and regulations of the State of Texas, including but not limited to, requirements of the Comptroller of the State of Texas and the State Auditor. Contractor shall maintain all such documents and other records relating to this Contract and the State's property for a period of seven (7) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. Contractor shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the "Work" as defined in paragraph 11.30 of this Contract. Contractor and the subcontractors shall provide the State Auditor with any information that the State Auditor deems relevant to any investigation or audit. Contractor must retain all work and other supporting documents pertaining to this Contract, for purposes of inspecting, monitoring, auditing, or evaluating by *{Insert agency name here}* and any authorized agency of the State of Texas, including an investigation or audit by the State Auditor.

Contractor shall cooperate with any authorized agents of the State of Texas and shall provide them with prompt access to all of such State's work as requested. Contractor's failure to comply with this Section shall constitute a material breach of this Contract and shall authorize the *{Insert agency name here}* and the State of Texas to immediately assess appropriate damages for such failure. Pursuant to Government Code, 2262.154 the acceptance of funds by Contractor or any other entity or person directly under this

Contract, or indirectly through a subcontract under this Contract, shall constitute acceptance of the authority of the State Auditor to conduct an audit or investigation in connection with those funds. Contractor acknowledges and understands that the acceptance of funds under this Contract shall constitute consent to an audit by the State Auditor, Comptroller or other agency of the State of Texas. Contractor shall ensure that this paragraph concerning the State's authority to audit funds received indirectly by subcontractors through Contractor and the requirement to cooperate is included in any subcontract it awards. Furthermore, under the direction of the legislative audit committee, an entity that is the subject of an audit or investigation by the State Auditor must provide the State Auditor with access to any information the State Auditor considers relevant to the investigation or audit.

Payment

Prior to authorizing payment to Contractor, *{Insert agency name here}* shall evaluate Contractor's performance using the performance standards set forth in all documents constituting this Contract. Contractor shall provide invoices to *{Insert agency name here}* for Commodities/Services provided/performed. Invoices must be submitted not later than the 15th day of the month after the Services are completed. No payment whatsoever shall be made under this contract without the prior submission of detailed, correct invoices. Subject to the foregoing, *{Insert agency name here}* must make all payments in accordance with the Texas Prompt Payment Act, Texas Government Code, Chapter 2251. Payments under this Contract are subject to the availability of appropriated funds. Contractor acknowledges and agrees that payments for services provided under this Contract are contingent upon *{Insert agency name here}* receipt of funds appropriated by the Texas Legislature.

Right to Audit

Pursuant to Section 2262.154 of the Texas Government Code, the state auditor may conduct an audit or investigation of the vendor or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the Respondent or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Respondent or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. Respondent will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the vendor and the requirement to cooperate is included in any subcontract it awards.

Technology Access Clause

1) Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.

2) Vendor shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard"

(http://www.buyaccessible.gov). Vendors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at http://www.section508.gov/.

Term of Contract

CONTRACT TERM. The services requested shall be provided for a period of _____ *[state initial term, ex. Two (2) years],* beginning _____ *[insert start date]*, or the last signature date, whichever is later, and ending _____ *[Length of contract term should not extend past end of biennium in which execution of contract occurs,* i.e. *no later than August 31, 20XX]*. *[If applicable, include the following]* This contract may be renewed for up to *[state renewal options, ex. three (3) one (1) year renewal options]* upon mutual agreement of the parties to be evidenced in writing prior to the expiration date of the initial term. *[Length of renewal term should run so it expires within biennium]* At the sole option of {Insert agency name here} the Contract may be extended as needed, not to exceed a total of {Insert extension period} months.

Termination

This Contract shall become effective on the date signed by the appropriate official of *{Insert agency name here}* and shall expire on _____unless otherwise sooner terminated as provided in this Contract. Notwithstanding the termination or expiration of this Contract, the provisions of this Contract regarding confidentiality, indemnification, transition, records, right to audit and independent audit, property rights, dispute resolution, invoice and fees verification, and default shall survive the termination or expiration dates of this Contract. *{Insert agency name here}* may, in its sole discretion, terminate this Contract upon thirty (30) days' written notice to Contractor. Such notice may be provided by facsimile or certified mail; return receipt requested and is effective upon Contractor's receipt.

Convenience

{Insert agency name here} may, in its sole discretion, terminate this Contract upon thirty (30) days' written notice to Contractor. Such notice may be provided by facsimile or certified mail return receipt requested and is effective upon Contractor's receipt. In the event of such termination, the Respondent shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination. Customers shall be liable only for payments for any goods or services ordered from the Respondent before the termination date.

