STATE OF TEXAS
PROCUREMENT AND CONTRACT MANAGEMENT GUIDE

STATEWIDE PROCUREMENT DIVISION

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INTRODUCTION

The Texas Comptroller of Public Accounts' (CPA) Statewide Procurement Division (SPD) is the central authority for state agency procurement guidance, education, and statewide contract development services. The SPD director serves as the Chief Procurement Officer (CPO) for the State of Texas.[1]

The CPO has authority over state agency procurement. Authorized to provide leadership on procurement issues, the CPO may analyze state purchasing data to leverage state purchasing power, provide functional support to agencies, and provide training on state purchasing and contract management. The CPO may also review solicitations for major contracts for information technology projects monitored by the Quality Assurance Team (QAT), review solicitations for major contracts reviewed by the Contract Advisory Team (CAT) and delegate certain purchasing authority to agencies.[2] Agencies are required to comply with any request for information from the CPO that is necessary to conduct an analysis of state purchasing data to leverage state purchasing power.[3]

SPD publishes this *State of Texas Procurement and Contract Management Guide* (Guide) to aid public procurement professionals in the execution of their duties and to provide step-by-step guidance and a framework for the continued development of public procurement processes and best practices.

The procedures in this Guide primarily focus on the implementation of Title 10, Subtitle D of the Texas Government Code as well as Chapters 2261 and 2262 of the Texas Government Code. Other procurement authority is addressed in the Guide to provide a broad working knowledge of commonly utilized procurement methods.

The content of this Guide is generally organized to align with the procurement activities specified in the Procurement Cycle. To facilitate a better understanding of the roles performed by state agency employees during the various procurement activities, this Guide differentiates between *procurement* and *purchasing*. The term *procurement* refers to all aspects of the sourcing activities, including drafting and issuing the solicitation, evaluation of responses, selection of successful respondents, the negotiation of contracts, and the actual purchasing of goods or services. By contrast, the term *purchasing* refers to the mechanical or administrative process of how goods and services are ordered. Purchasing can usually be described as the transactional function of the procurement process, whereas procurement is, essentially, the overarching or umbrella activity within which purchasing can be found.

When using this Guide, care should be taken to gain an understanding of the referenced terms. The term "state agency," for example, has different meanings depending upon statutory context. As used in this Guide, the terms "state agency" and "agency" are synonymous. Legal citations are included throughout the Guide to provide assistance to the reader. Also, a glossary of procurement terms and a list of selected acronyms and abbreviations are provided in Appendix 1 and Appendix 2, respectively.

Although this Guide serves as a reference manual for implementing the requirements of the State of Texas procurement laws included within it,[4] this Guide is not an exhaustive compilation of every statute, rule, and standard that may pertain to a particular transaction. Furthermore, this Guide is not intended to be a manual on the law of contracts or constitute legal advice. Agencies are expected to be knowledgeable about legal requirements within their enabling statutes and any federal law associated with their operations. Public procurement professionals are advised to seek assistance from their agency legal counsel to ensure that procurements comply with state law and, if applicable, federal law as well as the best practices implemented by their agency.

This Guide supersedes the *State of Texas Procurement Manual* and the *Contract Management Guide* issued by the former Texas Procurement and Support Services (TPASS) division. SPD is the successor to TPASS. Consequently, any reference to the TPASS division in forms, templates, or other publications held by an agency is now a reference to SPD. All published materials referencing the TPASS division are no longer current and agencies are directed to update and, as applicable, replace the outdated materials with the current SPD documents.

In June 2018, the Guide was first published as Version 1.0. When modifications are made to this Guide, the version number of the Guide will be updated and the Version History will be revised to include a summary of the revisions. A current version of this Guide is maintained by SPD and is available on the CPA website.[5]

1 TEX. GOV'T CODE § 2155.091.
2 TEX. GOV'T CODE §§ 2155.091(b), (d), (e).
3 TEX. GOV'T CODE § 2155.091(c).
4 Agencies making grant awards to other entities, in contrast to the procurement of goods or services, must follow Uniform Grant Management Standards (UGMS) published by SPD under Chapter 783 of the Texas Government Code.
5 The CPA website is located at Comptroller.Texas.Gov.

PROFESSIONAL CERTIFICATION AND TRAINING PROGRAM

SPD administers a training, continuing education, and certification program for Texas public procurement professionals. For members of the governing bodies of agencies, SPD also provides an abbreviated training program to provide an understanding of the ethical and professional responsibilities of public procurement professionals.[6]

The term "public procurement professional" refers to any agency employee that conducts Purchasing, Contract Development, or Contract Management activities. A description of the three procurement roles is summarized in the table below.

Procurement Roles	
Purchasing	The receipt and processing of requisitions, development of specifications, development of statement of work, the issuance of purchase orders against existing statewide, cooperative or agency contracts, and the verification of the inspection of merchandise or receipt of services by the agency. The term does not include the development of solicitations and contract awards that must be posted to the *Electronic State Business Daily* (ESBD) or in the *Texas Register*.
Contract Development	The term applies to actions taken prior to contract execution, including the receipt and processing of requisitions, assessment of need, development and review of specifications, development and review of scopes of work, identification and selection of procurement methods, identification and preparation of evaluation criteria, preparation and advertising of solicitation documents, tabulation of respondent bids, evaluation of respondent proposals, negotiation of proposals, and the preparation and completion of contract award documents. The term does not include invoice or audit functions.
Contract Management	The term applies to actions taken following contract execution, including the assessment of risk, verification of contractor performance, monitoring compliance with deliverable and reporting requirements, enforcement of contract terms, monitoring and reporting of vendor performance, and ensuring that contract performance and practices are consistent with applicable rules, laws and the *State of Texas Procurement and Contract Management Guide*.

All public procurement professionals, including those from agencies exempted from the purchasing authority of SPD, must receive training and continuing education to the extent required by SPD.[7] An 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.[8]

SPD offers two levels of certification: Certified Texas Contract Developer (CTCD) and Certified Texas Contract Manager (CTCM). Contract Developers and Contract Managers working in Texas state government must attend mandatory courses and pass an exam to become certified as either CTCD or CTCM. SPD also provides the continuing education required for public procurement professionals to maintain certification. A licensed attorney employed by an agency is not required to be certified as a CTCD or CTCM. An overview of the training and certification requirements for public procurement professionals is located the CPA website.[9]

Information regarding the course schedules is available on the CPA website.[10] In addition to state agencies, employees of political subdivisions, other governmental entities, and entities participating in the Texas SmartBuy Membership program may attend the training courses hosted by SPD.

The SPD training program provides public procurement professionals with a clear understanding of statewide procurement rules and best practices. Agencies may also make specific requests for training in areas of interest. The SPD training program encourages an open dialogue with agencies regarding the State's procurement training to ensure that public procurement professionals are receiving the best possible education.

6 TEX. GOV'T CODE § 656.053.
7 TEX. GOV'T CODE § 656.051(c).
8 TEX. GOV'T CODE § 656.051(c).
9 The CPA website is located at Comptroller.Texas.Gov.
10 The CPA website is located at Comptroller.Texas.Gov.

ETHICS LAWS AND PROFESSIONAL STANDARDS

Overview

Public procurement professionals are the gatekeepers for the proper expenditure of the government's limited financial resources. They are entrusted to uphold the highest ethical standards and be good stewards of public funds with every purchasing decision they make. Ethical behavior and integrity are fundamental tenets of the public procurement profession that derive from values like "fairness," "honesty," and "accountability." When an individual's official duties clash with the individual's personal interests, a "conflict of interest" may occur; this conflict may impair one's judgement when trying to determine the proper course of action. Any erosion of public trust or perception of impropriety is detrimental to the integrity of the procurement process; therefore, all state employees involved in procurement activities must act in an ethical, impartial, transparent, and professional manner.

Nepotism. Nepotism is a form of conflict of interest that involves an explicit act of using one's position to favor a relative. Relationships between family members are classified by consanguinity or affinity.

- A relationship by consanguinity is one established through bloodlines. The consanguinity relationship may be either lineal (persons in a direct line of descent) or collateral (persons not in a common line of descent but with a common ancestor).
- A relationship by affinity arises by virtue of marriage. A relationship by affinity exists between an individual and either the blood relatives of the individual's spouse or the spouses of the individual's blood relatives. Stated simply, if at least two marriages are required to establish a link between two persons, they are not related by affinity.[11]

There are different ways of computing degrees of relationship. Texas law computes degrees of relationship by the civil law method.[12] The table below provides descriptions of the consanguinity and affinity relationships[13] that may be referenced in the various nepotism laws which prohibit certain types of activities based on an employee's job responsibilities, employment within a particular branch of government, or employment by a particular agency.

Consanguinity and Affinity Relationship Chart From Public Official or Employee				
Consanguinity (Includes individuals related by blood to the official or employee)[1]			Affinity (Includes an officials' or employee's spouse and individuals related to the spouse)[2]	
First Degree	**Second Degree**	**Third Degree[3]**	**First Degree**	**Second Degree**
Parents	Grandparents Grandchildren	Great-grandparents Great-grandchildren	Spouse Spouse's Parents	Spouse's Grandparents Spouse's Grandchildren
Children	Brothers & Sisters	Nephews & Nieces Uncles & Aunts	Children's Spouses Spouse's Children	Spouse's Brothers & Sisters Brothers & Sisters' Spouses

TABLE NOTES

1 An adopted child is considered a child of the adoptive parent for this purpose.

2 Divorce or death ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue until the death of that child.

3 An aunt related in the third degree by consanguinity includes only aunts who are sisters of a parent of the official or employee. An uncle includes only uncles who are brothers of a parent of the official or employee. A nephew includes only nephews who are children of a brother or sister of the official or employee. A niece includes only nieces who are children of a brother or sister of the official or employee.

11 *See Johnson v. State*, 332 S.W.2d 321, 322 (Tex. Crim. App 1960).

12 TEX. GOV'T CODE § 573.021.

13 Degrees of relationships may be even more complicated and nuanced if there are any divorces and/or remarriages in either the consanguinity or affinity trees. This Guide will not attempt to explain the various combinations and permutations that may arise under those circumstances.

Appearance of Impropriety. The root of ethical behavior in public procurement is the commitment of public procurement professionals to ensure they neither gain personally from, nor unduly favor anyone, in the execution of their official duties. They are guided by a duty to serve the public for whom they are employed. Accordingly, public procurement professionals must not only comply with the minimum legal standards of ethical conduct established by statutes, agency rules and policies, and professional certifications, but they should also conduct themselves in a manner that avoids even the appearance of impropriety.

Resolving Ethical Dilemmas. Ethical dilemmas may arise in a variety of situations. This Guide does not contain a comprehensive list of every statute, agency rule, agency policy, or professional code of conduct that may apply to procurement activities; it does provide guidance on the most commonly applicable ethics laws and professional standards. SPD expects each public procurement professional to comply with all applicable legal requirements and use sound reasoning and best judgment to act ethically and with integrity. A public procurement professional's ethical dilemma may often be resolved by following this simple rule of thumb: If it *feels* wrong, it probably *is* wrong. When faced with an ethical dilemma, public procurement professionals should seek assistance from a supervisor, legal counsel, or agency ethics officer.

Certain Employment Restrictions and Disclosure Statements. Selected statutory state employment restrictions, post-employment restrictions, and required disclosures applicable to public procurement personnel are located in Appendix 3. Purchasers certify their compliance with Section 2155.003 of the Texas Government Code by completing the Non-Disclosure and Conflict of Interest Certification located in Appendix 4.

State Ethics Policy

It is the policy of the State of Texas that a state officer[14] or state employee[15] may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur an obligation of any nature that is in substantial conflict with the proper discharge of the officer or employee's duties in the public interest.[16]

To accomplish this policy objective, the Legislature has enacted statutes that detail the ethical responsibilities and disclosure obligations of state officers and employees; it also authorized the Texas Ethics Commission to oversee and enforce many of these laws and provided civil and criminal penalties for certain violations of these provisions.

State Standards of Conduct

The Legislature has established standards of conduct for state officers and employees. A state officer or employee should not:

- 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 or employee's official conduct;
- 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;
- accept other employment or compensation that could reasonably be expected to impair the officer or employee's independence of judgment in the performance of the officer or employee's official duties;
- make personal investments that could reasonably be expected to create a substantial conflict between the officer or employee's private interest and the public interest; or
- intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer or employee's official powers or performed the officer or employee's official duties in favor of another.[17]

A state employee who violates the state standards of conduct or the agency's ethics policy is subject to termination of employment or another employment-related sanction, and any applicable civil or criminal penalty if the violation also constitutes a violation of another statute or rule.[18] Additionally, agencies may not use appropriated funds to compensate a state employee who violates the state standards of conduct.[19]

Bribery

Bribery is a criminal offense. Bribery occurs if a person intentionally or knowingly *offers*, *confers*, or *agrees to confer on another*, or *solicits*, *accepts*, or *agrees to accept* any benefit as consideration

[14] A "state officer" is defined as an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency. TEX. GOV'T CODE §572.002(12).

[15] A "state employee" is defined as an individual, other than a state officer, who is employed by a state agency, Texas appellate courts or the Texas Judicial Council, either house of the Texas legislature or a legislative agency, council, or committee, including the Legislative Budget Board, Texas Legislative Council, State Auditor's Office, and Legislative Reference Library. TEX. GOV'T CODE §572.002(11).

[16] TEX. GOV'T CODE §572.001(a).

[17] TEX. GOV'T CODE § 572.051(a).

[18] TEX. GOV'T CODE § 572.051(b).

[19] TEX. GOV'T CODE § 2113.014(a).

for a violation of a public servant's legal duty or a public servant's decision, opinion, recommendation, vote, or any other exercise of discretion.[20] A salary is a benefit.[21] A state employee, therefore, is subject to criminal prosecution if the employee accepts employment as consideration for an official act.[22] A bribery offense occurs even if the benefit is offered after the employee has acted in a manner desired or after the employee has ceased working for the State.[23] However, bribery does not occur if the benefit is a political contribution defined by Title 15 of the Election Code or an expenditure made and reported in accordance with the lobby statute.[24]

Gift to Public Servant

It is a criminal offense for a public servant to accept a benefit from a person subject to his jurisdiction.[25] This statute prohibits seven (7) types of conduct by state employees and these prohibitions apply regardless whether the donor seeks or expects anything in consideration for the benefit.[26] A regulatory agency employee, for example, may not solicit, accept, or agree to accept any benefit from a person the employee knows is subject to regulation, inspection, or investigation by the agency.[27]

It is also an offense for a public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government to solicit, accept, or agree to accept any benefit from a person who the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of the public servant's discretion.[28] Acceptance of a gift may also be prohibited if the donor of the gift is a registered lobbyist.[29]

Not all gifts are prohibited.[30] Under this statute, some state employees may accept non-cash items of less than $50 in value.[31] For example, promotional or commemorative items of minimal value such as caps, coffee mugs, t-shirts, key rings, and discount coupons, do not constitute an improper benefit if such items are not solicited and not offered or accepted in exchange for any action or inaction on the part of public servants.[32] It is also permissible to accept a gift from a friend, relative, or business associate with whom a state employee has a relationship independent of the person's official status, provided that the gift is given on account of the personal relationship and not on account of the official status.[33]

Misuse of Official Information

As a result of employment with the State of Texas, a state employee may have access to information the public does not. A state employee faces criminal liability if the person uses information that has not been made public and was obtained during the course of official duties for a private purpose. The term "information that has not been made public" means any information to which the public does not generally have access, and that is prohibited from disclosure under the Texas Public Information Act, Chapter 552 of the Government Code.[34] A public servant commits an offense if, by relying on nonpublic information, the person (1) acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information, (2) speculates or aids another to speculate on the basis of the information, or (3) as a public servant, coerces another into suppressing or failing to report that information to a law enforcement agency.[35] A public servant also commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, the person discloses or uses information for a non-governmental purpose that the person has access to by means of office or employment and that information has not been made public.[36]

20 TEX. PENAL CODE § 36.02(a).

21 Tex. Ethics Comm'n Op. No. 155 (1993).

22 Tex. Ethics Comm'n Op. No. 205 (1994) (although the laws subject to interpretation by the Ethics Commission do not specifically address negotiations for future employment, the bribery law would prohibit a legislator from accepting or soliciting future employment in exchange for some official action on the part of the legislator during the remainder of the term of office and statutory standards of conduct prohibit a state officer or employee from accepting employment or compensation that might impair his or her independence of judgment in performing official duties).

23 TEX. PENAL CODE § 36.02(c).

24 TEX. PENAL CODE § 36.02(d).

25 TEX. PENAL CODE § 36.08; Tex. Ethics Comm'n Op. No. 139 (1993) (the purpose of the prohibition on gifts is to prevent even the appearance that government decisions are influenced by personal gifts to government officers and employees).

26 *Id.*; Tex. Ethics Comm'n Op. No. 425 (2000); *c.f.* TEX. PENAL CODE § 36.02 (providing that bribery occurs when a benefit is in consideration for a discretionary act or duty).

27 TEX. PENAL CODE § 36.08(a).

28 TEX. PENAL CODE § 36.08(d).

29 TEX. GOV'T CODE §§ 305.024, 305.025 (provisions relating to lobby activities); Tex. Ethics Comm'n Op. No. 118 (1993) (explaining that for a state employee to accept a gift or other expenditure, it must be permissible under both the lobby statute and the Texas Penal Code).

30 TEX. PENAL CODE § 36.10. Whether a state employee may accept a gift, even one of de minimis value, depends on the status of the donor as well as the nature of the gift. Tex. Ethics Comm'n Op. No. 130 (1993).

31 TEX. PENAL CODE § 36.10(a)(6); but see general discussion of ethics laws including TEX. GOV'T CODE § 2155.003.

32 Tex. Ethics Comm'n Op. Nos. 61, 66 (1992).

33 TEX. PENAL CODE § 36.10(a)(2).

34 TEX. PENAL CODE § 39.06(d).

35 TEX. PENAL CODE § 39.06(a).

36 TEX. PENAL CODE § 39.06(b).

Misuse of Government Property

State law prohibits the misuse of governmental resources.[37] Governmental resources include computers, copiers, supplies, and staff time.[38] A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, the person intentionally or knowingly misuses anything of value belonging to the government that has come into the person's custody or possession by virtue of the person's office or employment.[39] A public servant, for example, may face criminal prosecution for use of a state-issued credit card for a personal expenditure that is not an agency-authorized state business expense.[40]

Suspected Fraud, Waste, or Abuse

Each agency must develop and comply with a purchasing accountability and risk analysis procedure that includes an assessment of the risk of fraud, abuse, or waste in the contracting process, contract provisions, and payment and reimbursement rates and methods for the different types of goods and services for which the agency contracts.[41] The State Auditor's Office (SAO) investigates allegations of fraud, waste, or abuse.[42] Administrative heads of agencies who have reasonable cause to believe that money was lost, misappropriated, or misused, or that other fraudulent or unlawful conduct has occurred are required to report this information to the SAO.[43] A reasonable cause to believe exists when a set of facts would lead a reasonable and prudent person to believe that an offense may have been committed.[44] Employees and vendors who become aware of a situation that involves suspicious activities or fraudulent acts may also report the allegations to SAO.