Cause/Default

If the Respondent fails to provide the goods or services contracted for according to the provisions of the Contract, or fails to comply with any terms or conditions of the Contract. {Insert agency name here} may, upon written notice of default to the Respondent, immediately terminate all or any part of the Contract. Termination is not an exclusive remedy, but will be in addition to any other rights and remedies as provided in equity, by law or under the Contract. {Insert agency name here} may exercise any other right, remedy, or privilege which may be available to it under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the Contract. The exercise of any of the foregoing remedies will not constitute a termination of the Contract unless {Insert agency name here} notifies the Respondent in writing prior to the exercise of such remedy. The Respondent shall be liable for all costs and expenses, including court costs, incurred by {Insert agency name here} with respect to the enforcement of any of the remedies listed herein.

Rights upon Termination or Expiration

In the event that the Contract is terminated for any reason, or upon its expiration, the {Insert agency name here} and Customers shall retain ownership of all associated work products and documentation obtained from the Respondent under the Contract.

Survival of Terms

Termination of the Contract for any reason shall not release the Respondent from liability or obligation set forth in the Contract that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including the provisions regarding confidentiality, indemnification, transition, records, audit, property rights, dispute resolution, invoice and fees verification.

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RECOMMENDED CLAUSES

Assignment

Without the prior written consent of *{Insert agency name here}* Contractor may not assign this Contract, in whole or in part, and may not assign any right or duty required under it.

Drug Free Workplace Policy

Contractor represents and warrants that is shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (41 U.S.C. §§ 8101-8106 and maintain a drug-free work environment; and the final rule, government-wide requirements for drug-free work place (grants), issued by the Office of Management and Budget (C.F.R. Part 182) to implement the provisions of the Drug-Free Work Place Act of 1988 is incorporated by reference and the Contractor shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

Insurance

Contractor represents and warrants that it will, within five (5) business days of executing this agreement, provide *{Insert agency name here}* with current certificates of insurance or other proof acceptable to *{Insert agency name here}* of the following insurance coverage:

Standard Workers Compensation Insurance covering all personnel who will provide services under this Contract;

Commercial General Liability Insurance, personal injury and advertising injury with, at a minimum, the following limits: $500,000 minimum each occurrence; $1,000,000 per general aggregate.

Contractor represents and warrants that all of the above coverage is with companies licensed in the state of Texas, with “A” rating from Best, and authorized to provide the corresponding coverage. Contractor also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least thirty (30) days prior written notice to *{Insert agency name here}*. Contractor represents and warrants that it shall maintain the above insurance coverage during the term of this Contract, and shall provide *{Insert agency name here}* with an executed copy of the policies immediately upon request.

Notice

Any written notices required under this Contract will be by either hand delivery to Contractor’s office address specified on Page 1 of this Contract or by U.S. Mail, certified, return receipt requested, to *[Insert appropriate agency name and mailing address here].* Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this Section by written notification to the other party.

Order Precedence

In the event of conflicts or inconsistencies between this contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority: Signed Contract (or Notice of Award), Attachments to the Contract (or Notice of Award), Request for Proposals, and Respondent's Response to Request for Proposals.

Patents and Copyrights

Contractor shall indemnify, save and hold harmless the State of Texas from and against claims of patent, trademark, copyright, trade secret or other proprietary rights, violations or infringements arising from the State's or Contractor's use of or acquisition of any services or other items provided to the State of Texas by Contractor or otherwise to which the State of Texas has access as a result of Contractor's performance under this Contract, provided that the State shall notify Contractor of any such claim within a reasonable time of the State's receiving notice of any such claim. If Contractor is notified of any claim subject to this section, Contractor shall notify *{Insert agency name here}* of such claim within five (5) business days of such notice. No settlement of any such claim shall be made by Contractor without *{Insert agency name here}* prior written approval. Contractor shall reimburse the State of Texas for any claims, damages, losses, costs, expenses, judgments or any other amounts, including, but not limited to, attorneys' fees and court costs, arising from any such claim. Contractor shall pay all reasonable costs of the State's counsel and shall also pay costs of multiple counsel, if required to avoid conflicts of interest. Contractor represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

Proprietary Information

The CPA is a government agency subject to the Texas Public Information Act (PIA), Chapter 552, Gov't Code. The Proposal and other information submitted to the CPA by the Respondent are subject to release as public information. The Proposal and other submitted information shall be presumed to be subject to disclosure unless a specific exception to disclosure under the PIA applies. If it is necessary for the Respondent to include proprietary or otherwise confidential information in its Proposal or other submitted information, the Respondent must clearly label that proprietary or confidential information and identify the specific exception to disclosure in the PIA. Merely making a blanket claim that the entire Proposal is protected from disclosure because it contains some proprietary information is not acceptable, and shall make the entire Proposal subject to release under the PIA. In order to trigger the process of seeking an Attorney General opinion on the release of proprietary or confidential information, the specific provisions of the Proposal that are considered by the Respondent to be proprietary or confidential must be clearly labeled as described above. Any information which is not clearly identified as proprietary or confidential shall be deemed to be subject to disclosure pursuant to the PIA.