The SAO coordinates investigatory work with internal auditors, federal and state prosecutors, and law enforcement agencies at the city, county, state, and federal levels. Criminal offenses investigated by SAO include, but are not limited to, the following:

- theft,
- forgery,
- tampering with a governmental record,
- securing execution of document by deception,
- misapplication of fiduciary property,
- conversion of funds,
- abuse of official capacity,
- gift to a public servant by a person subject to his or her jurisdiction, and
- bribery.

Reports of fraud, waste, or abuse involving state resources may be submitted through the SAO website,[45] by phone at 1-800-TX-AUDIT (892-8348), or by mail to State Auditor's Office, Attn: IAS, P.O. Box 12067, Austin, TX 78711-2067. Someone who reports fraud may choose to remain anonymous.[46]

37 TEX. PENAL CODE § 39.02(a)(2).
38 *See, e.g.*, Tex. Ethics Comm'n Op. No 134 (1992).
39 TEX. PENAL CODE § 39.02(a)(2).
40 Tex. Ethics Comm'n Op. No. 147 (1993).
41 TEX. GOV'T CODE § 2261.256.
42 TEX. GOV'T CODE § 321.013, *et seq.*
43 TEX. GOV'T CODE § 321.022(a).
44 FAQ posted to SAO website at www.sao.texas.gov.
45 The SAO website is located at www.sao.texas.gov.
46 https://sao.fraud.texas.gov/.

VENDOR COMMUNICATION

Communication between public procurement professionals and vendors is imperative and encouraged. If used effectively, communication with industry representatives is a vital resource for public procurement professionals. Steps must be taken, however, to maintain a fair opportunity to compete for all vendors and avoid any appearance of favoritism. Agency personnel must be mindful that one-on-one communications with vendors occurring prior to contract award are subject to enhanced scrutiny due to the importance of maintaining a "level playing field" among all eligible vendors during competitive procurements. If there is any doubt about appropriate communications with vendors, consult with agency legal counsel.

Fact Gathering. Texas law authorizes the exchange of information between an agency and a vendor related to future solicitations.[47] Vendors are often experts in their respective fields and can offer insight on potential purchases, such as current trends, industry practices, and available products or solutions. The procurement team should develop a plan to obtain any needed vendor input, which may include issuance of a Request for Information (RFI), attendance at industry days, or directly contacting industry leaders or vendors listed under the applicable code on the CMBL. The result of these interactions may lead to increased competition, a more detailed and up-to-date description of technical requirements or scope of work, and ultimately better value for the State. However, Contract Developers must never tailor specifications to benefit a particular vendor, as this limits competition. Care should be taken to avoid the appearance of favoritism toward certain vendors in the fact-gathering process and when possible, agencies should avoid consulting exclusively with the incumbents or a small number of vendors, which could give the appearance of favoritism.

Drafting the Solicitation. When all fact gathering is completed and the actual solicitation-drafting process has begun, vendor communication must cease to ensure the integrity of the procurement. Contract Developers may use relevant information gathered from the vendor community when drafting specifications. Finally, if a vendor is compensated by an agency for its assistance in drafting specifications or scope of work for a solicitation, the vendor will not be eligible to bid on the resulting contract.[48]

During the Solicitation. Once the solicitation is issued, communications between procurement professionals and vendors should follow the procedure outlined in the solicitation. This could include designating specific agency points of contact for receipt of vendor inquiries, a public question and answer process (Q&A process), and pre-bid/offer/proposal conferences. When issuing a solicitation, it is always encouraged that an agency should include a Q&A process, as that will be the only time where an agency can benefit from vendors' input on the solicitation and make any necessary corrections to the solicitation through the addendum process. Failure to allow for vendor input during a Q&A process may result in higher costs to the agency if the specifications are unclear prompting vendors to bid high to cover unforeseen costs, or a non-award requires a supplemental solicitation.

If any information relevant to the procurement such as evaluation methods or projected ordering volumes is provided to any vendor, that information should be released to the public without delay. This includes information shared at conferences attended by some but not all potential vendors.

If an agency offers assistance with HUB subcontracting plans, such assistance should be made available from a designated person, preferably the agency's HUB coordinator, who will not be an evaluation committee member, and it should be offered and provided to all vendors equally. Agency policy may allow assistance with HUB plans during the entire posting period. To ensure a level playing field, any contact between vendors and end users or evaluators should be avoided during the solicitation posting period, and if a vendor fails to obey by the guidelines regarding vendor communication posted in the agency solicitation, the vendor's proposal may be subject to disqualification.

Evaluation and Negotiation. Allowable vendor-public procurement professional interactions between the response due date and contract award include:

- clarification of a respondent's ability to meet the solicitation requirements;
- negotiations, as appropriate based on the procurement method, including request for best and final offer (BAFO); and
- the exchange of information as necessary to facilitate a potential contract award.

Evaluation and vendor selection should be based on response documents formally submitted by each vendor, not other communications. If one vendor is provided an opportunity to clarify its response, similarly situated vendors should receive the same opportunity.

[47] TEX. GOV'T CODE § 2155.090(b).
[48] TEX. GOV'T CODE §§ 2155.004, 2155.090(b).

SPD, DIR, OVERSIGHT TEAMS, AND PLANNING DOCUMENTS

Overview

SPD and DIR each operate independent statewide centralized purchasing programs. Both agencies leverage the State's buying power in order to maximize competition to provide cost-effective products and services to agencies and other eligible public-sector customers. SPD and DIR serve on two interagency oversight teams — the Contract Advisory Team (CAT) and Quality Assurance Team (QAT) — which seek to improve agency procurement and contract management practices, as well as the Procurement Coordination Committee. The Procurement Coordination Committee was created by the Legislature in 2013 and is charged with reviewing DIR and SPD procurement functions to identify areas of overlap, mutually beneficial contracting methodologies, data management, customer relations, and consolidation opportunities; developing standard data collection and cost savings methodologies; and reporting findings to the Sunset Advisory Committee.[49]

SPD

SPD is the State's central authority for the procurement of non-IT goods and services.[50] SPD's primary functions include managing statewide contracts, exercising procurement authority delegation of specific purchases to individual agencies, and providing guidance on procurement practices which foster effective competition and ensure the quality and integrity of state purchases.

SPD leverages the State's buying power by developing statewide Term Contracts and establishing TXMAS contracts for large-volume non-IT goods and services. These contracts are available on Texas SmartBuy. Texas SmartBuy, managed by SPD, is the State's central e-procurement system for non-IT goods and services. Almost 2 million items are available through Texas SmartBuy for agencies as well as local governments and state-funded non-profit organizations through SPD's Texas SmartBuy Membership program.[51]

SPD provides procurement support services to agencies, entities participating in SPD's cooperative purchasing program, and the vendor community. SPD publishes and maintains this Guide and administers the State's professional procurement certification and training program. In addition, SPD manages the following programs that are utilized for both for IT and non-IT procurements:

- Centralized Master Bidders List (CMBL),
- Historically Underutilized Business Program (HUB),
- *Electronic State Business Daily* (ESBD), and
- Vendor Performance Tracking System (VPTS).

A summary of SPD programs and online systems is located in Appendix 5.

DIR

DIR is the State's information technology and telecommunications agency. By leveraging the buying power of the State for technology purchases, DIR provides a range of IT and telecommunications products and services to agencies and eligible voluntary customers, including local governments and universities.

DIR coordinates and supports the IT and telecommunications needs of the State by carrying out the following key functions:

- provides statewide IT strategic planning, reporting, and standards setting;
- provides guidance and oversight of state information security which includes operation of the Network Security Operations Center, creation of the State Information Security Advisory Committee and Texas Cybersecurity Council, and education and outreach for Information Resources Managers;
- oversees three major statewide programs: (1) TEX-AN, the State's telecommunications system, (2) Texas.gov, the official website of Texas, and (3) consolidated data center services for agencies;
- procures and manages statewide cooperative contracts for IT products and services; and
- operates the Capitol Complex Telephone System (CCTS).

49 TEX. GOV'T CODE § 2155.007.

50 In 2007, the functions of the Texas Building and Procurement Commission were divided between the TFC, its successor agency, and CPA. House Bill 3560 of the 80th Legislature transferred to CPA the statewide procurement function, fleet management, historically underutilized business program, and support services of the Texas Building and Procurement Commission. At that time, CPA became the State's purchasing manager, awarding and managing hundreds of statewide contracts on behalf of more than 200 state agencies and 1,600 cooperative purchasing members.

51 TEX. GOV'T CODE §§ 2155.061, 2155.204.

DIR also provides technology policy, planning, and standards that help shape consistent and effective use of technology across the state, addressing areas such as statewide project planning, electronic information resources (EIR) accessibility, and best practice guidance in new technologies. Furthermore, as the State's technology agency, DIR provides state leadership with updates on technology issues relevant to agencies.

Contract Advisory Team

The Contract Advisory Team (CAT) was created in 2001 to assist agencies in improving contract management practices. In addition to reviewing and making recommendations on the solicitation documents for contracts by agencies that have an estimated value of at least $5 million, the CAT also

- reviews any findings or recommendations made by the state auditor, including those made regarding an agency's compliance with this Guide;
- provides recommendations to SPD regarding the development of this Guide and training;
- provides recommendations and assistance to agency personnel throughout the contract management process;
- coordinates and consults with the QAT on all contracts relating to a major information resources project;
- develops and recommends policies and procedures to improve agency contract management practices;
- develops and recommends procedures to improve agency contracting practices by including consideration for best value; and
- creates and periodically performs a risk assessment to determine the appropriate level of management and oversight of contracts by agencies.[52]

As of May 1, 2018, the CAT consists of six members, one from each of the following agencies: CPA, DIR, Health and Human Services Commission, Office of the Governor, TFC, and DPS. Agency membership on the CAT is either designated by statute or appointment by the CPO.[53] SAO and LBB serve as technical advisors to the CAT and the OAG provides legal assistance to the CAT.[54]

Quality Assurance Team

The Quality Assurance Team (QAT) is an interagency working group established in 1993 to provide on-going oversight to reduce risk of project overruns and failures of major information resources projects that receive appropriations from the Legislature. Risk, for purposes of the QAT, is defined as the likelihood that a project will not deliver a quality solution based on the timeline, budget and scope commitments made to state leadership.

The QAT fulfills its purpose primarily by executing the following strategies:

- approves contracts related to major information resources projects valued at more than $10 million and contract amendments greater than 10 percent of original contract value;
- implements a standard, repeatable, predictable, and transparent quality assurance process;
- reviews deliverables produced by projects, including proactive monitoring of project outcomes;
- requires development of a corrective action plan for projects based on identification of project risks;
- reports to stakeholders (state leadership, agency leadership, agency project team) the QAT assessment of the health and overall status of projects; and
- elevates significant issues to state leadership and advises on alternative methods for correction.

All agencies are subject to QAT oversight, with the exception of institutions of higher education and self-directed, semi-independent state agencies. The QAT is composed of representatives of the LBB, DIR, and CPA, with SAO participating as an advisor.[55]

Agency Procurement Plan

Each agency must complete an agency procurement plan that identifies its management controls and purchasing oversight authority in accordance with the policy guidance contained in this Guide.[56] Agencies must submit a current procurement plan to SPD annually by November 30. The Agency Procurement Plan Template and submission information are located on the CPA website.[57] SPD uses information submitted in the procurement plans to analyze state spend and opportunities for contract consolidation at the statewide level, and as a reference for agency personnel's authority to submit procurement requests, such as open market requisitions or delegation requests.

52 TEX. GOV'T CODE § 2262.101(a).
53 TEX. GOV'T CODE § 2262.102(a-1).
54 TEX. GOV'T CODE § 2262.102(b)-(c).
55 TEX. GOV'T CODE § 2054.158.
56 TEX. GOV'T CODE § 2155.132(c); 34 TEX. ADMIN. CODE § 20.132(b).
57 The CPA website is located at Comptroller.Texas.Gov.

Historically Underutilized Business Program Reports

Each agency must maintain, and compile monthly, information relating to the agency's and each of its operating divisions' use of Historically Underutilized Businesses (HUBs), including information regarding subcontractors and suppliers.[58] On a monthly basis, each agency must require its prime contractors to report to the agency the identity and amount paid to each HUB and non-HUB subcontractor to whom the prime contractor has awarded a subcontract for the purchase of supplies, materials and equipment.[59] Prime contractors must report to the applicable agency the progress payments made to subcontractors and suppliers each month in which such payment is made.[60]

On a form prescribed by SPD, each agency must report to SPD, not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the total dollar amount of HUB and non-HUB contracting and subcontracting participation in all of the agency's contracts for the purchase of goods, services and public works payments.[61] Agencies must include contracting and subcontracting participation paid from treasury and non-treasury funds.[62]

SPD will prepare a consolidated report based on a compilation and analysis of the reports submitted by each state agency and other information available to SPD.[63] These reports of HUB purchasing and contracts shall form a record of each agency's purchases in which the agency selected the contractor.[64] On May 15 of each year, SPD will submit the consolidated report regarding the previous six-month period and on November 15 of each year regarding the preceding fiscal year to the presiding officer of each house of the Legislature.[65]

Agency Contract Management Handbook

Each agency must publish a contract management handbook that establishes consistent contracting policies and practices to be followed by the agency and that is consistent with this Guide.[66] The agency's handbook may include standard contract provisions and formats for the agency to incorporate in contracts.[67]

Agency Contract Management Procedures

Each 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 vendor 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.[68]

The agency shall post on the agency's website the procedures described in paragraphs (2) and (3) above and submit to SPD a link to the web page that includes the procedures.[69] The link to each agency's contract management procedures is located on the CPA website.[70]

58 TEX. GOV'T CODE § 2161.122(a).
59 TEX. GOV'T CODE § 2161.122(a).
60 TEX. GOV'T CODE § 2161.122(b).
61 TEX. GOV'T CODE § 2161.121(b).
62 TEX. GOV'T CODE § 2161.121(c).
63 TEX. GOV'T CODE § 2161.121(a).
64 TEX. GOV'T CODE § 2161.122(e).
65 TEX. GOV'T CODE § 2161.121(d).

66 TEX. GOV'T CODE § 2261.256(b).
67 TEX. GOV'T CODE § 2261.256(b).
68 TEX. GOV'T CODE § 2261.256(a).
69 TEX. GOV'T CODE § 2261.256(c).
70 The CPA website is located at Comptroller.Texas.Gov.

THE PROCUREMENT CYCLE

Before engaging in any public procurement activities, it is important to understand that there are common characteristics between all procurements and following each of the processes outlined below ensures that the procurement is conducted in a transparent and efficient manner.

The Procurement Cycle identifies the five steps performed by public procurement professionals for every procurement.

The steps of the Procurement Cycle are summarized as follows:

1. Procurement Planning: Define the business need and establish the procurement objectives;
2. Procurement Method Determination: Identify the appropriate Procurement Method and, if applicable, issue a solicitation;
3. Vendor Selection: Fairly and objectively select the vendor that provides best value to the State;
4. Contract Formation & Award: Ensure that the awarded contract complies with applicable procurement law and contains provisions that achieve the procurement objectives; and
5. Contract Management: Administer and enforce the terms of the contract.

The remainder of the Guide is organized to provide practical suggestions as well as best practices for the procurement activities associated with each step of the Procurement Cycle.

PROCUREMENT PLANNING

Overview

The procurement process begins with procurement planning. This is a crucial step to the successful outcome of any procurement because, with proper planning, an agency is likely to achieve its procurement objectives in an efficient and timely manner. Planning activities, at a minimum, include developing a needs assessment, a cost estimate and an Acquisition Plan. The most common procurement planning document is the purchase requisition.

Vendors also need time to plan for solicitations. To achieve a strong pool of responses, agencies are encouraged to develop a six-month calendar of upcoming solicitations and post it on their agency website. This will allow interested vendors time to allocate sufficient staffing resources for a response and foster greater competition for goods and services. Solicitations calendars are tentative and non-binding and remain subject to change at the agency's discretion.

Needs Assessment

The success of the procurement is often dependent upon how well the business requirements are documented during the Procurement Planning phase. The needs assessment, therefore, must contain sufficient detail to identify the key business requirements. As part of the needs assessment, the agency may conduct market research, study historical spend, use benchmarking, and issue a Request for Information (RFI) to the vendor community.

When conducting the needs assessment, public procurement professionals must be mindful that an agency may not accept a response or award a contract to a vendor that received compensation from the agency to participate in the preparation of the specifications or solicitation on which the proposal or contract is based.[71] A respondent or contract participant, however, may provide free technical assistance to an agency.[72]

Market Research. Market research is routinely used by public procurement professionals to obtain information relating to the size of the potential vendor pool, pricing, applicable industry standards, market trends, and determine if the item or service to be purchased is readily available in the commercial marketplace. Market research may include online research, review of industry periodicals and information obtained from professional organizations, attendance at trade shows, discussions with other customers, and consultations with industry representatives.

Historical Spend Analysis. Historical spend analysis is a tool used to optimize an agency's buying power. By studying an agency's purchasing data, public procurement professionals seek, among other things, to identify cost savings, which may be available by consolidating purchases or diversity, and areas for improvement of administrative efficiencies.[73] For instance, a study of an agency's spending pattern may reveal that the agency is missing a volume discount opportunity when it makes multiple single purchases rather than consolidating the individual purchases together as a bulk purchase.

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

Request for Information (RFI). An RFI is a formal research method used by an agency to gather information directly from the industry about a particular type of product or service. One of the benefits of the RFI process is that information, pertinent to an agency's business need, is obtained in real-time directly from the vendor community regarding applicable industry standards, best practices, potential performance measures, cost structures or pricing methodologies, and feedback on innovative items.

A common practice is to publish the RFI on the ESBD or submit the RFI to an appropriate professional or trade organization. This practice has the benefit of not only utilizing a venue that optimizes access by the vendor community, but also serves to control vendor communications so that they only occur with designated agency

[71] TEX. GOV'T CODE § 2155.004(a).
[72] TEX. GOV'T CODE § 2155.004(e).
[73] *See* General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(9)-(10) (directing agencies to consolidate purchasing requests and delivery intervals and, while ensuring maximum use of competitive sourcing, consolidate contracts for similar services into the fewest vendors possible to reduce duplication of effort).

contacts. By establishing a prescribed communication protocol at the beginning of the RFI process, the agency is ensuring that a "level playing field" is maintained within the vendor community if there is a subsequent procurement initiative.

It is important to note that an RFI is not a procurement opportunity; a contract cannot be developed from a response to an RFI. Responses to an RFI are strictly voluntary and there is no downside for vendors who choose not to participate; consequently, an RFI cannot be used to establish a pre-qualified vendor list as voluntary participation in the RFI process cannot disadvantage vendors that choose not to participate. Vendors may choose not to participate in RFIs for a variety of reasons. For instance, a vendor may have a company policy of not responding to RFIs. Vendors may also decide, on a case-by-case basis, not to respond to RFIs seeking information readily available on the internet. The number of responses to an RFI, therefore, should not be used to gauge industry interest in any subsequent procurement initiative.

An agency may choose to use information received from RFI responses to develop specifications for a solicitation. Responses to RFIs, therefore, are public information. Public procurement professionals must be mindful not to provide any information during the RFI process that would give a vendor an advantage in a later procurement or could be construed as preliminary negotiations. If RFI respondents are requested to deliver oral presentations, the same agency staff should attend all presentations and the respondents should be offered the same amount of time to conduct their presentations. It is best practice for RFI activities to conclude prior commencement of specifications drafting.

Cost Estimate

The agency must develop a cost estimate as well as make an initial determination of the funding source that will be used for the procurement during the Procurement Planning phase. Depending on the procurement, a cost estimate may be developed from a vendor's advertised price list, developed through online research, or may be prepared using standardized estimation methods and based on historical spend. The purchaser may contact someone within the agency who has knowledge in the subject area to assist with the cost estimate. The cost estimate must be developed in good faith as it will be used not only in the selection of the appropriate procurement method, but also for compliance with statutory requirements that may be applicable to the purchase based on contract value, funding source or expenditure restrictions and prohibitions.

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

Funding Source. As part of the procurement planning activities, the agency should determine the funding source that will be used to pay the vendor. Sources of funding include: General Revenue, General Revenue-Dedicated accounts, Federal Funds, and Other Funds. The agency must ensure that the procurement complies with any laws, special regulations, restrictions or limitations applicable to the source of funding. Information regarding funds and accounts may be found in the *Texas Comptroller Manual of Accounts* posted on the CPA website.[74] In addition, agencies planning to use grant funds must also comply with any applicable grant requirements or special conditions imposed by the underlying grant award that will fund the procurement.

Allowable Use of Appropriated Funds. The agency must ensure that the procurement is not prohibited by law, including the General Appropriations Act. For example, agencies may not use appropriated funds for the following goods and services unless the procurement falls within a statutorily authorized exemption:

- alcoholic beverages; [75]
- an audit of the financial records or accounts of the agency;[76]
- postage or a post office box from an entity other than the U.S. postal service;[77]
- membership in or dues for professional organizations;[78]
- live or artificial indoor plants;[79]

74 The CPA website is located at Comptroller.Texas.Gov.

75 TEX. GOV'T CODE §§ 2113.001(2), 2113.101 (exception for public junior colleges and authorized law enforcement purposes).

76 TEX. GOV'T CODE §§ 2113.001(2), 2113.102 (exception for public junior colleges, the Texas lottery, the Texas Department of Housing and Community Affairs, the Texas Turnpike Authority division of the Texas Department of Transportation, certain audits of payments received from the federal government, audits for certain grants, loans, or other money to an entity other than a state agency, and certain internal auditors or to a contract with the state auditor).

77 TEX. GOV'T CODE §§ 2113.001(2), 2113.103 (multiple exceptions).

78 TEX. GOV'T CODE §§ 2113.001(2), 2113.104 (exception for prior review and approval of the expenditure by the administrative head, or designee, of the state agency, institution of higher education, or university system, public junior colleges, and the state library).

79 TEX. GOV'T CODE §§ 2113.001(2), 2113.105 (exception for public junior colleges and plants purchased by institutions of higher education for education or research purposes).

- private facilities for meetings, conferences or exams;[80] and
- generally informational, promotional, or educational periodicals and publications issued by the agency intended for use by the general public and not essential for achievement of a statutory objective of the agency.[81]

Information regarding how to properly carry out purchase transactions while complying with certain provisions of the constitution, statutes, and rules related to expenditures may be found on eXpendit State Purchase Policies located on the CPA website.[82] Public procurement professionals should seek guidance from agency legal counsel to determine if an exception exists when there is a need to purchase a generally prohibited item.

Acquisition Plan

The Contract Developer, using the needs assessment and the cost estimate, will determine the procurement strategy or approach for obtaining the requisite goods or services. For relatively simple and routine procurements, like purchases using the set aside programs (State Use program and TCI program), Texas SmartBuy, or informal bidding, the Acquisition Plan may be documented as an agency procedure. For other procurements, the Contract Developer will develop a unique Acquisition Plan for each purchase. Factors to be considered by the agency in determining which procurements require individual Acquisition Plans include the following: procurement type (*e.g.*, furniture, software maintenance, consulting services), contract complexity, dollar value, and whether the procurement is part of a larger organizational project.

An agency may develop its own internal version of an Acquisition Plan. A sample Acquisition Plan is located in Appendix 6. DIR has also developed an Acquisition Plan template, which is available on the DIR website,[83] for technology procurements as part of the Texas Project Delivery Framework.

The objective of the Acquisition Plan is to ensure that the procurement is solicited, negotiated, executed, and managed in a way that delivers best value to the State. Accordingly, the Acquisition Plan tracks all of the procurement activities that take place throughout the Procurement Cycle. The Acquisition Plan identifies the procurement team (including the Contract Developer, Contract Manager, and end user), the team's roles and responsibilities, the schedule of events, as well as the activities necessary to ensure that the contract requirements are satisfied, the goods and services are delivered in a timely manner, and the financial interests of the agency are protected.

To aid public procurement professionals in the development of an Acquisition Plan, a procurement value threshold chart is located in Appendix 7. Also, a sample procurement file checklist is located in Appendix 8. A procurement file checklist is a tool used for documenting compliance with applicable procurement laws, rules, and agency practices.

Prior to contract award, the Acquisition Plan should be updated to address significant changes to the overall procurement effort, including changes to any identified assumptions that may impact the procurement scope or constraints to the procurement process. After contract award, the Acquisition Plan is used during the transition from Contract Developer to Contract Manager. A well-drafted Acquisition Plan will assist the Contract Manager in managing the contract throughout its term.

80 TEX. GOV'T CODE §§ 2113.001(2), 2113.106 (exception for public junior colleges or if state facilities are not available when needed, are not adequate to accommodate the meeting, conference, or examination, or are not an economically favorable alternative to other facilities).

81 TEX. GOV'T CODE §§ 2113.001(2), 2113.107(b) (multiple exceptions).

82 The CPA website is located at Comptroller.Texas.Gov.

83 The DIR website is located at www.dir.texas.gov.

PROCUREMENT METHOD DETERMINATION

Overview

The second step of the procurement process is to determine which procurement method would best achieve the identified business requirements and procurement objectives. SPD and DIR are charged with the responsibility of establishing and overseeing statewide contracts for use by agencies. Agencies must use SPD and DIR designated procurement methods unless the procurement is subject to a statutorily specified exclusion or authorized exemption.

This Guide primarily focuses on procurement methods that are within SPD and DIR's procurement authority. Public procurement professionals are expected to be knowledgeable about any exclusions or exemptions from SPD or DIR statewide procurement authority that pertain to their agencies. An exclusion or exemption occurs when

1. the procurement is not within the general grant of statutory authority to SPD or DIR, or
2. a particular agency, procurement type, or contract value is designated to be outside of SPD or DIR's authority.

Upon written request, SPD shall determine the source of purchasing authority for a particular procurement.[84]

Best Value to the State. Texas law mandates that contract awards may only be made to responsive vendors providing best value to the State. The best value standard may vary depending on the procurement method,[85] therefore, public procurement personnel must ensure that the appropriate best value standard is used as the basis for the contract award.

Procurement Methods

Procurement Method Identification Process

When identifying the appropriate procurement method, including relevant exclusions and exemptions, public procurement personnel will need to know the following for each purchase: procurement type, cost estimate, and purchasing entity. For certain procurements, SPD and DIR may delegate specific procurement authority to an agency. A delegation of authority may be provided for a pre-approved class of procurements, such as particular procurement type or contract value, or obtained on a case-by-case basis upon request by the agency.

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

The process for selecting the appropriate Procurement Method is outlined below.

Step 1: Is the purchase subject to a Declaration of Disaster by the Governor?

If yes, follow acquisition procedures for the Texas Disaster Act of 1975.

If no, proceed to Step 2.

Step 2: Can the purchase be completed using State or Federal surplus property?

If yes, follow acquisition procedures for the State and Federal Surplus Property Programs, as applicable.

If no, proceed to Step 3.

Step 3: Is the purchase for professional services, consulting services, or legal services?

If yes, follow the acquisition procedures for Professional Services, Consulting Services, or Legal Services, as applicable.

If no, proceed to Step 4.

Step 4: Can the purchase be completed using the TCI Program?

If yes, follow the acquisition procedures for TCI Purchases.

If no, proceed to Step 5.

Step 5: Can the purchase be completed using the State Use Program?

If yes, follow the acquisition procedures for the State Use Program.

If no, proceed to Step 6.

Step 6: Is the purchase for information technology (NIGP Class/Item with an *)?

If yes, follow the acquisition procedures for Information Technology Purchases.

If no, proceed to Step 7.

84 TEX. GOV'T CODE § 2261.001(c).

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

Step 7: Can the purchase be completed by contracting with another state agency or local government?

If yes, follow the acquisition procedures for Interagency Cooperation Contracts (IAC) or Interlocal Cooperation Contracts, as applicable.

If no, proceed to Step 8.

Step 8: Can the purchase be completed using SPD Term Contracts?

If yes, follow the acquisition procedures for Term Contracts.

If no, proceed to Step 9.

Step 9: Is the purchase for printing services or equipment, or mail and messenger services?

If yes, follow the acquisition procedures for Printing Services and In-House Copy Centers or Mail and Messenger Services, as applicable.

If no, proceed to Step 10.

Step 10: Does the purchase involve used equipment or supplies?

If yes, follow the acquisition procedures for Used Equipment.

If no, proceed to Step 11.

Step 11: Can the purchase be completed using one of the following:

SPD Delegated Purchases,

SPD TXMAS Contracts,

Contract Established by Another State Agency,

Federal Government Purchases, or

Interstate Compacts & Cooperative Agreements?

If yes, follow the applicable acquisition procedure.

If no, proceed to Step 12.

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

If yes, follow the acquisition procedures for SPD Administered Agency-Specific Procurements.

If no, consult SPD or agency legal counsel for the appropriate procurement method.

Procurement Method – SPD Non-Delegated Purchases

Overview

Chapters 2155 and 2156 of the Texas Government Code are the primary sources of SPD's procurement authority. SPD Non-Delegated Purchases include set aside programs and Term Contracts as well as procurements for which SPD's purchasing authority has not been delegated to agencies by rule. For procurements and procurement methods within SPD's purview, agencies must comply with SPD's rules and procedures.

Texas SmartBuy. Texas SmartBuy, maintained by SPD, is the State of Texas online marketplace for non-IT goods and services. As the State's central e-procurement system, agencies and local governments utilize the web-based ordering system to access hundreds of competitively bid and awarded state contracts with almost 2 million items available.

Set Aside Programs. For purposes of this Guide, set aside programs refer to

1. Prison Made Goods governed by Chapter 497 of the Texas Government Code, and
2. the State Use Program authorized by Chapter 122 of the Texas Human Resources Code.

These set aside programs do not require competitive procurement.

Texas Correctional Industries Purchases

Texas Correctional Industries (TCI) is a division of the Texas Department of Criminal Justice (TDCJ) that manufactures goods and services using primarily offender labor for purchase by Texas governmental entities.[86] The Prison Made Goods Act requires that agencies purchase goods made by and services offered by TCI. Competitive bidding is not required for items purchased from TCI under the Prison Made Goods Act.

TCI offers most goods through Texas SmartBuy. For goods not available through Texas SmartBuy, the agency may find them in the TCI Catalog published on the TCI website.[87] For TCI Catalog products, the PO must be issued directly to TDCJ via email to tci@tdcj.texas.gov with the following notation: "The award was made under the Prison Made Goods Act and is non-competitive."

[86] TEX. GOV'T CODE Chapter 497.

[87] The TCI website is located at www.tci.tdcj.texas.gov.

An agency may decline to procure a good or service from TCI if

- TCI grants a waiver,[88]
- SPD determines that the good or service produced by TCI does not meet the requirements of the agency,[89] or
- SPD certifies that the good or service can be purchased elsewhere at a lower price after the agency gives TCI final opportunity to negotiate on price.[90]

Printing. Procurements for printing must comply with the Printing Services and In-House Copy Centers procedures. For competitively procured printing purchases, including those solicited using CPA's State Print Shop Request Form, TCI must be given the final opportunity to meet or beat the lowest price.[91] Bids for printing must include a bid or no bid response (in lieu of the waiver) from TCI.

TCI Waiver Process. A waiver must be obtained from TCI if an agency desires to procure a product or service offered in the TCI catalog from a source other than TCI. The TCI waiver request form can be found in the Procurement Forms Library located on the CPA website.[92] The waiver request can be based on substantial differences in specifications, which may include the inability for TCI to provide deliverables on the requested delivery date, price differences, or precise specifications required by the agency that cannot be met by TCI. An agency may not evade the intent of Prison Made Goods Act by requesting a product that varies slightly from standards for products established under Section 497.027 of the Texas Government Code, if TCI produces a similar product that is in compliance with established standards and is reasonably suited to the actual needs of the agency.[93]

The waiver request must be submitted by fax or email to TCI, as indicated on the form. TCI will evaluate waiver requests on a case-by-case basis and reply with a written approval or a denial of each request. As a best practice, the procurement file must include the TCI waiver request and waiver response.

If TCI denies an agency's waiver request, the agency may send an appeal letter to SPD. To expedite processing, the agency must provide the waiver identification number from the TCI waiver denial letter as well as any supporting documentation. SPD will provide a written notice of the approval or denial of the agency's appeal.

SPD Certification Process. For requests to certify a lower available price, the purchasing agency must send to SPD the appropriate bid documents. If the certification is approved, SPD will provide a written certification to the agency in a form similar to the following: "SPD has reviewed the agency's documentation and certifies that the goods or services can be purchased elsewhere at a lower price."

The State Use Program

The Texas Workforce Commission (TWC) oversees the Purchasing from People with Disabilities Program, commonly referred to as the State Use Program.[94] TWC contracts with a Central Nonprofit Agency, currently TIBH Industries (TIBH), to administer the day-to-day operations of the program. TIBH partners with Community Rehabilitation Programs (CRP), which employ disabled workers to develop products or provide services for the State Use Program. TIBH is the management link between the CRP work centers (*e.g.*, Lighthouse for the Blind), agencies, and TWC. Only products and services approved by TWC qualify as a set aside purchase available for agencies to purchase on Texas SmartBuy.

Agencies must purchase products and services offered through TIBH that meet the applicable specifications of the agency and that are available within the time specified.[95] Competitive bidding is not required for purchases from TIBH. Any time the quality of a TIBH product or service is deemed unacceptable or failed to meet agency specifications, this information should be reported to TIBH and a vendor performance report must be filed with SPD.

State Use Program Exceptions. Agencies are not required to purchase products and services using the State Use Program under the following circumstances:

1. under the rules of SPD, a TIBH-provided or -produced product or service does not meet the reasonable requirements of the agency; or
2. the requisitions made cannot be reasonably complied with using products or services produced by persons with disabilities.[96]

Agency purchases from other sources of products and services generally offered through the State Use Program are subject to enhanced scrutiny. Accordingly, specifications must satisfy a reasonable requirement by the agency and not be used to avoid the State Use Program. For example, if the purchase is for a pen with orange ink and TIBH only offers pens in black, blue, or red ink, the agency should document why black, blue, or red ink pens would not satisfy the agency's business need. To determine whether a

88 TEX. GOV'T CODE § 497.024(b).
89 TEX. GOV'T CODE § 497.024(b).
90 TEX. GOV'T CODE § 497.024(b).
91 TEX. GOV'T CODE § 497.025(c).
92 The CPA website is located at Comptroller.Texas.Gov.
93 TEX. GOV'T CODE § 497.024(c).
94 TEX. HUM. RES. CODE Chapter 122.
95 TEX. HUM. RES. CODE § 122.008.
96 TEX. HUM. RES. CODE § 122.016(a); 34 TEX. ADMIN. CODE § 20.306(b).

TIBH-offered product or service meets the reasonable requirements of the agency, the agency must not consider price. An exemption is not needed to document the purchase of a product or service that is unavailable through the State Use Program.

For products and services offered through the State Use Program, agencies are not required to use TIBH provided products or services if they do not meet the agency's specifications as to quantity, quality, delivery time, or life cycle costs.[97] If a TIBH-offered product or service is obtained from another source, the agency must document which of the four (4) authorized exceptions to the State Use Program is being utilized for the purchase. Price is not a factor used in the comparison of other sources to TIBH-provided products or services.

- **Exception for Quantity.** Quantity exceptions can be made when TIBH has a minimum order requirement that is more than is needed by the agency, or when an agency has a need for a quantity greater than TIBH is able to fill. For example, if an agency requires 3 toner cartridges and the TIBH minimum order quantity for toner cartridges is 10, on the exception report, the agency must state that quantity is the reason for procuring from another source because the agency need is less than the minimum order quantity specified in Texas SmartBuy by TIBH. As a best practice, quantity should not be used as an exception when the TIBH minimum order requirement could be met by combining the business need of several teams or divisions within the agency. Nor should orders be split to avoid a minimum quantity requirement.
- **Exception for Quality.** Quality exceptions can be made when a TIBH good or service does not meet specific performance standards (*e.g.*, the TIBH item is not functionally equivalent to commercial sources). This exception cannot be based on opinion or preference. The determination must be based on an identical and/or similar comparison of specifications and performance. For example, when purchasing self-adhesive note pads, the agency's determination, based on employee feedback after prior TIBH self-adhesive note pad purchases, is that the TIBH product does not adhere as well as other brands. On the exception report, the agency must state that quality is the reason for the decision to procure from another source. The procurement file must be documented with a justification as to why the TIBH product does not meet the specifications or performance criteria of the agency.
- **Exception for Delivery Time.** Exceptions based on delivery time may only be made after TIBH has been contacted and TIBH has confirmed its inability to meet an essential schedule or delivery date requirement. For example, if an agency is purchasing 50 boxes of name tag labels and the TIBH delivery for the goods is 10 days from the date the PO is received, but the name tags are needed within 5 calendar days, the agency must state on the exception report that delivery time is the reason for the decision to purchase from a source other than TIBH. The procurement file must be documented with a justification explaining why the 10-day delivery will prevent the end user from conducting its normal business or will present a hazard to life, health, safety, welfare, or property.
- **Exception for Life Cycle Costs.** Life cycle cost exceptions can be made when the purchaser determines the TIBH product or service is not the most cost-effective option to meet the business requirements of the agency. For example, when an agency needs to procure a large number of folding tables and chairs for an agency hosted meeting that occurs once every two years, the agency may decide to rent, rather than purchase, the tables and chairs after considering the life cycle costs (*e.g.*, costs associated with purchasing, owning, operating, maintaining, storing, and disposing of an item). On the exception report, the agency must state that life cycle cost is the reason for the decision to procure from a source other than TIBH.

The State Use Program Exception Reporting. Each agency that purchases products or services through TIBH must:

1. designate an agency employee to ensure that the agency complies with the requirements of the State Use Program; and
2. report through SPD's State Use Program exception reporting tool each month[98] the reason that products or services that could have been purchased from TIBH on behalf of a CRP, were purchased from another source.[99] TWC receives the exception report.[100]

The purpose of exception reporting is to provide SPD and TWC with the data to identify and address deficiencies and to evaluate whether additional commercially sourced products should be added to SPD statewide contracts for situations where TIBH products do not meet agency needs.

Term Contracts

OVERVIEW

SPD establishes Term Contracts for the purchase or lease of goods and services used in large quantities by several agencies.[101] Best value is achieved by using SPD established Term Contracts, therefore, competitive bidding by agencies is not required for items purchased from Term Contracts.

The Term Contracts are categorized according to the NIGP Class/Item codes which are located in the NIGP Commodity Book maintained on the CPA website.[102] With the exception of Managed Term

[97] 34 TEX. ADMIN. CODE § 20.306(b).

[98] TEX. HUM. RES. CODE § 122.016(b).

[99] TEX. HUM. RES. CODE § 122.0095(a).