The Comptroller of Public Accounts recommends that pursuant to SB 1368, state governmental entities include the following language in their contracts**:** "**Contractor is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the state**." In addition to this recommended language, the Comptroller also advises that in order to ***comply with the new statutory requirements***, each state governmental entity should supplement this provision with the additional terms agreed upon by the parties regarding the specific format by which the vendor is required to make the information accessible by the public.

Public Disclosure

No public disclosures or news releases pertaining to this contract shall be made without prior written approval of {Insert agency name here}.

Smoking Policy

The {Agency} has a policy of being a smoke-free agency. The policy reflects our commitment to providing a healthy environment for all our employees and visitors. This policy prohibits smoking within any state building or on the grounds. Contractor, by acceptance of this contract, agrees to abide by this policy when on the property of {Agency}.

Substitutions

Substitutions are not permitted without written approval of {Insert agency name here}.

Taxes

Contractor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, State, or local income, sales or excise taxes of Contractor or its employees. *{Insert agency name here}* shall not be liable for any taxes resulting from this Contract.

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LEGAL REFERENCE SECTION

i Black's Law Dictionary (7th ed. 1999).

ii State agency means a department, board, commission or other entity of state government, other than a university system or an institution of higher education as defined by Section 61.003, Education Code, that:

1) has authority that is not limited to a geographical portion of the state;

2) was created by the constitution or a state statute with an ongoing mission and responsibilities;

3) is not the office of the governor or lieutenant governor;

4) is not within the judicial or legislative branch of government; and

5) is not a committee created under state law whose primary function is to advise an agency.

Iii Texas Government Code §572.001(a)

iv Texas Government Code §572.051

v Texas Government Code §2113.014(a)

vi Texas Constitution, Article XVI, Section 21

vii Texas Government Code §2052.302

viii All notices requiring publication in the Texas Register, the Electronic State Business Daily, or newspapers should be identified, scheduled and drafted at this stage.

ix Black's Law Dictionary (7th ed. 1999), defines: standard, n.2. A criterion for measuring acceptability, quality or accuracy. A legal standard that is based on conduct and perceptions external to a particular person. In tort law, for example, the reasonable person standard is considered an objective standard because it does not require a determination of what the defendant was thinking. *Subjective standard.* A legal standard that is peculiar to a particular person and based on the person's individual views and experiences. In criminal law, for example, premeditation is determined by a subjective standard because it depends on the defendant's mental state.

x See Southwestern Bell Tel Co. V. FDP Corp. 811 S.W. 2d 572,576 (Tex. 1991) ("The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2.711, and are available to a buyer "[w]here the seller fails to make delivery." Tex. Bus. & Com. Code §2.711(a). The remedies for breach of warranty, however, are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner. Tex. Bus. & Com. Code §2.714, §2.711 (Comment 1); see also 1 J. White & R. Summers, Uniform Commercial Code 501 (3rd ed. 1988). Indeed, "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." Tex. Bus. & Com. Code § 2.313(Comment 4). No sound reason exists to apply a different standard when the contract is for services instead of goods.")

xi Generally, a warranty describes then "character, quality or title" of that which is being sold and "by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them." Black's Law Dictionary 1586 (6th ed. 1990). An express warranty is a definitive affirmation of fact or promise which becomes part of the basis for the bargain and upon which the parties rely. *See* Morris v. Adolph Coors Co., 735 S. W. 578, 587 (Tex.App.-Fort Worth 1987, writ ref'd n.r.e.). Implied warranties are based in tort law and are judicially interjected into agreements whenever necessitated by public policy to ensure that parties receive that for which they bargained. *See* Melody Home Mfg. Co. v. Barnes, 741 S. W. 2d 349, 353(Tex. 1987); *see also* Parkway Co. v. Woodruff, 901 S. W. 2d 434, 438 (Tex. 1995). A contract term identifies what is being sold; warranties described the attributes, suitability for a particular purpose and ownership of what is sold. Cf. Donnelley Mktg. v. Lionel Sosa, Inc. 716 S. W. 2d 598, 604 (Tex.App. – Corpus Christi 1986, no writ) (court held supplier's provision of wrong mailing list to advertiser was tantamount to no delivery at all and amounted to breach of contract). *See* Chilton Insurance Company v. Pate & Pate Enterprises, Inc. 930 S.W.2d 877 (Tex.App.-San Antonio 1996, rehearing overruled).