[100] TEX. HUM. RES. CODE § 122.0095.

[101] 34 TEX. ADMIN. CODE § 20.220.

[102] The CPA website is located at Comptroller.Texas.Gov.

Contracts, agencies must order goods or services on Term Contracts through the Texas SmartBuy online ordering system. Blanket POs and Confirmation Orders are not permitted in Texas SmartBuy.

Agencies are encouraged to use Term Contracts whenever possible.[103] Agencies are not allowed to use delegated authority to purchase goods or services that are available through a statewide Term Contract unless the quantity required is less than the minimum order quantity specified in the relevant Term Contract.

MANAGED TERM CONTRACTS

A "Managed" Term Contract is a type of Term Contract that requires manual processing by the ordering entity. These contracts typically have different pricing structures or require a quote that is based on a discount percentage due to the agency's business need or for regular scheduled deliveries or flexible delivery dates.[104] General Contract Information (GCI) listings for Managed Term Contracts are located on Texas SmartBuy, however, the purchase cannot be made through the online ordering system. Instead, the agency issues a PO directly to the awarded vendor. A purchaser may contact SPD's Contract Management Office for questions relating to a purchase from a Managed Term Contract. Blanket POs can be issued to the vendors of Managed Term Contracts; however, Blanket PO terms, including date range, must not exceed the Managed Term Contract term. When the Managed Term Contract expires, orders cannot be placed against any Blanket PO issued by the agency for that contract.

TRAVEL SERVICES CONTRACTS

As part of the State Travel Management Program (STMP), SPD negotiates contracts with private travel agents, travel and transportation providers, and credit card companies that provide travel services and other benefits to the State. SPD monitors travel reservations and other travel arrangements required for business travel by state employees and provides travel-related services.[105] By establishing a contracted rate with commercial lodging establishments, motels, inns, and bed & breakfasts, SPD obtains cost-effective lodging for state employees traveling on official government business.[106]

Agencies[107] may not enter into a contract for travel services without prior approval from SPD. As part of the review process, SPD considers whether the proposed contract offers the best value for the State and the impact of the proposed contract on existing travel service contracts. Reimbursement of certain travel expenses and purchase requests by agencies for commercial airline or rental car transportation at an amount that exceeds SPD's contracted fares or rates or certain limitations as prescribed by Chapter 660 of the Texas Government Code, the General Appropriations Act and rules adopted by CPA will not be granted unless the agency has a valid exception.

Exceptions to the Use of SPD Travel Services Contracts.

The following are exceptions to the use of the Travel Services Contracts:

- Lower cost to the State. Agencies may use any travel services obtained at a price lower than SPD's travel services contract price. Agencies are encouraged to obtain lower priced travel services through the use of 14-day or other advanced reservations programs, promotional price reductions, or any method that provides a lower overall cost of travel.[108]
- Unavailability of contract travel services. SPD's travel services contracts are not available during the time or at the location necessary for the business purpose; or the travel service contract does not provide the service required; or because the contractor is unable to provide the contract services due to a force majeure event.[109]
- Special needs. The traveler's health, safety, physical condition, or disability requires accommodations, including medical emergency or other necessary services, not available from SPD's travel service contracts.[110]
- Custodians of persons. The traveler has custody of a person pursuant to statute or court order and the traveler is required to provide a degree of security and safety that is not available from SPD's travel services contract.[111]
- In travel status. The traveler is in the course of travel and changes in scheduling render the use of SPD's travel services contracts impractical or the appropriate travel services are not available. The traveler must make reasonable efforts to secure rates equal to or lower than SPD's travel service contract rates.[112]
- Group program. The traveler is using a group program wherein reservations were made through a required source to obtain a particular rate or service.[113]

[103] *See* General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(7) (directing agencies to use Texas SmartBuy, Term Contracts and cooperative contracts whenever possible).

[104] TEX. GOV'T CODE § 2155.084.

[105] TEX. GOV'T CODE § 2171.051. *See also* TEX. GOV'T CODE Chapter 660.

[106] For more information on rates, allowances, exceptions, and further resources, please see the State Travel Management Program at https://comptroller.texas.gov/purchasing/programs/travel-management/#skip-scroll.

[107] State agencies in the executive branch of state government shall participate under CPA rules in SPD contracts for travel services, provided that all travel agents approved by SPD are permitted to contract with the State and provide travel services to all state agencies. TEX. GOV'T CODE § 2171.055(a).

[108] 34 TEX. ADMIN. CODE § 20.408(b).

[109] 34 TEX. ADMIN. CODE § 20.408(c).

[110] 34 TEX. ADMIN. CODE § 20.408(d).

[111] 34 TEX. ADMIN. CODE § 20.408(e).

[112] 34 TEX. ADMIN. CODE § 20.408(f).

[113] 34 TEX. ADMIN. CODE § 20.408(g).

- **Emergency response.** The traveler is responding to a public health or safety emergency situation.[114]
- **Legally required attendance.** The traveler is required by a court, administrative tribunal, or other entity to appear at a particular time and place without sufficient notice to obtain services under an SPD travel services contract.[115]

In its written request seeking SPD approval of a requested exception, an agency may request that SPD consider additional exceptions.[116] The request must include a reasonable justification for the need for the exception. SPD will not grant exceptions for longer than the term of existing state travel services contracts.[117]

Travel Coordinators. Each agency shall designate an employee as its travel coordinator; this person will serve as the single point of contact between STMP and the agency for disseminating and collecting travel data and information. The following information must be provided to STMP about the travel coordinator:

- name,
- business telephone number,
- email address,
- business mobile telephone number, and
- other requested and relevant contact information.

It is recommended that agency travel coordinators participate in travel advisory, proposal evaluation, education, and any other groups needed to assist SPD in contracting for the most economical, efficient, and useful travel services. CPA may conduct audits of travel reimbursement requests for compliance with rules and to enforce travel requirements.

SPD-Administered Agency-Specific Procurements

For procurements not delegated to the agencies under the SPD Review and Delegation Process, SPD will establish and administer an agency-specific procurement. The ordering agency initiates the process by submitting delegation request to SPD either as an Open Market Requisition (OMR) or via the Procurement Oversight & Delegation portal.

The Contract Developer is responsible for providing current and complete specifications to SPD — providing out-of-date or incomplete specifications may prolong the procurement timeline. If the request includes items distributed to various geographic regions, the Contract Developer must ensure that the estimated quantity per region is provided to SPD. Also, the Contract Developer must indicate on the delegation request if all or any part of the purchase is considered to be proprietary.

SPD will communicate with the ordering agency point of contact throughout solicitation development, posting, evaluation, and award. For SPD administered agency-specific contracts, the agency PO(s) submitted to the contractor must reference the SPD contract number. The ordering agency must notify the assigned SPD Contract Manager of any contractor performance matters. In addition, the agency should enter vendor performance reports to Vendor Performance Tracking System (VPTS).

Proprietary Purchases

A proprietary purchase is one where the specifications or conditions of the proposed purchase are proprietary to one vendor and do not permit an equivalent product or service to be supplied.[118] The term "proprietary" refers to a product or service that has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services.[119] Proprietary purchases include products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law.[120]

Proprietary purchases, by definition, preclude competition because an attribute of the purchase limits consideration to only one product or supplier. In today's robust marketplace, it is unusual for only one product or one vendor to be capable of addressing an agency's business need. Because Texas procurement law promotes the use of competitive bidding for purchases,[121] proprietary purchases are subject to enhanced scrutiny.

Proprietary purchases may be either sole source or competitive.

- Sole Source: The specified product or service is only available for purchase through a single vendor *e.g.,* manufacturer, publisher, service provider. Examples of sole source proprietary purchases include a back issue of a magazine available from only the publisher and an educational conference available from only the conference sponsor.
- Competitive: The specified product or service is available for purchase through more than one vendor *e.g.,* dealers, distributors, resellers, authorized service providers. Examples of competitive proprietary purchases include brand-specific

[114] 34 TEX. ADMIN. CODE § 20.408(h).
[115] 34 TEX. ADMIN. CODE § 20.408(i).
[116] 34 TEX. ADMIN. CODE § 20.409(b).
[117] 34 TEX. ADMIN. CODE § 20.409(b).
[118] TEX. GOV'T CODE § 2155.067(a).
[119] 34 TEX. ADMIN. CODE § 20.25(44).
[120] 34 TEX. ADMIN. CODE § 20.25(44).
[121] TEX. GOV'T CODE § 2155.063 (Except as otherwise provided by Subtitle D of Title 10 of the Texas Government Code, a purchase of or contract for goods or services shall, whenever possible, be accomplished through competitive bidding.).

replacement parts for equipment available through multiple OEM-authorized dealers and software that a software publisher makes available to the public through several resellers.

When a specification for a proposed purchase is drafted so narrowly that there is only one viable product or one vendor eligible for contract award, the agency must document the rationale for the restrictive specification by placing a written Proprietary Purchase Justification in the procurement file.[122] The Proprietary Purchase Justification must include the following information in order to document best value to the State:

1. describe the product or service the agency proposes to purchase, and provide a statement regarding the agency's business need and planned use;
2. explain why the agency specifications for the product or service are written as they are, and why those specifications are necessary to accomplish the agency's goal for the procurement;
3. state the reason that no other competing products or services will satisfy the need of the agency and provide examples of the technical, practical, or operational risks that would occur if competing products or services are selected; and
4. specify whether the purchase is sole source or competitive.

The Proprietary Purchase Justification must be signed by the agency head, the chairman of its governing body, or a person to whom such signature authority has been properly delegated in the Agency Procurement Plan, or in the case of an institution of higher education, by a person properly designated as a purchasing officer for the institution.[123] A Proprietary Purchase Justification template is located in Appendix 9.

Proprietary purchases, regardless of whether they are sole source or competitive, are subject to ESBD posting requirements as well as requirements applicable to SPD delegation, CAT reviews, and QAT reviews.

Examples of Non-Compliant Proposed Proprietary Purchase Justifications.

- "Our professionals have identified [vendor's product] as the most durable, safe, and efficient system of its kind."
- "[The vendor] has claimed their technology is proprietary and we agree."
- "[Vendor] is the exclusive patent holder of US Patents [X, Y, and Z]. No other manufacturer can legally produce [the product] with the same properties."
- "Our agency has performed research [on these products]. The manufacturer can provide [a range of products] that will enable [our agency] to [meet our statutory requirement]."
- "Our staff tested [these products] against others, and only [the identified products] that passed our rigorous qualification process were placed on the agency's approved products list. We can only buy products on our approved products list; therefore, these products are proprietary."
- This is the only vendor the feds will let us spend this money with.
- This vendor is our incumbent and only their products will work with the equipment we already have.
- "The [brand] furniture purchased will be used to provide a comfortable and aesthetically pleasing work environment for employees' working in the office so they may provide customers frequenting the building excellent customer service in a welcoming atmosphere."

Proprietary Sole Source Procurements ≤ $25,000. No competitive bidding is required if the total value of the proprietary sole source contract is $25,000 or less.

Proprietary Purchases under SPD Delegation by Rule. For purchases made under SPD's delegated authority by rule, agencies are required to maintain the Proprietary Purchase Justification in the agency procurement file and to provide it to SPD upon request. A Proprietary Purchase Justification is not required for procurements valued at $5,000 or less.

For proprietary purchases exceeding $5,000, the solicitation must include the following statement:

> "These specifications are being advertised under Section 2155.067 of the Texas Government Code. Only bids on items conforming exactly to these specifications, which include proposing only the brand name(s), make and model number(s) specified, will be considered in determining an award."

Proprietary Purchases under the SPD Review and Delegation Process. For procurements made under the SPD Review and Delegation Process, additional information must be submitted with the agency's delegation request. For goods valued at more than $50,000, the Proprietary Purchase Justification must be submitted to SPD along with the OMR at open.market@cpa.texas.gov. For services valued at more than $100,000, the agency must submit the Proprietary Purchase Justification on agency letterhead along with its delegation request submission to the Procurement Oversight & Delegation portal.

[122] TEX. GOV'T CODE §§ 2155.067(a), (c).
[123] 34 TEX. ADMIN. CODE §20.209(b)(4).

SPD will notify the agency in writing if the proprietary procurement is authorized by SPD. For proprietary purchases exceeding $5,000, the solicitation must include the following statement:

> "These specifications are being advertised under Section 2155.067 of the Texas Government Code. Only bids on items conforming exactly to these specifications, which include proposing only the brand name(s), make and model number(s) specified, will be considered in determining an award."

If a review of the agency's proposed specifications and Proprietary Purchase Justification does not show that the procurement is proprietary, then SPD will inform the agency that the proprietary procurement, as currently drafted, is not authorized. If SPD does not authorize the proprietary purchase, the agency may choose either to submit a revised Proprietary Purchase Justification and specifications for SPD review and approval or proceed with a non-proprietary procurement.

Proprietary Purchases using the RFO Procurement Method. For proprietary purchases made using the RFO procurement method, agencies are required to maintain the Proprietary Purchase Justification in the agency procurement file and to provide it to SPD upon request. In addition, for proprietary purchases exceeding $5,000, the RFO must include the following statement in bold and prominent type at the beginning of the solicitation:

> "The issuing office believes that the requested items in this request for offers may be proprietary to one vendor under Section 2155.067 of the Government Code; however, the issuing office strongly encourages offers from all qualified respondents that may be able to provide the requested items."

Mail and Messenger Services Contracts

SPD's Statewide Mail Operations provides and operates an interagency mail and messenger service to deliver unstamped or non-metered written communications and packages between the Legislature, state agencies, and legislative agencies located in Travis County.[124] Mail may also be delivered to and from the United States Postal Service by agreement of the agency and SPD.[125] In addition, the mail and messenger service may process and meter outgoing mail for agencies upon agreement of the agency and the CPA. Each agency must furnish funds to cover amounts of postage to be metered.[126]

When utilizing the metered mail service, a monthly report showing the amounts of postage used and volume of mail metered will be provided to the agencies. Mail may not be metered for an agency in excess of funds provided by the agency, unless approved by SPD as to avoid undue delays in processing mail. Any deficit in an agency's postage account must to be promptly reimbursed to SPD.[127]

Agencies located in Travis County are required to consult with SPD before renting, purchasing, upgrading, or selling mail processing equipment, contracting with a private entity for mail processing services, or taking any action that will significantly affect the agency's first-class mail practices.[128] The agency must submit the following:

1. For mail equipment or private entity service contracts under $10,000, an agency must submit a written justification to SPD stating why the equipment or service is needed and what benefits are expected to be received.[129]
2. For mail equipment or private service contracts over $10,000, an agency must submit a detailed life cycle cost benefit analysis to SPD that includes all expected costs and benefits over the life of the equipment or service. The analysis must be in a format prescribed by SPD.[130]
3. For any action that will significantly affect its first-class mail practices, an agency must provide a written statement of the need for the action and anticipated benefits.[131]

SPD will provide a written response to the agency indicating whether or not it agrees with the intended action and any suggested alternatives.[132]

Printing Services and In-House Copy Centers

Agencies are authorized to provide for their own incidental copying needs by using available local and networked printers and office copy machines either purchased or leased. DIR establishes and manages statewide contracts for these purposes. Incidental copying is day-to-day production and copying of documents within a quantity limit and job specification that does not reasonably require high-volume duplication equipment or services.

Agencies are not authorized to establish full service print shops without the approval of SPD.[133] Some agencies' production volumes may require centralized in-house copy centers with multiple pieces

[124] TEX. GOV'T CODE §2176.051; 34 TEX. ADMIN. CODE § 20.381(a).
[125] 34 TEX. ADMIN. CODE § 20.381(d).
[126] 34 TEX. ADMIN. CODE § 20.381(e).
[127] 34 TEX. ADMIN. CODE § 20.381(e)(1).
[128] TEX. GOV'T CODE § 2176.104.
[129] 34 TEX. ADMIN. CODE § 20.381(f)(1).
[130] 34 TEX. ADMIN. CODE § 20.381(f)(2).
[131] 34 TEX. ADMIN. CODE § 20.381(f)(3).
[132] 34 TEX. ADMIN. CODE § 20.381(f)(4).
[133] 34 TEX. ADMIN. CODE § 20.381(f)(4).

of printing and reproduction equipment, typically with dedicated staff assigned to the locations and operating order fulfillment process to support the agencies' functions. Staffing and equipment located within a copy center should be appropriate to the size, scope and mission of the agency. The purchase or lease of equipment is subject to review by SPD, not only in regard to the merit of the individual purchase, but also in the context of the copy center's entire equipment inventory. Equipment typically associated with print shop operations (*e.g.,* printing presses, folding machines, cutting machines, etc.) should not be deployed in agency copy centers.

Agencies must utilize SPD approved State Print Shops[134] to competitively procure print services for printing procurements estimated to be $2,500 dollars or more. State Print Shops provide services through interagency contracts with SPD. The State Print Shops provide design, digital, and traditional offset printing, binding, fulfillment, mailing, and other print-related services to agencies.

SPD Approved State Print Shops	
Agency Name	**Interagency Contract No.**
Texas Correctional Industries (TCI)	PSIAC-06-2017
Texas Department of Public Safety (DPS)	PSIAC-01-2017
Texas Department of Transportation (TxDOT)	PSIAC-03-2017
Texas Department of State Health Services (DSHS)	PSIAC-02-2017
Texas Workforce Commission (TWC)	PSIAC-05-2017
The University of Texas at Austin (UT)	PSIAC-04-2017
University of North Texas (UNT)	PSIAC-07-2017

To submit specifications to the State Print Shops, the agency must complete the Print Shop Job Request Form located on the CPA website.[135] The Print Shop Job Request Form provides the agency with an opportunity to enter the "Project Due Date," the "Estimate Needed by," and the "Time Needed by" fields for the job. If no required date is submitted, the State Print Shops that are able to perform the work should respond to the request within three business days of the job request. Once the Print Job Request is submitted, the agency must print or save a copy of the results page for the procurement file.

If an agency has a print job that it needs fulfilled on a more-or-less regular schedule and is identical or substantially the same job each time, the agency should complete only one Print Shop Job Request Form. The agency will provide the estimated print schedule for the Fiscal Year and the estimated quantity. Estimates should be based on historical information, where available, to assist the State Print Shops in their bid efforts.

Examples of scheduled print jobs include, but are not limited to, the following:

- newsletters;
- forms, brochures, and other similar jobs that need to be printed on a regular basis or as stock levels are depleted;
- reports; and
- business cards, letterhead, and other agency specific stationery.

Agencies will need to resubmit the job request each Fiscal Year. Agencies are also encouraged to submit a new Print Shop Job Request Form should the job change dramatically at any point in the Fiscal Year.

[134] Beginning in 2017, SPD took over management of the State Print Shop Program (Contract No. 966-M2) from the Council for Competitive Government which was dissolved by the 85th Legislature.

[135] The CPA website is located at Comptroller.Texas.Gov.

Print Services of less than $2,500. For print and print-related service requests of less than $2,500, agencies are encouraged to establish internal procurement procedures; these requests may be sourced directly from any of the contracted state print shops or by soliciting bids through the web form.

Best Value Determination. An agency intending to purchase print services must conduct a best value determination before issuing a PO. State Print Shops should respond with a bid within the requested time frame and the purchasing agency is required to tabulate these bids using the SPD Print Bid Tabulation Template to identify the lowest bid that meets the specifications.

For print purchases, TCI must be given the final opportunity to meet or beat the lowest price.[136] If TCI submitted a bid and TCI is not the lowest bid, the purchasing agency is required to request a final bid from TCI. The purchasing agency should not disclose the other bids to TCI during this stage of the competitive bid process. Upon award, the completed bid tabulation noting the successful bidder should be sent to all State Print Shops and SPD with the email subject line: "Print Bid Tabulation for Requisition No. XXX."

No Bids Received From State Print Shops. If none of the State Print Shops respond to the Print Job Request, agencies may solicit competitive bids from commercial vendors and TCI. ESBD posting requirements apply to printing services contracts.

Agencies Hosting State Print Shops. An agency hosting a State Print Shop is not required to follow the competitive bidding procedures if the print job is performed at the agency's print shop. If there is a need to outsource the work, the agency must follow the competitive bidding procedures by submitting its specifications to the State Print Shops using the Print Shop Job Request Form.

State Data Center Printing. DIR has entered into a private vendor contract to manage Data Center Services (DSC) for participating agencies. Any agency receiving DSC services may opt to leverage those high-speed production print output and presort/barcode mail services instead of the services available through the State Print Shops.

Used Equipment

PURCHASE OF USED EQUIPMENT

As a general rule, an agency should procure new equipment. Sometimes, however, it is necessary or advantageous to purchase used or demonstrator equipment and supplies. The most common reasons are:

- the inability to secure new equipment,
- the lack of adequate funds for new equipment, or
- used equipment that will satisfy the agency's need is available at a substantial savings.

To acquire used or demonstrator equipment, the agency must utilize the procurement method applicable to the estimated amount for the procurement.

For procurements not delegated to the agency under the SPD Review and Delegation Process, the procurement file must contain the following:

1. a statement from an authorized person of the agency that the equipment or supplies have been personally examined,
2. a description of the condition and value of the equipment or supplies, and
3. the reasons for inability to secure new equipment and/or that the used equipment or supplies would provide a substantial savings.

If the value of the procurement exceeds the agency's delegated authority, the agency must comply with the SPD Review and Delegation Process. The OMR submitted to SPD must include the following information:

1. a statement from an authorized person of the agency that the equipment or supplies have been personally examined,
2. a description of the condition and value of the equipment or supplies, and
3. the reasons for inability to secure new equipment and/or that the used equipment or supplies would provide a substantial savings.

TRADE-IN OF USED EQUIPMENT

An agency may trade in agency-owned equipment for new equipment of the same or similar type if it is in the best interest of the State. An agency may not trade in property that has been declared either surplus or salvage; such property must be disposed of through the State Surplus Property Program. Trade-ins are not allowed through orders placed against Term Contracts.

The agency must have documentation supporting the equipment's value in order to make a decision whether to process as surplus or trade-in the equipment for new equipment utilizing a solicitation.

Trade-In Surplus. If the State could reasonably realize greater cost savings by declaring the equipment as surplus or salvage, the equipment should be disposed of under the State Surplus Property Program.

[136] TEX. GOV'T CODE § 497.025(c).

Trade-In Through Solicitation. If an agency determines that a trade-in will provide the greater cost savings, the procurement file must contain an estimated approximate value for that determination and the solicitation must include the following:

1. Requirements and Clauses:
   - The acceptance of the trade-in amount is at the State's option,
   - Release of trade-in equipment will not be allowed until final delivery and acceptance of the new equipment,
   - Deadline for pickup of the equipment by awarded respondent "where is, as is"
2. Equipment Description:
   - Age of equipment,
   - Condition of equipment,
   - Make (Manufacturer/Brand),
   - Model Number, and
   - Serial Number (if applicable).

Contract Established by Another State Agency

When a contract created by another state agency fulfills an unmet need, the SPD director may either (1) endorse the contract of the other agency as an SPD contract and make it generally available for agency use or (2) authorize the use of the contract of the other agency on a case-by-case basis.[137] For case-by-case reviews, the requesting agency must provide written notification to SPD that the purchase is being considered. The notification must be signed by the agency's purchasing director and include a confirmation that an SPD contract does not exist for similar goods or services.[138] The agency notification should also disclose the terms of the other agency contract, capabilities of the vendor, and a justification that addresses how using the other agency contract will be more advantageous than creating a new contract.[139] SPD will inform the requesting agency of its determination. If SPD approves the use the other contract, the requesting agency may proceed with the procurement utilizing established purchasing procedures.[140]

[137] 34 TEX. ADMIN. CODE § 20.236(b), (d).
[138] 34 TEX. ADMIN. CODE § 20.236(b).
[139] 34 TEX. ADMIN. CODE § 20.236(b).
[140] 34 TEX. ADMIN. CODE § 20.236(c).

Federal Government Purchases and Interstate Compacts & Cooperative Agreements

SPD or the governing body of an institution of higher education may negotiate purchases of goods of any kind needed by a state agency or the institution of higher education with the appropriate agency of the federal government as long as the price of goods that are purchased from the federal government does not exceed the fair market value of the goods.[141] In addition, SPD may enter into one or more compacts, interagency agreements, or cooperative purchasing agreements directly with one or more state governments, agencies of other states, or other governmental entities or may participate in, sponsor, or administer a cooperative purchasing agreement through an entity that facilitates those agreements for the purchase of goods or services if SPD determines that the agreement would be in the best interest of the State.[142]

A compact or agreement may not be used to purchase services that are defined as part of the practice of engineering under Section 1001.003 of the Texas Occupations Code or architecture under Section 1051.001 of the Texas Occupations Code.[143] For assistance with federal government purchases and procurements utilizing interstate compacts and cooperative agreements, agencies should contact SPD at open.market@cpa.texas.gov.

Procurement Method – SPD Delegated Purchases

Overview

SPD is authorized to delegate its purchasing functions to agencies.[144] A delegation of authority may be

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

A delegated purchase is made by an agency under the authority of SPD and subject to SPD's rules and procedures. Delegated purchases shall, whenever possible, be accomplished through competitive bidding.[145] Delegated purchases exempt from the competitive

[141] TEX. GOV'T CODE § 2155.084(a)-(b).
[142] TEX. GOV'T CODE § 2156.181(a), 34 TEX. ADMIN. CODE § 20.237. *See also* TEX. GOV'T CODE § 2158.241 (SPD may enter into compacts and cooperative agreements with other states and government entities for procuring products made of recycled materials when SPD determines it is in the best interest of the State.).
[143] TEX. GOV'T CODE § 2156.181(a-1).
[144] TEX. GOV'T CODE § 2155.131.
[145] TEX. GOV'T CODE § 2155.063; 34 TEX. ADMIN. CODE § 20.206(c).

bidding requirement are expressly identified on the Summary of Minimum Requirements for Delegated Purchases chart. An agency may not divide a purchase into small lot purchases to match the delegation dollar thresholds. If an agency does not comply with procurement rules or laws under delegated purchasing authority, SPD may revoke that agency's purchasing authority and report the violations to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and the LBB.[146]

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

Determining Contract Value

For SPD reporting, review, and delegation requirements, contract value is defined as "the estimated dollar amount that an agency may be obligated to pay pursuant to the contract and all executed and proposed amendments, extensions and renewals of the contract."[147] Contract value, therefore, is not limited to just the cost for the initial term, it is determined by the total value of the contract over a contract's term as well as any modifications, renewals, or extensions of the contract.[148]

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

Public procurement professionals must be mindful that other oversight agencies may not use the same standard for determining contract value. For example, the value of a contract is calculated differently for IT commodity purchases under DIR contracts.

Summary of Minimum Requirements for Delegated Purchases

The following chart provides a summary of the delegated purchases, each of which will be discussed in further detail in the Guide.

MINIMUM REQUIREMENTS FOR SPD DELEGATED PURCHASES*								
Contract Value	**Purchases of Goods****	**Purchases of Services****	**Direct Publication Purchases**	**Perishable Goods Purchases**	**Distributor Purchases**	**Fuel, Oil and Grease Purchases**	**Internal Repair**	**Emergency Purchases****
$0.00 to $5,000.00	Competitive Process Not Required PCC E	Competitive Process Not Required PCC E	Competitive Process Not Required PCC K	Competitive Process Not Required PCC L	Competitive Process Not Required PCC M	Competitive Process Not Required PCC P	Competitive Process Not Required PCC E	Competitive Process Not Required PCC E
$5,000.01 to $25,000.00	Informal Competitive Solicitation PCC F	Informal Competitive Solicitation PCC Q	Competitive Process Not Required PCC K	Informal Competitive Solicitation PCC L	Informal Competitive Solicitation PCC M	Informal Competitive Solicitation PCC P	Informal Competitive Solicitation PCC Q	Informal Competitive Solicitation PCC Q
$25,000.01 to $50,000.00	Formal Competitive Solicitation PCC S	Formal Competitive Solicitation PCC S	Formal Competitive Solicitation PCC K	Formal Competitive Solicitation PCC L	Formal Competitive Solicitation PCC M	Formal Competitive Solicitation PCC P	Formal Competitive Solicitation PCC S	Formal Competitive Solicitation When Possible PCC T
$50,000.01 to $100,000.00	Non-delegated PCC S	Formal Competitive Solicitation PCC S	Formal Competitive Solicitation PCC K	Formal Competitive Solicitation PCC L	Formal Competitive Solicitation PCC M	Formal Competitive Solicitation PCC P	Formal Competitive Solicitation PCC S	Formal Competitive Solicitation When Possible PCC T
Over $100,000.00	Non-delegated PCC S	Non-delegated PCC S	Formal Competitive Solicitation PCC K	Formal Competitive Solicitation PCC L	Formal Competitive Solicitation PCC M	Formal Competitive Solicitation PCC P	Formal Competitive Solicitation PCC S	Formal Competitive Solicitation When Possible PCC T

* Procurements made under SPD's delegation authority are subject to ESBD posting requirements as well as requirements applicable to CAT and QAT reviews.
** Purchases for printing must comply with the Printing Services and In-House Copy Centers procedures.

146 TEX. GOV'T CODE § 2155.132(a); 34 TEX. ADMIN. CODE § 20.82(c).
147 34 TEX. ADMIN. CODE § 20.25(b)(13).
148 TEX. GOV'T CODE §§ 322.020(a), 2254.006, 2254.0301; 34 TEX. ADMIN. CODE 20.25(b)(13).

SPD Delegation by Rule

OVERVIEW

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

- one-time purchases of goods that do not exceed $50,000;
- purchases of services that do not exceed $100,000;
- direct publications;
- purchases of perishable goods;
- distributor purchases;
- fuel, oil, and grease purchases;
- internal repair purchases; and
- emergency purchases.

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

Request for SPD-Administered Agency-Specific Procurement. Although SPD has by rule delegated its purchasing authority to agencies for certain procurements, agencies may request assistance from SPD for procurements under the delegated threshold. Agencies must submit their procurement assistance requests to SPD using the SPD Review and Delegation Process.

PURCHASES OF $5,000 OR LESS ("SPOT" PURCHASES)

With the exception of printing services,[149] competitive bidding is not required if the total value of the contract is $5,000 or less.[150] For Spot Purchases, an agency may supplement the CMBL with non-CMBL vendors. Dividing purchases to avoid the competitive bidding requirement is explicitly prohibited.[151]

ONE-TIME PURCHASES OF GOODS OF $50,000 OR LESS

SPD delegates the purchasing functions of one-time purchases of goods, including goods for the resale, which do not exceed $50,000. Goods refer to supplies, materials, and equipment.

PURCHASES OF SERVICES OF $100,000 OR LESS

SPD delegates the purchasing functions of services, including services for resale, the estimated cost of which does not exceed $100,000. A service is defined as the furnishing of skilled or unskilled labor or professional work. Delegated purchases of services do not include the following:

- Professional or consulting services as defined by Chapter 2254 of the Texas Government Code,
- Services of an employee of an agency, or
- Services of public utilities.[152]

DIRECT PUBLICATIONS

An agency may purchase publications directly from the publisher only when such publications are not available through statewide contract (*e.g.*, TCI Purchases, State Use Program purchases, Term Contracts) or through competitive bidding, including proprietary competitive purchases. Direct publication orders shall be made by following guidelines established by SPD. Examples of direct publications include, but are not limited to, the following:

- foreign publications;
- out-of-print or rare publications;
- back issues of magazines, journals, and newspapers;
- publications produced by professional societies;
- audio, visual, or audiovisual materials (films, audio presentations, etc.);
- computer software;
- collections of any of the foregoing items, and microfilm or microfiche copies of any of the foregoing items; and
- Library of Congress cards.

Direct Publication Declaration. The following statement should be placed on POs for the Direct Publication purchases: "Direct Publication - Not available from any other source."

Direct Publication Purchases ≤ $25,000. No competitive bidding is required if the total value of the direct publication contract is $25,000 or less.

PERISHABLE GOODS PURCHASES

Perishable goods are items that are subject to spoilage within a relatively short time. Perishable goods include, but are not limited to, the following: fresh fruit, fresh vegetables, and meat. The NIGP Class 390 perishable goods category, NIGP Class 375 (bakery products, fresh), and NIGP Class 380 (dairy products, fresh) qualify for this delegation using competitive bidding processes.

[149] TEX. CONST. art. XVI, § 20; purchases for printing must comply with the Printing Services and In-House Copy Centers procedures.
[150] TEX. GOV'T CODE § 2155.132(e); 34 TEX. ADMIN. CODE § 20.82(b)(1).
[151] TEX. GOV'T CODE § 2155.132(g).
[152] TEX. GOV'T CODE § 2155.001.

DISTRIBUTOR PURCHASES

The purchase of repair parts for a unit of major equipment that is needed immediately, or a maintenance contract for laboratory/medical equipment may qualify as a distributor purchase. Complete components, such as engines, transmissions and compressors do not qualify as repair parts under this description. A distributor purchase must be made from a dealer or distributor of the equipment being repaired; a major component that is built by another manufacturer, such as an engine in a vehicle, the distributor purchase can be made from the component manufacturer.

Examples of major equipment include, but are not limited to, the following:

- motor vehicles, aircraft, boats,
- farm tractors and equipment,
- road building machinery and equipment,
- heavy construction machinery and equipment,
- traffic signal lights or traffic signal controller equipment,
- Intelligent Transportation Systems (ITS),
- laboratory or medical equipment, and
- industrial manufacturing machinery.

Purchasers must verify that the installation of distributor parts will not void the equipment's warranty before proceeding with this type of procurement. An agency may not purchase any of the following on a distributor purchase basis: consumable items, labor of any kind, "will fit" parts (non-OEM), parts for stock, contract items, electrical parts for electric motors, electrical switch panel boards, and electrical accessories.

FUEL, OIL, AND GREASE PURCHASES

The following goods may be purchased by an agency in either bulk or packaged form: fuel, oil, and lubricants/grease purchases including gasoline, diesel fuel, kerosene, aviation fuels, transmission fluids, motor oil and other lubricants, liquefied petroleum gas (LPG), and compressed natural gas (CNG).

Lubricants. The solicitation and award of lubricants should be based on firm-fixed prices or a discount from a manufacturer's published list price.

Indexed Fuel Pricing. Because fuel prices fluctuate, agencies should construct bulk fuel solicitations using indexed pricing based on the contractor's terminal price. The posted terminal price is the contractor's cost per gallon for the fuel from the refiner's depot. The posted terminal price for a contract may be either:

- The contractor's actual cost, as shown on fuel receipts.
- A standard industry quote such as Oil Price Information Service (OPIS).
- Data Transmission Network (DTNrgy).
- A current index price from The Federal Department of Energy, Energy Information Administration.

The contractor's constant is the difference between the posted terminal price per gallon and the selling price per gallon. The constant includes applicable taxes, environmental fees, freight charges, load fees, operational overhead and contractor's profit margin. It is recommended that the agency, in the agency terms and conditions, prohibit contractors from changing the constant during the term of the contract. To determine the actual cost of the fuel, add the contractor's constant price to the terminal price:

EXAMPLE: $1.10/gallon Posted Terminal Price
+ $0.24/gallon Contractor's Constant
$1.34/gallon Selling price

Fuel, Oil, and Grease Purchase Procedure. If the specification and requirement is for:

1. Service station point of sale transactions (amounts of fuel, oil or grease required for continued operation of a motor vehicle such as pump-delivered gasoline, pump-delivered diesel fuel, and less than case lots of oil or other fluids), may be purchased using a State of Texas Retail Fuel Card issued through SPD 946-M3 contract.
2. For bulk fuel, the contract should include the following information:
    - The term of the contract, including beginning and ending dates.
    - Estimated total quantities to be purchased during the contract term.
    - Estimated frequency and quantity for each delivery.
    - The delivery destination or destinations.
    - Storage capacity of the agency's tank or tanks.
    - Any requirements for contractor-provided storage tanks.
    - A statement that the state is exempt from federal fuels excise tax.

INTERNAL REPAIR PURCHASES

An internal repair is a repair to state-owned equipment where the extent of the work cannot be determined until the equipment is disassembled. An internal repair must contain labor and may also

include parts. Internal repairs are usually the result of an unexpected, basic service outage. If an internal repair qualifies as an emergency, it must be processed as an emergency purchase.

EMERGENCY PURCHASES

For purposes of an emergency purchase under SPD's delegated authority,[153] an emergency purchase occurs when the agency must make the procurement quickly to prevent a hazard to life, health, safety, welfare, or property or to avoid undue additional cost to the state. Proper procurement planning for anticipated business need is expected. Pending expiration of funds does not constitute an emergency. Emergencies occur as the result of unforeseeable circumstances and may require an immediate response to avert an actual or potential public threat or to avoid undue additional cost to the state.

Note: Emergency purchases discussed in this section are different from agency purchases conducted under a Declaration of Disaster by the Governor. SPD authority does not extend to purchases made under the Texas Disaster Act of 1975. Refer to Procurement Method – Texas Disaster Act of 1975.

SPD has delegated to all agencies the authority to make emergency procurements. Notwithstanding this delegation, emergency procurements are subject to SPD's rules and procedures. Upon request, SPD will assist in advising agencies on the proper procedures for emergency purchases, but SPD will not certify the existence of an emergency.

The decision to declare an emergency purchase is the sole responsibility of the agency. If an emergency exists, a written determination of the basis for the emergency and for the selection of a particular vendor shall be included in the procurement file. For an emergency purchase of goods or services exceeding $25,000, an agency must send to SPD a full written explanation of the emergency along with other documentation required by SPD. The notification to SPD must be provided as soon as reasonably practical given the nature of the emergency.

Notwithstanding the immediate nature of an emergency, all procurements conducted as emergencies should be made as competitive as possible under the circumstances. The agency should make a reasonable attempt to obtain at least three informal bids. Emergency procurements over $25,000 must be posted to the ESBD; however, the minimum time for posting of the solicitation does not apply to the extent necessary to address the emergency. In addition, emergency procurements are subject to CAT and QAT reviews; expedited reviews are available upon request to these oversight teams. Emergency purchases of goods or services should not exceed the scope or duration of the emergency.

SPD Review and Delegation Process

OVERVIEW

Agencies seeking a delegation of SPD's purchase authority for a procurement that is not addressed by SPD rule must submit a procurement-specific delegation request to SPD as either an Open Market Requisition (OMR) for goods via email or through the Procurement Oversight & Delegation portal for services, as applicable.