xii Warranty of Title and Against Infringement; Buyer's Obligation against Infringement. Tex. Bus & Com. Code §2.312

xiii Implied Warranty: Merchantability; Usage of Trade. Tex. Bus. & Com. Code §2,314 (merchantability – Goods to be merchantable must be at least such as: 1) pass without objection in the trade under the contract description; and 2) in the case of fungible goods, are of fair average quality within the description, and 3) are fit for the ordinary purposes for which such goods are used; and 4) run,

within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and 5) are adequately contained, packaged, and labeled as the agreement may required; and 6) confirm to the promises or affirmations of fact made on the container or label if any.); Tex. Bus. & Com. Code §2A.212. Implied Warranty of Merchantability (lease of personal property).

xiv Implied Warranty: Fitness for Particular Purpose. Tex. Bus. & Com. Code §2.315 (implied warranty that the goods shall be fit for such purpose, where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods); Tex. Bus. & Com. Code §2A.213 Implied Warranty of Fitness for Particular Purpose (lease of personal property).

xv Texas Government Code, §2155.074, §2155.075, §2156.007, §2157.003 and § 2157.125, and Texas Administrative Code, Title 1, Chapter 113.6

xvi *See* Tex. Bus. Com. Code §2.607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach after Acceptance; Notice of Claim or Litigation to Person Answerable Over (1967).

xvii *See also* Texas Government Code §2254.022(b), which states subchapter B does not discourage state agencies from using consultants if the agencies reasonably foresee the use of consultants will produce a more efficient and less costly operation or project.

xviii Texas Government Code §2254.026; *See also* General Appropriates Act, 77th Leg., S. B. 1, art. IX, §6.48(2001) (before expending appropriated funds for contracting for a consultant or other private assistance in conducting a legislatively mandated study that includes statistical or demographic data analysis, the state agency must determine if the resources of the Texas Legislative Council are available to perform this work).

xix Texas Government Code §2254.025. Note: A waiver will not be granted if the agency was negligent in foreseeing the occurrence of the emergency. *See* §2254.025(e).

xx Texas Government Code §2254.024©; *See* also 34 TAC §5.54 (The Office of the Comptroller of Public Accounts has rules regarding consultants, but the dollar thresholds reflect lower amounts as prescribed in previous versions of the statute).

xxi Texas Government Code §2254.002(2). *See also* Atty Gen. Op. JC-0374 (2001). The issue addressed by this opinion was: "whether a registered professional surveyor may provide a competitive bid to the primary contractor of a contract with a government entity."

… the Professional Services Act applies whenever a governmental entity awards a contract that includes professional services as a component part; we turn to the question of whether a surveyor may submit competitive bids to a prime contractor in connection with a governmental contract. The Professional Services Procurement Act does not impose any legal obligation on a professional to refrain from providing a competitive bid to a governmental entity. The prohibition against competitive bidding in section §2254.003 applies to a governmental entity rather than a professional. See Texas Government Code Ann. §2254.003 (Vernon 2000) ("*a governmental entity may no* select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services….") (emphasis added). Similarly, the requirements for procuring architectural, engineering, and land survey services apply to the governmental entity rather than the architect, engineer or surveyor or prime contractor. *See* id §2254.004(a) ("In procuring architectural, engineering, and land survey services, a *governmental entity* shall …") (emphasis added).

xxii Texas Government Code §2254.003(e).

xxiii Texas Government Code §2254.004

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

xxv Foster v. Wagner, 343 S. W. 2d 914, 927 (Civ.App.-El Paso 1961, ref. n.r.e.).

xxvi See the following excerpt from AG Opinion JC-0131 (1999).

"There are numerous limitations on the contracting authority of state officers and employees pertinent to your inquiry. First and foremost, no one has the authority to make a contract binding on the state unless authorized to do so by the constitution or by statute. *See* State v. Ragland Clinic-Hosp. 159 S.W.2d 105, 106 (Tex. 1942); Vitapro Foods, Inc. v State, 969 S.W.2d 84, 88 (Tex. App.-Texarkana 1998, pet granted). Normally authority to bind the state is given by the legislature to entities such as the governing boards of state agencies and to state officers, rather than to employees. In some instances, contracting authority granted to a governing board may be delegated to other officers or employees. For example, the Education Code allows the University of Houston board of trustees to delegate its contracting authority: "All contracts of the university shall be approved by a majority of the board. However, the board is authorized to adopt reasonable rules that delegate to the president or his authorized representatives the authority to negotiate, approve and execute contracts." Tex. Educ. Code Ann. §111.34 (Vernon 1991). Similarly, under the Government Code, "[t]he Texas Transportation Commission may delegate to one or more employees of the Texas Department of Transportation the authority to approve vouchers for expenditures from the state fund and the authority to approve and sign

contracts and other documents." Tex. Gov't Code Ann. §2103.064 (Vernon Supp. 1999). All state officers and employees are potentially able to bind the state, but to do so they must be able to point to some constitutional or statutory authority for their actions."