When determining whether to grant a delegation request, SPD considers factors relevant to an agency's ability to perform purchasing functions, including:

- the capabilities of the agency's purchasing staff and the availability of automated purchasing tools at the agency;
- the certification levels held by the agency's purchasing personnel;
- the results of SPD's procurement review audits of an agency's purchasing practices; and

[153] TEX. GOV'T CODE § 2155.137; 34 TEX. ADMIN. CODE § 20.210. *Compare* TEX. GOV'T CODE § 2254.025(e).

- whether the agency has adopted and published protest procedures as part of its purchasing rules that are consistent with SPD's procedures.[154]

SPD's delegation to an agency may be conditioned on the agency's compliance with certain recommendations identified in the delegation letter. SPD may provide recommendations regarding mitigation of identified risk and best contracting practices. Prior to proceeding with the procurement (*e.g.*, posting the solicitation to the ESBD), the agency must provide a written explanation to SPD if it does not implement SPD's recommendations.

A delegation request will be reviewed, processed, and prioritized in the order received. Delegation reviews may take up to 30 days to complete. Even if the review period exceeds 30 days, the agency does not have the authority to issue the solicitation until it receives a letter of delegation from SPD. If the agency proceeds with the procurement without receiving a letter of delegation from SPD, the resulting contract is voidable. For procurements not delegated to the agencies, refer to SPD-Administered Agency-Specific Procurements.

Lease transactions are "services" for purposes of the SPD delegation and review process. For procedures applicable to proprietary purchases, refer to Proprietary Purchases.

DELEGATION REQUEST FOR GOODS EXCEEDING $50,000

For the non-delegated purchase of goods with an estimated contract value of more than $50,000, the agency must submit its delegation request as an OMR to SPD. The procuring agency is responsible for downloading the most current OMR form posted on the CPA website.[155] The OMR with all applicable attachments must be submitted to open.market@cpa.texas.gov. If the delegation request is denied, SPD will procure the goods on behalf of the agency. Refer to SPD-Administered Agency-Specific Procurements.

DELEGATION REQUEST FOR SERVICES EXCEEDING $100,000

For the non-delegated purchase of services with an estimated contract value of more than $100,000, the agency must submit its delegation request and its solicitation through the Procurement Oversight & Delegation portal. Once an agency has submitted a solicitation for review, the procurement is analyzed from a contract management and business perspective. If the delegation request is denied, SPD will procure the services on behalf of the agency. Refer to SPD-Administered Agency-Specific Procurements.

[154] TEX. GOV'T CODE § 2155.132(b).
[155] The CPA website is located at Comptroller.Texas.Gov.

Competitive Bidding (IFBs, Informal Bidding)

Procurements for goods and services must, whenever possible, be accomplished through competitive bidding.[156] A competitive bidding procurement method is used when the requirements are so clearly defined that they may be described by detailed specifications listed in a PO.

Competitive bidding may be accomplished either by a formal solicitation or informal bidding.

- **Invitation for Bids (IFB).** An Invitation for Bid (IFB) is a formal written competitive sealed bid method[157] used to obtain written bids. An IFB must be used for procurements exceeding $25,000 and may be used for procurements of $25,000 or less. If the total value of a solicitation is greater than $25,000,[158] an IFB must be posted on the ESBD and all eligible vendors within the NIGP Class and/or Class/Items designated for the procurement that are active on the CMBL must be solicited for formal bids. Guidance on how to draft a solicitation can be found in the Solicitation – Preparation section of this Guide.
- **Informal Bidding (Purchases $25,000 or Less).** If the total value of a contract is over $5,000[159] but not more than $25,000, a Contract Developer must provide bid opportunities to vendors active on the CMBL within the NIGP Class and/or Class/Item designated for the solicitation.[160] These vendors may be chosen in the geographic region that serves the agency. The Contract Developer must solicit bids from a minimum of three active vendors on the CMBL, two of which must be current Texas-certified HUBs. The acceptable methods for receiving informal responses for purchases greater than $5,000 but not greater than $25,000 are in person, via direct mail, via facsimile transmission, over the telephone, or via email.[161]

Negotiations are not permitted by the competitive bidding procurement method. However, if there is only one qualified bidder then the Contract Developer may negotiate with the sole bidder, including price, provided the negotiation does not result in a material change to the advertised specifications.[162] Proprietary procurements must follow the procedures set forth in Proprietary Purchases.

Best Value Standard. Each agency shall purchase goods and services that provide the best value for the State.[163] For a purchase made through competitive bidding, the agency must specify in the

[156] TEX. GOV'T CODE § 2155.063; 34 TEX. ADMIN. CODE § 20.206(c).
[157] 34 TEX. ADMIN. CODE § 20.206(a)(1).
[158] TEX. GOV'T CODE § 2155.083(a); 34 TEX. ADMIN. CODE § 20.209.
[159] TEX. GOV'T CODE § 2155.132(e).
[160] TEX. GOV'T CODE § 2155.132(h).
[161] TEX. GOV'T CODE § 2156.063.
[162] 34 TEX. ADMIN. CODE § 20.206(d)(5).
[163] TEX. GOV'T CODE § 2155.074(a).

solicitation the factors other than price that will be considered in determining which bid offers the best value for the State.[164] In determining the best value for the state, the purchase price and whether the goods or services meet specifications are the most important considerations.[165] The agency may, however, consider other relevant factors, including:

1. installation costs;
2. life cycle costs;
3. the quality and reliability of the goods and services;
4. the delivery terms;
5. indicators of probable vendor performance under the contract such as past vendor performance, the vendor's financial resources and ability to perform, the vendor's experience or demonstrated capability and responsibility, and the vendor's ability to provide reliable maintenance agreements and support;
6. the cost of any employee training associated with a purchase;
7. the effect of a purchase on agency productivity;
8. the vendor's anticipated economic impact to the state or a subdivision of the State, including potential tax revenue and employment; and
9. other factors relevant to determining the best value for the State in the context of a particular purchase.[166]

Competitive Sealed Proposals (RFPs)

A Request for Proposals (RFP) is a written solicitation document for purchases acquired by means of the competitive sealed proposals procurement method. Generally, an RFP is recommended when factors other than price are to be considered, negotiations are desired, requirements cannot be described by detailed specifications included in a PO, or the vendor is expected to provide innovative ideas. This solicitation type must be used when an IFB is not practicable or advantageous.[167] One of the key differences between an IFB and an RFP is that negotiations are allowed in an RFP and not allowed in an IFB.

For goods and services acquired under SPD's purchasing authority, SPD shall determine whether to delegate to the agency sole oversight of the use of the competitive sealed proposal procurement method or retain oversight of the procurement.[168] For purchases made under SPD's delegation authority, SPD delegates to the agency the assessment whether to use the competitive sealed proposals procurement method. Agencies must follow the SPD Review and Delegation Process to submit delegation requests to SPD procurements of goods with a value of more than $50,000 and services with a value of more than $100,000. Proprietary procurements must follow the procedures set forth in Proprietary Purchases. Guidance on how to draft a solicitation can be found in the Solicitation – Preparation section of this Guide.

Best Value Standard. Each agency shall purchase goods and services that provide the best value for the State.[169] For a purchase made through competitive sealed proposals, the agency must specify in the solicitation the known factors other than price that the agency will consider in determining which proposal offers the best value for the State.[170] The agency shall make a written award of a contract to the respondent whose proposal offers the best value for the state, considering price, past vendor performance, vendor experience or demonstrated capability, and any other evaluation factors in the RFP.[171]

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

SPD establishes Texas Multiple Award Schedule (TXMAS) contracts to supplement the Term Contracts. The TXMAS Program adapts existing competitively awarded government contracts to service the procurement needs of state agencies and Texas SmartBuy members.[172] A contract award through the TXMAS Program must be based on an existing contract that was previously awarded by the federal government or any other governmental entity in any state using a competitive process that is adaptable to the laws of the State of Texas. Neither consulting services nor certain professional services (such as engineering and architecture) are offered as part of the TXMAS program.[173]

Unlike some other procurement methods, agencies may utilize TXMAS contracts developed by SPD without obtaining delegated authority from SPD to make purchases that exceed $50,000 for goods and exceed $100,000 for services. Prior to purchasing from a TXMAS contract, however, the Contract Developer must follow applicable procedures to purchase first from TCI, the State Use Program, and the Term Contracts. For purchases that exceed $25,000, the agency must post the award notice on the ESBD.[174]

164 TEX. GOV'T CODE § 2155.075(a).
165 TEX. GOV'T CODE § 2155.074(b).
166 TEX. GOV'T CODE § 2155.074(b).
167 TEX. GOV'T CODE §§ 2156.121(a), 2156.122, 2157.121(a); 34 TEX. ADMIN. CODE § 20.208.
168 TEX. GOV'T CODE § 2156.121.
169 TEX. GOV'T CODE § 2155.074(a).
170 TEX. GOV'T CODE § 2155.075(b)(1).
171 34 TEX. ADMIN. CODE § 20.208(e)(1).
172 TEX. GOV'T CODE § 2155.502.
173 TEX. GOV'T CODE §§ 2155.001(2), 2155.502(c)(4).
174 TEX. GOV'T CODE § 2155.509.

DIR has developed TXMAS contracts for IT procurements. For AIS procurements designated with an asterisk (*) on the NIGP Commodity Book maintained on the CPA website,[175] Contract Developers must follow the procurement procedures associated with DIR TXMAS Contracts.

Best Value Determination. An agency intending to purchase from a TXMAS contract must conduct a best value determination before issuing a PO. For purchases with a value of no more than $50,000, the agency may directly award a PO to an SPD TXMAS contractor without submitting a price request to other contractors in the same category. SPD recommends that for contracts that exceed $50,000 the agency submit a pricing request to at least three TXMAS vendors included in the TXMAS category to which the contract relates or all TXMAS vendors included in the applicable TXMAS category if the category has fewer than three vendors.

Negotiation Permitted. Orders placed between the minimum and maximum dollar limits listed on the contract details page are subject to TXMAS catalog pricing. Although certain negotiations are permitted, a TXMAS vendor is not required to accept orders or honor contract prices below the minimum and above the maximum dollar limits shown on its contract details page.

The price listed on the TXMAS contract is the maximum price allowable. The agency may negotiate lower prices when purchasing from a TXMAS contract; however, the TXMAS vendor may not charge a price higher than the price published in the TXMAS contract. A TXMAS vendor may provide a lower price than the price listed in its Texas SmartBuy catalog. For orders above the maximum PO dollar limit and offers through a promotional program, the agency may negotiate lower prices than those listed in the Texas SmartBuy catalog. Lower prices must be noted in the file by the agency along with the vendor representative's name. The agency must document the description of the good(s) or service(s) for TXMAS purchases and include pricing documentation in the agency's procurement file.

Orders Entered on Texas SmartBuy. POs for TXMAS contracts must be entered through the Texas SmartBuy online ordering system. The guidelines below are to be used when submitting a TXMAS PO entry into Texas SmartBuy.

1. Review the order. The Texas SmartBuy shopping cart allows up to 45 line items. Once 45 line items are added to the shopping cart, the additional order items must be totaled and entered using the quote order line on line 46. State agencies must enter at least 20 items into the Texas SmartBuy shopping cart before utilizing the quote line option. Texas SmartBuy Members are encouraged to add items to the Texas SmartBuy cart before utilizing the quote line option.
2. All POs containing a quote line item must include an uploaded attachment of the vendor's quote containing the core items with a detailed breakdown of the price. The ordering entity is responsible for validating the quoted price in its best value determination.
3. The ordering entity may request SPD assistance to validate prices before the order is entered into Texas SmartBuy by submitting a request to: txmasquote@cpa.texas.gov.

Offline Sales. Offline sales are TXMAS contract sales issued outside of Texas SmartBuy and directly with the vendor. All orders against TXMAS contracts must be entered on Texas SmartBuy unless the contract details page expressly states that offline sales are authorized. SPD encourages all TXMAS orders to be issued in Texas SmartBuy in lieu of placing the order through a vendor authorized to accept offline sales.

Incidental, Off-Schedule Items. Only products or services listed in the underlying contract may be purchased from the TXMAS contract, with one exception. Incidental, off-schedule items may be purchased as "best value, open market" items provided that they are necessary for product integration or product completeness. The purchasing entity is responsible for ensuring that the quoted price for such incidental items is fair and reasonable. These incidental items may be added to the TXMAS purchase order if they are clearly labeled as "open market (OM), best value" items.

Incidental items may not exceed $5,000 or 50 percent of the purchase order total, whichever is less. If the pending order includes incidental items that exceed the stated limits, a request may be submitted to SPD for review and consideration of an exception. Exception requests shall be submitted to txmasquote@cpa.texas.gov. The request must include a copy of the complete vendor quote listing all core items and a detailed incidental charge breakdown.

Procurement Method – Reverse Auction Procedure

Agencies may purchase goods or services using the reverse auction procedure. This procedure, which is not commonly used in Texas state agency procurement, may be conducted in either of two ways:

1. Multiple vendors submit bids (anonymously to other vendors) at a previously scheduled time and Internet location (lasting usually less than an hour) to provide solicited goods or services;[176] or

[175] The CPA website is located at Comptroller.Texas.Gov.

[176] TEX. GOV'T CODE §§ 2155.062(d)(1), 2155.085.

2. Multiple vendors submit bids (anonymously to other vendors) during a specific time period (usually two weeks or less) and at a previously scheduled Internet location, to provide solicited goods or services.[177]

Procurement Method – Information Technology Procurements

Automated Information Systems

Agencies are required to use contracts established by DIR to obtain Automated Information Systems (AIS) unless the procurement is subject to an exclusion or exemption.[178] AIS type products and services are associated with computers (automation) or telecommunications systems.

The term AIS is defined to include the following:

1. computers and computer devices on which an information system is automated, including computers and computer devices that SPD identifies in guidelines developed by SPD in consultation with DIR and in accordance with Chapter 2054 and rules adopted under that chapter;
2. services related to the automation of an information system, including computer software or computers;
3. telecommunications apparatus or device that serves as a component of a voice, data, or video communications network for transmitting, switching, routing, multiplexing, modulating, amplifying, or receiving signals on the network, and services related to telecommunications that are not covered under paragraph (4); and
4. for DIR, as telecommunications provider for the state, the term includes any service provided by a telecommunications provider, as that term is defined by Section 51.002 of the Texas Utilities Code.[179]

As an aid in determining the appropriate procurement method, classification codes with an AIS component are noted with an asterisk (*) on the NIGP Commodity Book maintained on the CPA website.[180]

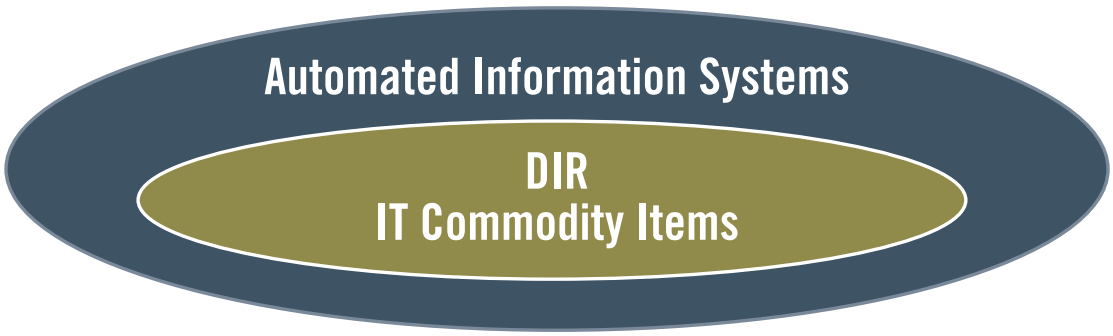
DIR Contracts

Under DIR's statewide procurement authority, DIR establishes and manages the following types of master contracts for use by eligible customers:[181] (1) Cooperative Contracts for IT commodity items, (2) Texas Multiple Award Schedule contracts for IT commodity items, (3) the Texas.gov contract, (4) Data Center Services contracts, and (5) Telecommunication Services contracts.

Note: This section of the Guide provides a summary of the five master contracts established by DIR. Agencies are directed to DIR for guidance on applicable procedures and best practices to be utilized in procuring IT commodity items under DIR contracts.

IT Commodity Items. IT commodity items are a subset of AIS. IT commodity items refer to commercial software, hardware, or technology services, other than telecommunications services, that are generally available to businesses or the public and for which DIR determines that a reasonable demand exists in two or more agencies.[182] The term includes End-User IT Outsourcing (managed services), through which an agency transfers its personal computer equipment and service responsibilities to a private vendor to manage the personal computing needs for each desktop in the agency, including all necessary hardware, software, and support services.[183]

The correlation between AIS and DIR IT commodity items is illustrated below:



177 TEX. GOV'T CODE §§ 2155.062(d)(2), 2155.085.
178 TEX. GOV'T CODE § 2157.006.
179 TEX. GOV'T CODE § 2157.001(1).
180 The CPA website is located at Comptroller.Texas.Gov.
181 DIR contracts cover a wide variety of information technology products and services. Customer eligibility varies with each program.
182 TEX. GOV'T CODE § 2157.068(a).
183 TEX. GOV'T CODE § 2157.068(a).

Determining Contract Value of IT Commodity Item Procurements. An agency must use its best judgement to determine the monetary value of the anticipated contract. The dollar value of a contract does not include the following for purposes of determining the monetary threshold applicable to an IT commodity item procurement under a DIR contract:

1. optional extensions or renewals;
2. documents executed for purposes of encumbering funds but not constituting a binding transaction; or
3. any related document without an accompanying purchase order, including but not limited to statements of work, license agreements, maintenance agreements, or service agreements.[184]

DIR COOPERATIVE CONTRACTS PROGRAM

DIR develops master contracts for the procurement of IT commodity items. All master contracts established by DIR within the Cooperative Contracts Program are awarded through an open and competitive procurement process, beginning with a formal and public Request for Offers. DIR offers the following categories of contracts through DIR's Cooperative Contracts Program: hardware, software, technology-based training, managed services, IT Staff Augmentation Contracts (ITSAC),[185] and Deliverables-Based IT Services (DBITS).

DIR establishes and maintains a catalog of active contracts on the DIR website that contain IT commodity items available for purchase by state agencies.[186] The DIR Cooperative Contracts Program leverages the volume buying power of the State to negotiate competitive pricing, which translates into savings for agencies. The DIR master contracts offer negotiated *minimum* discounts on hundreds of products and services. DIR customers may negotiate even deeper discounts based on individual purchase volumes by issuing pricing requests to multiple DIR vendors in order to drive price competition for the final purchase award.

Monetary Thresholds for Competitive Action. An agency purchasing an IT commodity item under a DIR contract must follow the following procedure:

1. For a contract with a value of no more than $50,000, the agency may directly award the contract to a vendor included in the category to which the contract relates without submitting a price request to other vendors in the same category;
2. For a contract with a value of more than $50,000 but not more than $1 million, the agency must submit a request for pricing to at least three vendors or resellers included in the category to which the contract relates; and
3. For a contract with a value of more than $1 million but not more than $5 million, the agency must submit a request for pricing to at least six vendors included in the category to which the contract relates or all vendors in the category if the category has fewer than six vendors.[187]

An agency may not enter into a contract to purchase a commodity item through the DIR Cooperative Contracts Program if the value of the contract exceeds $5 million.[188]

DIR Review and Signature Approval of Certain DIR SOWs. Agencies are required to prepare and submit to DIR certain Department of Information Resources Statements of Work (DIR SOW) for contracts that exceed $50,000. A DIR SOW executed by an agency under a contract for an IT commodity item is not valid and money may not be paid to the contractor under the terms of the DIR SOW unless DIR first signs the DIR SOW.[189]

DIR contracts that require DIR SOWs include, but are not limited to, the following:

- DBITS;
- Managed Services for IT;
- IT Security Services;
- Web Development; and
- Cloud Services.

A DIR SOW is not applicable to:

- IT staffing services;
- contracts exclusively for hardware or software and not including services; or
- the vendors' standard commercially available support, maintenance, and warranties as documented in the DIR cooperative contract or modified in accordance with the DIR cooperative

184 1 TEX. ADMIN. CODE § 212.1(2)(B).

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

186 The DIR website is located at www.dir.texas.gov.

187 TEX. GOV'T CODE § 2157.068(e-1).

188 TEX. GOV'T CODE § 2157.068(e-2).

189 TEX. GOV'T CODE § 2157.0685.

contract provision addressing modification of contract terms and/or amendments.[190]

If a DIR contract for IT commodity items requires an agency to develop and execute a DIR SOW to initiate services under the contract, before submitting a DIR SOW to a vendor, the agency must consult with DIR as follows:

1. The agency must submit a completed draft DIR SOW to DIR for review at least 30 business days before anticipated submission of the DIR SOW to vendors. The DIR submission must include:
    a. the completed DIR SOW which at a minimum includes: the scope of the project, milestones, deliverables description, schedule, acceptance criteria, and any other items DIR may require; and
    b. a list of DIR cooperative contracts to which the DIR SOW will be advertised.
2. DIR may accept or reject the submitted DIR SOW. An agency may not submit the DIR SOW to vendors until DIR has issued written approval. If rejected, the agency may resubmit with required modifications. DIR will not issue retroactive or backdated reviews.

If an agency experiences an unforeseeable circumstance that requires immediate attention but is not considered an Emergency Procurement as defined in 34 TAC §20.25(b)(20), the agency may submit an expedited request for review. The expedited request for review must include a statement from the head of the requesting agency, or his/her designee, describing the circumstances and justification for expedited review by DIR.

Following execution of the final DIR SOW by the agency and vendor, the agency must submit the signed DIR SOW to DIR for its signature. DIR will review the signed DIR SOW and determine whether it will be signed or rejected by DIR. If DIR rejects the DIR SOW, DIR will notify the agency of the reason(s) for rejection. DIR must sign the DIR SOW before it becomes valid and any money is paid to a vendor. DIR will not issue retroactive or backdated signatures. The DIR signature affixed to the DIR SOW verifies only that the statement of work is within the scope of the DIR contract being utilized. The DIR signature does not make DIR a party to the agreement, and DIR will not be responsible for any other agency obligations in connection with the purchase. The DIR signature does not verify or assure any other relevant fact including, but not limited to, the following:

1. that funding is appropriate or sufficiently available;
2. that the appropriate procurement method was chosen by the agency;
3. that the appropriate vendor was selected; or
4. that the statement of work documented by the agency will successfully achieve a goal or projected outcome.

If an agency experiences an unforeseeable circumstance that requires immediate attention but is not considered an Emergency Procurement as defined in 34 TAC §20.25(b)(20), the agency may submit an expedited request for signature. The expedited request for signature must include a statement from the head of the requesting agency, or his/her designee, describing the circumstances and justification for expedited signature by DIR.

Upon execution of the DIR SOW, each DIR SOW entered into by an agency must be posted on the agency's internet website as follows:

1. post the DIR SOW in its entirety, subject to the exceptions in the Texas Public Information Act and opinions of the Office of Attorney General;
2. maintain the posting, at a minimum, throughout the term of the DIR SOW, including any renewals or extensions;
3. maintain a listing of the DIR SOWs in alphabetical order by vendor name or numerical order by contract number in a central location; and
4. maintain a current agency contact person with related email address and phone number to contact for information regarding the DIR SOW.[191]

Exemptions and Exclusions. An agency may obtain an exemption or waiver from the requirement to use a DIR Contract to purchase an IT commodity item in one of three ways: DIR exemption, LBB approval, or DIR certification.

1. **DIR Exemption.**[192]
    a. Blanket Exemption. DIR may determine that under certain circumstances it is reasonable to grant a blanket exemption to all agencies. Procurements utilizing blanket exemptions must be made in accordance with the exact scope, terms, and requirements specified in the blanket exemption. A current list of blanket exemptions is located on the DIR website.[193]
    b. One-Time Exemption Request.
        - If a blanket exemption is unavailable, an agency must submit an exemption request on a prescribed form through the DIR portal.[194] DIR will review each exemption request on a case-by-case basis to determine if the proposed purchase is in the best interest of the

190 1 TEX. ADMIN. CODE § 212.1(10).

191 1 TEX. ADMIN. CODE § 212.41(c).

192 TEX. GOV'T CODE § 2157.068(f); 1 TEX. ADMIN. CODE § 212.22.

193 The DIR website is located at www.dir.texas.gov.

194 1 TEX. ADMIN. CODE §§ 212.20, 212.23.

State. DIR will notify the requesting agency of its decision to approve or deny the exemption request. If DIR has not issued a written denial of the exemption request within 15 business days following the date of its receipt of the request, or the date of receipt of requested additional information, the request for the exemption is deemed to have been approved for an amount equal to the total value of the proposed purchase or for the period of time described in the exemption request.[195]

- If an agency experiences an unforeseeable circumstance that requires immediate attention but is not considered an Emergency Procurement as defined in 34 TAC §20.25(b)(20), the agency may submit an expedited exemption request.[196] DIR must issue a written approval or denial of an exemption request within three business days of receipt of the expedited exemption request. The expedited exemption request must include a statement from the head of the requesting agency, or his/her designee, describing the circumstances and justification for expedited review. If DIR has not issued a written denial of the expedited exemption request within three business days following the date of its receipt of the request, or the date of receipt of requested additional information, the expedited request for the exemption must be deemed to have been approved for an amount equal to the total value of the proposed purchase or for the period of time described in the expedited exemption request.

2. **LBB Approval**. With express prior approval from the LBB for the expenditure necessary for the purchase, an agency may procure an IT commodity item without using a contract established by DIR.[197] The agency must request an exemption from DIR before seeking LBB approval.[198] The LBB's approval of a biennial operating plan is not an express prior approval for the purpose of obtaining an exemption from the use of DIR contracts.[199]
3. **DIR Certification of Unavailability**. An agency may procure an IT commodity item though an avenue other than a DIR contract if DIR certifies in writing that the commodity item is not available for purchase under an existing contract developed by DIR.[200]

Certain agency purchases are not within DIR's procurement authority for IT commodity items. These include procurements that are

1. over the $5 million monetary threshold for IT commodity items established by statute,[201]
2. procurements for commercial software, hardware, or technology services for which DIR determines that a reasonable demand does not exist in two or more agencies,[202] and
3. exclusions expressly authorized by statute.[203]

DIR TEXAS MULTIPLE AWARD SCHEDULE (TXMAS) CONTRACTS

The Texas Multiple Award Schedule (TXMAS) Program adapts existing competitively awarded government contracts to the procurement needs of the State of Texas. Agencies may utilize TXMAS contracts developed by DIR for the purchase of IT commodity items.[204] For orders that exceed $25,000, the agency must post the award notice on the ESBD.[205]

The monetary thresholds associated with the DIR Cooperative Contracts Program apply to procurements under DIR TXMAS contracts.

- For a contract with a value of $50,000 or less, the agency may directly award the contract to a vendor on the DIR TXMAS contract without submission of a request for pricing to other vendors on DIR TXMAS contracts.[206]
- For a contract with a value of more than $50,000 but not more than $1 million, the agency must submit a request for pricing to at least three vendors included on DIR's TXMAS contract Schedule in the category to which the contract relates.[207]
- For a contract with a value of more than $1 million but not more than $5 million, the agency must submit a request for pricing to at least six vendors included on DIR TXMAS contracts on the Schedule in the category to which the contract relates or all vendors on the DIR TXMAS contract Schedule if the category has fewer than six vendors.[208]

TEXAS.GOV SERVICES

Texas.gov is the official e-government web portal for the State of Texas providing seamless "one-stop shopping" access to many state, county and city government services, and allowing citizens to access government services online. Texas.gov is a public/private partnership between DIR and DIR's service provider. Texas.gov

195 1 TEX. ADMIN. CODE § 212.1(10), 212.23.
196 1 TEX. ADMIN. CODE § 212.21.
197 TEX. GOV'T CODE §§ 2157.068(f), 2157.068(g).
198 TEX. GOV'T CODE § 2157.068(g).
199 TEX. GOV'T CODE § 2157.068(g).
200 TEX. GOV'T CODE § 2157.068(f).
201 TEX. GOV'T CODE § 2157.068(e-2).
202 TEX. GOV'T CODE § 2157.068(a).
203 TEX. GOV'T CODE §§ 2157.002, 2157.068(i).
204 TEX. GOV'T CODE § 2155.502(e).
205 TEX. GOV'T CODE § 2155.509.
206 TEX. GOV'T CODE § 2155.504(a).
207 TEX. GOV'T CODE § 2155.504(a).
208 TEX. GOV'T CODE § 2155.504(a).

Services include 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, DIR's service provider, and DIR. Only Texas agencies and other entities defined as customers in the master agreement between DIR and the contractor are eligible to participate.

DIR DATA CENTER SERVICES

DIR may directly operate, or contract with another entity to operate, statewide technology centers to provide governmental entities, on a cost-sharing basis, services related to:

- information resources and information resources technology; and
- the deployment, development, and maintenance of software applications.[209]

The Data Center Services project is part of the State of Texas' long-term strategy to improve government, reduce costs, and increase return on investment in information technology. DIR's Data Center Services contract provides participating agencies data center (mainframe and server operations), disaster recovery, and bulk print and mail services. The monetary threshold requirements and SOW review and signature process associated with the DIR Cooperative Contracts Program apply to all procurements made as a pass-through expense in the Data Center Services Program; however, these requirements do not apply to contracts procured through the Data Center Services Program that are signed by the contracted vendors.

TELECOMMUNICATION SERVICES

DIR provides a variety of telecommunications services to eligible customers throughout the State, through the operation of major and secondary networks and numerous contracts for communications-related services. Agencies in the Capitol Complex are required to use the Capitol Complex Telephone System (CCTS) for landline services. All agencies are required to use the Texas Agency Network (TEX-AN) for telephone, internet, data, and video services. If a telecommunications service is offered by DIR, an agency must purchase the service through DIR or must request and be granted a waiver before procuring the service through an avenue other than DIR.[210]

[209] TEX. GOV'T CODE § 2054.378; 1 TEX. ADMIN. CODE § 215.1.
[210] TEX. GOV'T CODE § 2170.051.

RFO Procurement Method

The Request for Offers (RFO) procurement method is intended as the designated, primary purchasing method for procuring AIS other than under DIR's IT commodity program.[211] However, agencies may choose to use the RFO procurement method or any other procurement method authorized by Title 10, Subtitle D of the Texas Government Code that will obtain the best value.[212] When using these other methods to procure such AIS, the procuring entity must follow the guidelines published by SPD.[213]

The RFO method is available for use by agencies to procure AIS items in the following circumstances:

- The agency has obtained an exemption from DIR;
- The agency has obtained express prior approval from LBB for the expenditure necessary for the purchase;
- DIR has certified in writing that the IT commodity item is not available for purchase under an existing DIR contract; or
- The agency is otherwise exempt from the requirements of Section 2157.068 of the Texas Government Code.

The RFO method is a direct purchase or lease method used after the procuring entity's evaluation of written offers received in response to an open and competitive solicitation in accordance with the solicitation to result in best value. Under the RFO method, agencies must solicit, evaluate, select, negotiate as appropriate, and contract directly with one or more qualified vendors in accordance with the open and competitive solicitation.

To initiate an RFO, the agency must issue a written, open and competitive request for offers. In procuring under the RFO method, the procuring entity must also comply with the RFO guidelines published by SPD. If the agency believes that the procurement is proprietary, then the agency must follow the Proprietary Purchases procedures. The procuring entity's use of an RFO does not require or involve delegation of authority or prior approval by SPD. Procurements using the RFO method are subject to ESBD posting requirements as well as requirements applicable to CAT and QAT reviews.

Best Value Standard. The term "best value" means the lowest overall cost of an automated information system.[214] In determining the lowest overall cost for a purchase or lease of an AIS, the agency shall consider factors including:

1. the purchase price;

[211] TEX. GOV'T CODE § 2157.006(a)(2); 34 TEX. ADMIN. CODE § 20.391.
[212] 34 TEX. ADMIN. CODE § 20.391.
[213] 34 TEX. ADMIN. CODE § 20.391.
[214] TEX. GOV'T CODE § 2157.003.

2. the compatibility to facilitate the exchange of existing data;
3. the capacity for expanding and upgrading to more advanced levels of technology;
4. quantitative reliability factors;
5. the level of training required to bring persons using the system to a stated level of proficiency;
6. the technical support requirements for the maintenance of data across a network platform and the management of the network's hardware and software;
7. the compliance with applicable department statewide standards validated by criteria adopted by DIR rule; and
8. applicable factors listed in Sections 2155.074 and 2155.075 of the Texas Government Code.[215]

Procurement Method – Professional Services

Agencies are authorized to procure professional services under Chapter 2254, Subchapter A, of the Texas Government Code.[216] Acquisition of professional services is delegated to agencies by statute and does not require a delegation of authority from SPD. The procurement of professional services is subject to ESBD posting requirements as well as requirements applicable to CAT reviews.

Professional services refer to services that are either

1. 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, or professional nursing; or
2. provided in connection with the professional employment or practice of a person who is licensed or registered as one of the following: a certified public accountant, an architect, a landscape architect, a land surveyor, a physician, including a surgeon, an optometrist, a professional engineer, a state certified or state licensed real estate appraiser, or a registered nurse.[217]

Professional services procurements are usually advertised as either an RFQ or RFP. The award of a professional services contract is based on (1) demonstrated competence and qualifications to perform the services, and (2) a fair and reasonable price.[218] The professional fees under the contract may not exceed any maximum provided by law.[219]

To procure architectural, engineering, or land surveying services, the governmental entity[220] must first select the most highly qualified provider based on demonstrated competence and qualifications, and then attempt to negotiate a fair and reasonable price for the services.[221] If a satisfactory contract cannot be negotiated with the most highly qualified respondent, the agency must formally end negotiations with the respondent and then must attempt to negotiate a fair and reasonable price with the next most highly qualified respondent. This process may continue until a contract is executed for the service solicited by the governmental entity.[222] Although the described process applies to the services of an architect, engineer or land surveyor, this selection process can be used for all professional services.

An agency shall provide written notice, on a prescribed form, to the LBB not later than the 10th day after the date the agency enters into a contract for professional services, other than a contract for physician or optometric services, if the amount of the contract, including an amendment, modification, renewal, or extension of the contract, exceeds $14,000.[223] A contract entered into or an arrangement made in violation of Chapter 2254, Subchapter A, of the Texas Government Code is void as against public policy.[224]

SAO Delegation of Authority for Audit Services. Section 321.020 of the Texas Government Code specifies that a state agency or corporation that is dedicated to the benefit of a state agency may enter into a contract for audit services only if

1. the agency or corporation is authorized to contract with a private auditor through a delegation of authority from SAO;
2. the scope of the proposed audit has been submitted to SAO for review and comment; and
3. the services of the private auditor are procured through a competitive selection process in a manner allowed by law.

In addition, Article IX, Section 6.20 of the General Appropriations Act (85th Legislature), provides for state agencies and higher education institutions that use appropriated funds to contract for audit services, including a requirement to obtain a delegation of authority to enter into such a contract.

215 TEX. GOV'T CODE § 2157.003.
216 TEX. GOV'T CODE § 2254.003.
217 TEX. GOV'T CODE § 2254.002(2).
218 TEX. GOV'T CODE § 2254.003(a).
219 TEX. GOV'T CODE § 2254.003(b).

220 TEX. GOV'T CODE § 2254.002(1) (defining "governmental entity" to be (a) a state agency or department, (b) a district, authority, county, municipality, or other political subdivision of the State, (c) a local government corporation or another entity created by or acting on behalf of a political subdivision in the planning and design of a construction project, or (d) a publicly owned utility).
221 TEX. GOV'T CODE § 2254.004(a).
222 TEX. GOV'T CODE § 2254.004(b)-(c).
223 TEX. GOV'T CODE § 2254.006.
224 TEX. GOV'T CODE § 2254.005.

Procurement Method – Consulting Services

Agencies are authorized to procure consulting services pursuant to Chapter 2254, Subchapter B, of the Texas Government Code.[225] Acquisition of consulting services is delegated to agencies by statute and do not require a delegation of authority from SPD. The procurement of consulting services is subject to ESBD posting requirements as well as requirements applicable to CAT reviews.

Consulting service refers to the service of studying or advising an agency under a contract that does not involve the traditional relationship of employer and employee.[226] An agency[227] may contract with a consultant only if there is a substantial need for the consulting services and the agency cannot adequately perform the services with its own personnel or obtain the consulting services through a contract with a state governmental entity.[228] Consulting services procurements are usually advertised as an RFP.

If a contract involves both consulting and other services, the services will be procured as consulting services if the primary objective of the contract is the acquisition of consulting services.[229] Consider for instance a solicitation for an analysis of an agency's information systems needs and the development and implementation of a computer system. The primary objective of this contract is the delivery of a system and not the analysis provided. This contract is not a consulting services contract; therefore, the requirements for consulting services contracts would not apply. The agency, however, must comply with the applicable procurement method for acquiring AIS.

A "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 for a state agency or $25,000 for an institution of higher education other than a public junior college.[230] A consulting services contract cannot be divided into more than one contract to avoid the procurement requirements pertaining to major consulting services contracts.[231] In selecting a consultant, the agency must base its choice on demonstrated competence, knowledge, qualifications, and on the reasonableness of the proposed fee for the services.[232] If other considerations are equal, the agency must give preference to a consultant whose principal place of business is located in the State or who will manage the consulting services contract wholly from an office in the State.[233]

A consulting services contract with an agency must include provisions that allow the agency and any other agency and the Legislature, at the contracting agency's discretion, to distribute any consultant reports and post the report on the agency's website or the website of a standing committee of the Legislature.[234] The distribution of the report will not affect the application of Chapter 552 of the Texas Government Code.[235]

Particular care must be taken to closely follow all statutory requirements for procuring consulting services. A consulting services contract, or renewal, amendment, or extension, is void under the following circumstances:

1. the contract is entered into without complying with the *Texas Register* publication requirements and notification requirements to the LBB and Governor's Budget and Planning Office. (Refer to the "Pre-Award Notification and Publication Requirements for Major Consulting Services Contracts" and "Post-Award Notification and Publication Requirements for Consulting Services Contracts" described in this Section of the Guide); and
2. the contract is entered into with a private consultant who has been employed by that agency or by another agency at any time during the two years preceding the making of the offer and failed to disclose in the offer:
    a. the nature of the previous employment with the agency or the other agency;
    b. the date the employment was terminated; and
    c. the annual rate of compensation for the employment at the time of its termination.[236]

If the contract is void, CPA may not draw a warrant or transmit money to satisfy an obligation under the contract and an agency may not make any payment under the contract with state or federal money or money held in or outside the state treasury.[237]

225 TEX. GOV'T CODE § 2254.023.
226 TEX. GOV'T CODE § 2254.021(1).
227 TEX. GOV'T CODE § 2254.021(6) (defining "state governmental entity" to be a state department, commission, board, office, institution, facility, or other agency the jurisdiction of which is not limited to a geographical portion of the state. The term includes a university system and an institution of higher education, other than a public junior college, as defined by Section 61.003 of the Texas Education Code. The term does not include a political subdivision.).
228 TEX. GOV'T CODE § 2254.026; TEX. GOV'T CODE § 2254.021(5) (defining "state agency" to be (1) a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute, (2) the supreme court, the court of criminal appeals, a court of appeals, or the Texas Judicial Council, or (3) a university system or an institution of higher education as defined by Section 61.003 of the Texas Education Code, except a public junior college).
229 TEX. GOV'T CODE § 2254.038.
230 TEX. GOV'T CODE § 2254.021(2).
231 TEX. GOV'T CODE § 2254.035(a). The value of the contract for purposes of determining division includes all renewals, amendments, and extensions of the contract. TEX. GOV'T CODE § 2254.035(b).
232 TEX. GOV'T CODE § 2254.027.
233 TEX. GOV'T CODE § 2254.027.
234 TEX. GOV'T CODE § 2254.041(a).
235 TEX. GOV'T CODE § 2254.041(b).
236 TEX. GOV'T CODE § 2254.034(a)-(b), (d).
237 TEX. GOV'T CODE § 2254.034(c).