"Apparent authority is not enough to make an obligation binding upon the state; an officer or employee must have actual authority to do so. VitaPro, 969 S.W.2d at 88. In a contract between private parties, an agency who has no actual authority to bind his principal can nevertheless bind the principal if the principal leads the other party to believe that the agency had the authority to act on the

principal's behalf. *See* Moodey v. E.M.C. Servs., Inc. 828 S.W.2d 237, 241 (Tex. App. - Houston [14th Dist.] 1992, writ denied). In such a case, the principal is estopped from claiming that the agent had no authority to act on the principal's behalf. Id. But the powers of state officers are set by law and all persons dealing with them are charged with notice of the limits of their authority and are bound at their peril to ascertain whether a contemplated contract is within the power conferred. Ragland Clinic-Hosp., 159 S.W. 2d at 107; VitaPro, 969 S.W.2d at 88. Thus, even if a state officer or employee appears to have authority to bind the state, the state will not be bound unless the officer or employee had actual authority to bind the state."

"Second, the subjects of state contracts, the procedure for entering into contracts, and the general policy relating to contracts are all within the power of the legislature to establish. See Texas Nat'l Guard Armory Bd., 126 S.W.2d at 637. Although an oral contract is normally just as binding and enforceable as a written contract, *See* Ward v. Strickland, 177 S.W.2d 79, 82 (Tex.Civ.App.-Dallas 1943, writ ref'd), the authority of a person or entity to enter into an oral contract on behalf of the state may be restricted by the constitution or by statute or regulation."

xxvii State v. Ragland Clinic=Hosp., 138 Tex. 393, 159 S.W. 2d 105 (1942).; State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc. 8 S.W.3d 316, 322 (Tex. 1999). Rehearing overruled.

xxviii Tex. Gov't. Code §2155.061 Commission Purchasing System.

(a) The commission shall acquire by purchase, lease rental or another manner all goods and services for a state agency, including a purchase that does not require a competitive bid or a spot purchase.

(b) The commission shall operate an effective and economical system for purchasing goods and services.

xxix Tex. Gov't Code §2162.105. Exemption from Purchasing Laws.

xxx Tex. Gov't Code § 2155.134

xxxi Tex. Gov't Code § 2155.135

xxxii Tex. Gov't Code § 2155.136

xxxiii Tex. Gov't Code § 2155.138

xxxiv Tex. Gov't Code § 2155.139

xxxv Tex. Gov't Code § 2155.140

xxxvi Tex. Gov't Code § 2155.141

xxxvii Tex. Gov't Code § 2155.142

xxxviii Tex. Gov't Code § 2155.143

xxxix Tex. Gov't Code § 2155.144

xl Tex. Gov't Code § 2155.1441

xli Tex. Gov't Code § 2155.146

xlii Tex. Gov't Code § 2155.202

xliii Tex. Gov't Code § 2155.203

xliv Tex. Gov't Code § 2155.204

xlv State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316, 322 (Tex. 1999) rehearing overruled.

xlvi Tex. Gov't Code § 2155.132(f); 1 T.A.C. §113.11 (3). For items that are required by statute to be purchased from a particular source, *See* Government Code §497.024 et seq. (if the Texas Department of Criminal Justice produces an article or product under the Prison Made Goods Act, state agencies may purchase the article or product only from the Department). For definitions of 'scheduled purchase' and 'term contract purchase', *See* 1 T.A.C. §113.2 (55) (a 'scheduled purchase' is a purchase with a pre-scheduled bid opening date, allowing the Commission to combine orders for goods); (62) (a 'term contract purchase' is a purchase under a term contract, which established a source of supply for particular goods at a given price for a specified period).

xlvii See Buxani v. Nussbaum, 940 S. W. 2d 350, 352 (Tex App.-San Antonio 1997, no writ); and Hallmark v Hand, 885 S.W.2d 471, 476 (Tex.App.-El Paso 1994, writ denied): *see also* McCulley Fine Arts Gallery, Inc. v "X" Partners, 860 S.W.2d 473, 477 (Tex. App. - El Paso, 1993, no writ).

xlviii *See* Roark v. Stallworth Oil and Gas Inc., 813 S.W.2d 492,496 (Tex. 1991); and see also Federal Sign v. Texas Southern University, 951 S.W.2d 401,408 (Tex. 1997) rehearing of cause overruled (Oct 02, 1997).

xlix Restatement (Second) of Contracts §24 (1981). ++++

l Restatement (Second) of Contracts §50 (1) (1981).

li United Concrete Pipe Corp. v Spin-Line Co., 430 S.W.2d 360, 364 (Tex. 1968).

lii Antonini v. Harris County Appraisal Dist. 999 S.W.2d 608, 611 (Tex.App.-Houston [14th Dist] 1999, no pet.)

liii Weynand v Weynand, 990 S.W.2d 843, 846 (Tex. App.-Dallas 1999, pet. denied).

liv Copeland v Alsobrook, 3 S.W.2d 598, 604 (Tex. App. - San Antonio 1999, pet. denied).

lv Wiley V. Bertelson, 770 S.W.2d 878,882 (Tex. App.-Texarkana 1989, no writ).

lvi Gulf Coast Farmers Co-op v. Valley Co-op Oil Mill. 572 S.W.2d 726, 737(Tex. Civ. App. - Corpus Christi 1978, no writ).

lvii Runnells v. Firestone 746 S.W.2d 845, 849 (Tex. App. - Houston [14th Dist.] 1988), writ denied per curiam, 870 S.W.2d 240 (Tex. 1988).

lviii Copeland, 3 S.W.3d at 605

lix T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

lx Komet v. Graves, 40 S.W.3d 596, 602 (Tex. App.-San Antonio 2001, no pet.); Hardin Constr. Group, Inc. v Strictly Painting, Inc. 945 S. W. 2d 308, 313 (Tex App. - San Antonio 1997, orig. proceeding): Texas Oil Co. v. Tenneco Inc., 917 S.W.2d 826, 830 (Tex. App.- Houston [14th Dist.] 1994), rev'd on other grounds sub nom. Morgan Stanley & Co., Inc. v. Texas Oil Co., 958 S.W.2d 178 (Tex. 1997).

lxi T.O. Stanley Boot Co., 847 S.W.2d at 221; Scott v. Ingle Bros. Pac., Inc. 489 S.W. 2d 554, 555 (Tex. 1972); Texas Oil Co, 917 S.W.2d at 830; Komet, 40 S.W.3d at 602.

lxii Texas Oil Co, 917 S.W.2d at 830.

lxiii T.O. Stanley Boot Co. v Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

lxiv Fort Worth Indep. Sch. Dist. V. City of Fort Worth, 22 S.W.3d 832, 846 (Texas. 2000) (quoting Texas Oil Co. v. Tenneco Inc., 917 S.W. 2d 826, 830 (Tex. App.-Houston [14th Dist] 1994), rev'd on other grounds, 958 S.W.2d 178 (Tex. 1997)).

lxv T.O. Stanley Boot Co., 847 S.W.2d at 221.

lxvi Scott v. Ingle Bros. Pacific., Inc., 489 S.W.2d 554, 555 (Tex. 1972); City of Fort Worth v. Gene Hill Equip. Co., 761 S.W.2d 816, 820 (Texas.App.-Dallas, 1991).

lxvii Texas Oil Co., 917 S.W.2d at 830.

lxviii When a contract leaves open the time and place of performance, the law may imply that the time of performance was to be reasonable time. Moore v. Dilworth, 142 Tex. 538, 542 179 S.W.2d 940, 942 (1944). What is reasonable depends on the facts and circumstances as they existed at the date of the contract. Heritage Resources, Inc. v. Anschutz Corp., 689 S.W.2d 952, 955 (Tex.App.-El Paso 1985, writ ref'd n.r.e.). *See also* Solomon v. Greenblatt, 812 S.W.2d 7 (Tex.Appl.-Dallas, 1991) (court implied the time and place of performance in a 'consulting services' contract for management consulting.).

lxix Smith v. Renz, 840 S.W. 2d 701, 704 (Tex.App.-Corpus Christi 1992, writ denied).

lxx Roark, 813 S.W.2d at 496.

lxxi Solomon V. Greenblatt, 812 S.W.2d 7, 15(Tex.App.-Dallas 1991, no writ).

lxxii City of Crystal City v. Crystal City County Club, 486 S.W.2d 887,888 (Tex.Civ.App.-Beaumont 1972, writ ref'd n.r.e.); *see also* Jennings v. Radio Station KSCS, 96.3 FM, Inc., 708 S.W.2d 60, 61 9Tex.App.-Forth Worth 1986) rev'd on other grounds, 750 S.W.2d 760 (Texas 1988) (plaintiff/listener entitled to collect contest proceeds; consideration to radio station was gain in new listeners who hoped to win contest).

lxxiii Texas Business & Commerce Code §2.2.07 Sales, may be applicable in certain types of transaction.

§2.207. Additional Terms in Acceptance or Confirmation

(a) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) The additional terms are to be construed as proposal for addition to the contract. Between merchants such terms become part of the contract unless:

a. The offer expressly limits acceptance to the terms of the offer;

b. They materially alter it; or

c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(c) Conduct by both parties which recognized the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this title.

lxxiv Texas Government Code §2251.

lxxv Attorney General Opinion No. MW-296 (MW-296)

lxxvi Attorney General Opinion No V-981 (V-981)

lxxvii Attorney General Opinion No. MW-296 (MW-296)

lxxviii Niles v. Harris County Fresh Water Supply District No. 1A, 336 S.W.2d 637 (Tex. Civ. App.--Waco 1960, writ ref'd)

lxxix Texas Administrative Code §113.9(d) 1.

lxxx **Elements for Breach of Contract**. The essential in a suit for breach of contract are: (1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. Landrum v. Devenport, 616 S.W.2d 359, 361 (Tex. Civ. App. – Texarkana 1981, no writ); Bradley v. Houston State Bank, 588 S.W.2d 618, 624 (Tex. App. – Houston[14th Dist.] 1979, writ ref'd n.r.e.); Hussong v. Schwan's Sales Enterprises, Inc., 896 S.W.2d 320, (Tex. App – Houston[1st Dist.] 1995, no writ); Wright v. Christian & Smith, 950 S.W.2d 411, 412 (Tex. App. – Houston [1st Dist] 1997, no writ); McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex. App.-El Paso 1993, no writ).

Elements for Breach of an Express Warranty. In order to recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods;(2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon said affirmation of fact or promise; (4)that the goods failed to comply with the affirmations of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the proximate cause of plaintiff's injury. General Supply and Equipment Co., Inc. v Phillips, 490 S.W.2d 913, 917 (Tex. Civ. App. – Tyler 1972, writ ref'd n.r.e.); Tex Bus. & Com. Code Ann. Sec. 2.313 (Vernon 1968).

Privity of Contract. It is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress from an injury. Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976); Sherry Lane National Bank v. Bank of Evergreen, 715 S.W2d 148, 152 (Tex. App. – Dallas 1986, writ ref'd n.r.e.). Stated another way, one may not maintain an action based upon the harm suffered by another. Texas Industrial Traffic League v. Railroad Commission of Texas, 628 S.W.2d 187, 191 (Tex. App. – Austin 1982), rev'd on other grounds, 633 S.W.2d 821 (Tex. 1982).

In contract actions, privity of contract is an essential element of recovery. Republic National Bank v. National Bankers Life Ins. Co., 427 S.W.2d 76, 79 (Tex. Civ. App. – Dallas 1977, no writ). In order to maintain an action to recover damages flowing from the breach of a written agreement, there must be ordinarily be a privity existing between the party damaged and the party south to be held liable for the repudiation of the agreement. Id. "A well defined exception to the general rule thus stated is that one who is not privy to the written agreement may demonstrate satisfactorily that the contract was actually made for his benefit and that the contracting parties intended that he benefit by it so that he becomes a third-party beneficiary and eligible to bring an action on such agreement." Id. By its very definition, however, such a third party beneficiary exception arises when on party asserts that it is the third-party beneficiary of a written agreement and, therefore, does not have to be in privity of contract with another party to bring an action against that party for breach of contract. *See* Exchange Bank & Trust v. Lone Star Life Ins. Co., 546 S.W.2d 948, 953 (Tex. Civ. App. – Dallas 1977, no writ); Briercroft Sav. & Loan Ass'n. v. Foster Fin. Corp., 833 S.W.2d 898, 902 (Tex. Civ. App. – Eastland 1976, writ ref'd n.r.e.).

Substantial Performance. Generally, a party to a contract who is itself in default cannot maintain a suite for its breach. *See* Dobbins v. Redden, 785 S.W.2d 377, 378 (Tex. 1990). The doctrine of substantial performance has ameliorated this rule by allowing a contract action by a builder who has breached, but nevertheless substantially completed, a building contract. *Id.* The doctrine is an equitable action that allows a contractor who has substantially performed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit. *See* Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 482 (Tex. 1984). The doctrine does not permit the contractor to recover the full consideration provided in the contract because, by definition, the doctrine recognized that the contractor is in breach of the contract. *Id.* Although the contractor is allowed to sue on the contract, his recovery is decreased by the cost of remedying those defects for which he is responsible. Id.

A contractor seeking recovery on a substantial performance theory has the burden to please substantial performance, to provide that he did substantially perform, and to prove the consideration due him under the contract, and the cost of remedying the defects due to his errors or omissions. Id. at 483. Carr v. Norstok Bldg. Systems, Inc., 767 S.W.2d 936, 940 (Tex. App. – Beaumont 1989, no writ). A finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects. Uhlir v. Golden Triangle Development Corp., 763 S.W. 2d 512, 515, (Tex. App. – Fort Worth 1988, writ denied).

To establish substantial performance of a contract, the defendant must show that the essential elements of the parties' contract were performed and that the defects in performance did not prevent the parties from accomplishing the purpose of the contract. Matador Drilling Co. v. Post, 662 F2d 1190, 1195 (5th Cir. 1981. Acceptance of performance alone does not constitute substantial performance, although it is a factor to be considered in determining whether there was substantial performance. Measday v. Kwik Kopy Corp., 713 F.2d 118, 124-25 (5th Cir. 1983).

Condition Precedent. A contract may include conditions precedent that must be satisfied before a vendor has an obligation of performance. A condition precedent may be either a condition to the formation of the contract or to an obligation to perform an existing agreement. Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). To make performance conditional, terms such as "if", "provided that", "on condition that", or some similar phrase of conditional language must normally be included, although there is no requirement to utilize such language. Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 945 (Tex. 1990).

Promissory Estoppel. The doctrine of promissory estoppel is derived from § 90 of the Restatement of Contracts, which states: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does not induce such action or forbearance is binding if injustice can be avoided only be enforcement of the promise. Restatement (Second) of Contracts § 90 (1971); Aubrey v. Workman, 384 S.W.2d 389, 393 (Tex. Civ. App. – Fort Worth 1964), writ ref'd n.r.e.). Promissory estoppel does not operate to create liability where it does not otherwise exist. Hruska v. First State Bank of Danville, 747 S.W. 2d 783, 785 (Tex. 1988). Promissory estoppel does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them. "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 937 (Tex. 1972).

The requisites of promissory estoppel in Texas are: (1) a promise; (2) foresee ability of reliance thereon by the promisor; and (3) substantial reliance by the promise to his detriment. English v. Fischer, 660 S.W.2d 521, 524, (Tex. 1983). When promissory estoppel is raised to bar the application of the statute of frauds, there is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds. Nagle v. Nagle, 633 S.W.2d 796, 800 (Tex. 1982); "Moore" Burger, 492 S.W.2d at 936-37 (Tex. 1972); Margin v. Norwest Mortgage, Inc. 919 S.W.2d 164, 167 (Tex. App. – Austin 1996, no writ); Coastal Corp. v. Atlantic Richfield Co., 852 S.W.2d 714, 718 (Tex. App. – Corpus Christi 1993, no writ); Cobb v. West Tex. Microwave Co., 700 S.W. 2d 615, 616 (Tex. App. – Austin 1985, writ ref'd n.r.e.).

Revocation of Acceptance (UCC). Under the UCC, a buyer may reject or revoke acceptance of non-conforming goods. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Otherwise known as the "perfect tender" rule, a buyer may reject non-conforming goods in whole or in part. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Rejection or revocation of acceptance will impose additional duties on a buyer.
Anticipatory Breach. The term anticipatory breach is a term that is described as a basis to avoid performance. To prove that affirmative defense of anticipatory breach of a contract, the defendant must show either words or actions by the plaintiff that indicate an intention to not perform the contract according to its terms. Builders Sand, Inc. v. Torture, 678 S.W.2d 115, 120 (Tex. App. – Houston [14th Dist.] 1984, no writ). The plaintiff must have distinctly, unequivocally, and absolutely refused to perform either the whole contract or a covenant which affects the whole consideration. American Bankers Inc. Co. v. Moore, 73 S.W.2d 620, 622 (Tex. Civ. App. – Fort Worth 1934, no writ). The refusal to perform must be unexcused. Taylor Pub. Co. V. Systems Mktg. Inc. 686 S.W.2d 213, 217 (Tex. App. – Dallas 1984, writ ref'd n.r.e.).

lxxxi Texas Administrative Code §113.9

lxxxii §2261.102. Liability Insurance Coverage Required. Each state agency shall, when feasible, include provisions in each of its contracts for goods or services that are subject to this chapter that require the contractor to carry director or officer liability insurance coverage in an amount not less than the value of the contract that is sufficient to protect the interests of the state in the event an actionable act or omission by a director or officer of the contractor damages the state's interests.

lxxxiii Texas Government Code §2261.101 Remedies and Sanctions Schedules. (a) Each state agency shall create and incorporate in each of its contracts for goods or services that are subject to this chapter a remedies schedule, a graduated sanctions schedule, or both, for breach of the contract or substandard performance under the contact. (b)State agencies shall design fair and feasible standards that will hold contractors accountable for breach of contract or substandard performance under a contract without diminishing the number of able providers who are willing to contract with the state.

lxxxiv Texas Government Code §2155.4441. Preference Under Service Contracts.

lxxxv Texas Government Code §572.051. Standards of conduct; Texas Government Code §2155.003. Conflict of Interest

lxxxvi Texas Government Code §2252.901. Contracts with Former or Retired Agency Employees; Texas General Appropriations Article IX, Section 9-6.27.

lxxxvii Tex. Bus. Corp. Act §2.45

9/1/2015 MMK