Pre-Award Notification and Publication Requirements for Major Consulting Services Contracts. Before entering into a major consulting services contract, an agency must

1. notify the LBB and the Governor's Budget and Planning Office that the agency intends to contract with a consultant;
2. give information to the LBB and the Governor's Budget and Planning Office to demonstrate that the agency has complied or will comply with Sections 2254.026 and 2254.027 of the Texas Government Code; and
3. obtain a finding of fact from the Governor's Budget and Planning Office that the consulting services are necessary.[238]

The Consultant Contract Finding of Fact Request is located on the Governor's Budget and Planning Office website.[239] Notification to the LBB should be sent to contract manager@lbb.texas.gov. A major consulting services contract that an agency enters into without first obtaining a finding of fact from the Governor's Budget and Planning Office is void.[240]

In addition to notifying the LBB and the Governor's Budget and Planning Office, an agency must file a notice of its intent to solicit for consulting services with the Secretary of State for publication in the *Texas Register* not later than the 30th day before entering into a major consulting services contract. The *Texas Register* notice must include the following:

- an invitation for consultants to provide offers of consulting services;
- the name of the individual who should be contacted by a consultant that intends to respond to the solicitation;
- the closing date for the receipt of proposals;
- the procedure by which the agency will award the contract;
- information on whether the consulting services sought by the agency relate to services previously provided by a consultant; and
- information on any intention to award the contract for the consulting services to a consultant that previously provided the services, unless a better offer is received.[241]

Post-Award Notification and Publication Requirements for Consulting Services Contracts. An agency must provide written notice in a prescribed format to the LBB not later than the 10th day after the date the entity enters into a contract for consulting services if the amount of the contract, including an amendment, modification, renewal, or extension of the contract, exceeds $14,000.[242]

Not later than the 20th day after the date of entering into a major consulting services contract, the agency must file with the Secretary of State for publication in the *Texas Register* the following:

- a description of the activities that the consultant will conduct;
- the name and business address of the consultant;
- the total value and the beginning and ending dates of the contract; and
- the dates on which documents, films, recordings, or reports that the consultant is required to present to the agency are due.[243]

Notification and Publication Requirements for Renewals, Amendments, and Extensions to Consulting Services Contracts.

An agency that intends to renew a major consulting services contract must either

1. file with the Secretary of State for publication in the *Texas Register* the following information not later than the 20th day after the date the contract is renewed if the renewal contract is not a major consulting services contract:
   a. a description of the activities that the consultant will conduct;
   b. the name and business address of the consultant;
   c. the total value and the beginning and ending dates of the contract; and
   d. the dates on which documents, films, recordings, or reports that the consultant is required to present to the agency are due; or
2. comply with "Pre-Award Notification and Publication Requirements for Major Consulting Services Contracts" described in this Section of the Guide if the renewal contract is a major consulting services contract.[244]

238 TEX. GOV'T CODE § 2254.028(a). This requirement does not apply to a major consulting services contract to be entered into by an institution of higher education other than a public junior college if the institution includes in the invitation published under Section 2254.029 of the Texas Government Code a finding by the chief executive officer of the institution that the consulting services are necessary and an explanation of that finding. TEX. GOV'T CODE § 2254.028(c).

239 The Office of the Governor website is located at www.gov.texas.gov.

240 TEX. GOV'T CODE § 2254.028(b).

241 TEX. GOV'T CODE § 2254.029.

242 TEX. GOV'T CODE § 2254.0301(a).

243 TEX. GOV'T CODE § 2254.030.

244 TEX. GOV'T CODE § 2254.031(a).

An agency that intends to renew a contract that is not a major consulting services contract must comply with the "Pre-Award Notification and Publication Requirements for Major Consulting Services Contracts" described in this Section of the Guide if the original contract and the renewal contract have a reasonably foreseeable value totaling more than $15,000, or $25,000 for an institution of higher education other than a public junior college.[245]

An agency that intends to amend or extend a major consulting services contract must

1. not later than the 20th day after the date the contract is amended or extended, file the information required by Section 2254.030 with the Secretary of State for publication in the *Texas Register* if the contract after the amendment or extension is not a major consulting services contract; or
2. comply with the "Pre-Award Notification and Publication Requirements for Major Consulting Services Contracts" described in this Section of the Guide if the contract after the amendment or extension is a major consulting services contract.[246]

An agency that intends to amend or extend a contract that is not a major consulting services contract shall comply with the "Pre-Award Notification and Posting Requirements for Major Consulting Services Contracts" described in this Section of the Guide if the original contract and the amendment or extension have a reasonably foreseeable value totaling more than $15,000, or $25,000 for an institution of higher education other than a public junior college.[247]

Emergency Waiver of Compliance for Consulting Services Contracts. The Governor, after receipt of a request from an agency, may grant a limited waiver of compliance with the statutory provisions governing consulting services for an agency that requires consulting services before compliance can be completed because of an unforeseen emergency.[248] The waiver must include information required by the Governor, including:

- information about the nature of the emergency;
- the reason that the agency did not foresee the emergency;
- the name of the consultant with whom the agency intends to contract; and
- the amount of the intended contract.[249]

The agency must include a detailed description of the emergency, on which the request for waiver was predicated, with the information filed with the Secretary of State for publication in the *Texas Register*.[250] As soon as possible after the Governor grants a limited waiver, the agency must comply with the statutory provisions to the extent that the requirements of the provisions are not superfluous or ineffective because of the waiver.[251]

Procurement Method – Legal Services

The OAG provides legal services to state agencies.[252] Except as authorized by other law, a contract for legal services between an attorney, other than a full-time employee of the OAG, and a state agency in the executive department, other than an agency established by the Texas Constitution, must be approved by the OAG to be valid.[253]

The OAG may require agencies to obtain outside legal services through a competitive procurement process, under conditions prescribed by the OAG.[254] Unless an exemption is obtained from the OAG, an agency is required to publish a Request for Qualifications (RFQ) on the ESBD for a minimum of 30 calendar days before selecting outside counsel, regardless of the anticipated maximum liability of the anticipated Outside Counsel Contract (OCC).[255]

To obtain OAG approval for the use of services provided by outside counsel, the agency must electronically submit a Request to Retain Outside Counsel (RtR) and the proposed OCC to the OAG.[256] Deviations from the prescribed OCC template are not permitted without the OAG's prior approval. An amendment to an OCC also must be approved by the OAG.[257] Questions regarding the electronic submission process may be sent to general.counsel@oag.texas.gov.

If the contingent legal services contract is also a contingent fee contract, the agency must comply with the requirements set forth in Subchapter C, Chapter 2254 of the Texas Government Code. The

245 TEX. GOV'T CODE § 2254.031(b).
246 TEX. GOV'T CODE § 2254.031(c).
247 TEX. GOV'T CODE § 2254.031(d).
248 TEX. GOV'T CODE § 2254.025(a). "Unforeseen emergency" means a situation that suddenly and unexpectedly causes a state agency to need the services of a consultant. The term includes the issuance of a court order, an actual or imminent natural disaster, and new state or federal legislation. An emergency is not unforeseen if a state agency was negligent in foreseeing the occurrence of the emergency. TEX. GOV'T CODE § 2254.025(e).
249 TEX. GOV'T CODE § 2254.025(b).
250 TEX. GOV'T CODE § 2254.025(c).
251 TEX. GOV'T CODE § 2254.025(c).
252 TEX. GOV'T CODE §§ 402.021, 402.0212(a).
253 TEX. GOV'T CODE § 402.0212(a).
254 TEX. GOV'T CODE § 2254.154. *Cf.* TEX. GOV'T CODE § 2151.005 (The State Purchasing and General Services Act, Subtitle D of Title 10 of the Texas Government Code does not apply to (1) obtaining outside legal counsel services, (2) obtaining expert witnesses, or (3) procuring litigation-related goods and services for which competitive procurement is not feasible under the circumstances.).
255 1 TEX. ADMIN. CODE § 57.4.
256 1 TEX. ADMIN. CODE § 57.3.
257 1 TEX. ADMIN. CODE § 57.5(a).

term "contingent fee contract" means a contract for legal services under which the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained.[258]

A state governmental entity that has authority to enter into a contract for legal services in its own name may enter into a contingent fee contract for legal services only if:

1. the governing body of the state governmental entity approves the contract and the approved contract is signed by the presiding officer of the governing body, or
2. for an entity that is not governed by a multimember governing body, the elected or appointed officer who governs the entity approves and signs the contract.[259]

Before approving the contract, the governing body, elected or appointed officer, or governor, as appropriate, must find that:

1. there is a substantial need for the legal services,
2. the legal services cannot be adequately performed by the attorneys and supporting personnel of the state governmental entity or by the attorneys and supporting personnel of another state governmental entity, and
3. the legal services cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the matter for which the services will be obtained or because the state governmental entity does not have appropriated funds available to pay the estimated amounts required under a contract providing only for the payment of hourly fees.[260]

Certain contingent fee contracts also require that the agency obtain a finding from the LBB that the agency does not have appropriated funds available to pay the estimated amounts required under a contract providing only for the payment of hourly fees.[261] A contingent fee contract for legal services is void if the agency fails to obtain the required LBB finding.[262]

Public agencies, as defined by Section 30.003(3) of the Texas Water Code, may not enter into or amend a contingent fee contract for legal services without review and approval of CPA.[263] Public agencies requesting review must submit a completed questionnaire, with applicable attachments and the proposed contract, to contracts@cpa.texas.gov. All other requisite reviews, findings and approvals must first be completed prior to submission to CPA for review and approval and must be clearly reflected in the attachments submitted with the request. Requesting public agencies should allow a minimum of 30 days from date of submission prior to the requested effective date of the contract or contract renewal or amendment for CPA to complete its review. Additional information regarding CPA's review and approval process is available on the CPA website.[264]

Procurement Method – Interagency Cooperation Contracts (IACs)

An interagency contract is a written understanding between two or more agencies[265] as authorized by Chapter 771 of the Texas Government Code. An agency may agree or contract with another agency for the provision of necessary and authorized services (including technical services) and materials and equipment. Competitive bidding requirements do not apply to Interagency Contracts.

Before an agency may provide or receive a service or resource under the Interagency Cooperation Act, the agency must have entered into a written agreement signed by authorized representatives of both agencies and the contract (IAC) must specify the kind and amount of services or resources to be provided, the basis for computing reimbursable costs, and the maximum cost during the contract term. To ensure that an IAC is statutorily compliant, the contracting agencies must also certify that:

1. the services specified are necessary and essential and are properly within the statutory functions and programs of the affected agencies of state government;
2. the proposed arrangements serve the interest of efficient and economical administration of those agencies;
3. the services, supplies or materials contracted for are not required to be supplied under contract to the lowest responsible bidder;[266] and
4. the contract neither requires, nor permits, either party to exceed its duties and responsibilities or the limitations of its appropriated funds.

258 TEX. GOV'T CODE § 2254.101(2).
259 TEX. GOV'T CODE § 2254.103(a).
260 TEX. GOV'T CODE § 2254.103(d).
261 TEX. GOV'T CODE § 2254.103(e).
262 TEX. GOV'T CODE § 2254.103(f).
263 TEX. GOV'T CODE § 403.0305 (A public agency as defined under Section 30.003(3) of the Texas Water Code, may not enter into a contract as provided by Subchapter C, Chapter 2254 of the Texas Govermnet Code without review and approval by CPA.).
264 The CPA website is located at Comptroller.Texas.Gov.
265 TEX. GOV'T CODE § 771.002(1) (defining "agency" to be a department, board, bureau, commission, court, office, authority, council, or institution of state government; an institution of higher education or service or part of an institution; a local workforce development board; and certain statewide job or employment training programs for disadvantaged youth).
266 TEX, CONST. Art. XVI, § 21; TEX. GOV'T CODE § 771.003.

A written IAC between two agencies is not required in the following circumstances:

1. an emergency for the defense or safety of the civil population or in the planning and preparation for those emergencies;
2. cooperative efforts, proposed by the governor, for the economic development of the state; or
3. a situation in which the amount involved is less than $50,000.

When an interagency exchange is exempt from the requirements of a written contract, the agencies involved must document the exchange through informal letters of agreement or memoranda. As with other contractual agreements, it is best practice for a fixed term to be included in the contract. The inclusion of a termination date obligates the agencies to review and assess whether the contract is needed and if any changes in contract scope or pricing will be required before entering into a subsequent agreement.

Procurement Method – Interlocal Cooperation Contracts

An interlocal contract is a written understanding authorized by the Interlocal Cooperation Act, Chapter 791 of the Texas Government Code. The purpose of the Interlocal Cooperation Act is to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the State.[267]

A local government may contract with another local government, an agency of the State, an agency of another state, and a federally recognized Indian tribe located within the boundaries of Texas.[268]

The term "local government" refers to a

1. county, municipality, special district, junior college district, or other political subdivision of this State or another state;
2. local government corporation created under Subchapter D, Chapter 431 of the Transportation Code;
3. political subdivision corporation created under Chapter 304 of the Local Government Code;
4. local workforce development board created under Section 2308.253 of the Texas Government Code; or
5. combination of two or more entities described by Paragraphs 1, 2, 3, or 4.[269]

An interlocal contract must

1. be authorized by the governing body of each party to the contract unless a party to the contract is a municipally owned electric utility, in which event the governing body may establish procedures for entering into interlocal contracts that do not exceed $100,000 without requiring the approval of the governing body;
2. state the purpose, terms, rights, and duties of the contracting parties; and
3. specify that each party paying for the performance of governmental functions or services must make those payments from current revenues available to the paying party.[270]

An interlocal contractual payment must be in an amount that fairly compensates the performing party for the services or functions performed under the contract.[271] In addition, a governmental entity of this State or another state that makes purchases or provides purchasing services under an interlocal contract for a state agency, as that term is defined by Section 771.002 of the Texas Government Code, must comply with Chapter 2161 of the Texas Government Code in making the purchases or providing the services.[272] Depending on the specific contracting authority and type of services provided, additional statutory requirements may apply to the interlocal contract.

Procurement Method – State and Federal Surplus Property Programs

The Federal and State Surplus Property programs are administered by the Texas Facilities Commission (TFC). The programs have different laws, rules, and procedures. Specific procedures for use of these two programs are located in Appendix 10.

Procurement Method – Request for Qualifications

A Request for Qualifications (RFQ) is generally used for professional services wherein the respondents are evaluated based solely on their qualifications and skills. This solicitation method is more like an application process, where it is very clear what is expected from the vendor. Price is negotiated after the agency selects its preferred respondent based on how well the respondents met the published qualifications.

267 TEX. GOV'T CODE § 791.001.
268 TEX. GOV'T CODE § 791.011(a)-(b).
269 TEX. GOV'T CODE § 791.003(4).
270 TEX. GOV'T CODE § 791.011(d).
271 TEX. GOV'T CODE § 791.011(e).
272 TEX. GOV'T CODE § 791.011(g).

Vendors must respond to an RFQ by submitting their qualifications to perform specified work. The submissions are reviewed to determine the qualified respondent(s) who are requested to prepare a proposal, including cost, to perform the specific work as may be embodied in an RFQ. Price is not a factor until after the vendor is selected.

Procurement Method – Texas Disaster Act of 1975

Under Chapter 418 of the Texas Government Code, the Governor may by executive order or proclamation declare a state of disaster[273] if a disaster has occurred or that the occurrence or threat of disaster is imminent. The Governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of an agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster. For example, the Governor may suspend enforcement of statutes and administrative rules regarding contracting or procurement that would impede any agency's emergency response that is necessary to protect life or property threatened by a declared disaster.

A purchase made under a disaster must clearly relate to the disaster, conform to the directives of the disaster declaration, and occur within the timeframe specified in the disaster declaration. The procurement file, at a minimum, must contain a copy of the disaster declaration, documentation to support the purchase, receipt of goods or services, and approval of the payment. An example of a disaster declaration is located in Appendix 11.

Emergency Procurement. If a purchase does not fall within the parameters of a Governor-declared disaster, agencies should check whether the purchase qualifies as an emergency purchase under the applicable procurement method.

[273] The term "disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, other public calamity requiring emergency action, or energy emergency. TEX. GOV'T CODE § 418.004(1).

Solicitation Process

Solicitation – IFB, RFP, RFO, RFQ

Overview

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

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

Comparison of Competitive Procurement Methods

The table below provides a summary of the distinguishing characteristics for the most commonly used competitive procurement methods.

Comparison of Competitive Procurement Methods			
Procurement Method	**Use When**	**Advantages**	**Disadvantages**
Invitation for Bids (IFB)	Products and services are standardized or uniform.	Award process is simpler. In determining best value, price and whether the goods or services meet specifications are the most important considerations.	Defined specifications may be difficult to develop. Does not encourage innovative solutions. Negotiations are not allowed if there is more than one responsive bidder.
Request for Proposals (RFP) **Request for Offers (RFO)**	When negotiations are desired. Vendor is expected to provide innovative ideas or solutions.	Allows for customized proposals suggesting different approaches to the same business need. Allows for negotiations. Considerations in addition to price are used to determine best value.	Lead time for procurement is much greater. Evaluations tend to be more complex.
Request for Qualifications (RFQ) *[This method is usually required by statute, e.g., Professional Services[1]]*	Selection is made solely on the skills and qualifications of the vendor. Price is not a factor until after a vendor is selected.	Emphasizes the competency and experience of the vendors.	Vendor is selected before price is negotiated. Two step process.

TABLE NOTES

1 Texas Government Code, Chapter 2254, Subchapter A.

Request for Applications

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

An RFA is used to invite grant applications, in which the grants are tied to designated funds and for a specific purpose. An RFA must include the grant objective, guidelines, and any limitations on spending or eligibility. It is recommended that agencies include the Essential Provisions in grant agreements. An RFA must also specify evaluation criteria that will determine which applications are funded and any other information that is needed to submit an application.

When issuing an RFA, an agency should consider the Uniform Grant Management Standards (UGMS) to the extent they are applicable. UGMS were established to promote the efficient use of public funds by providing awarding (grantor) agencies and grantees a standardized set of financial management procedures and definitions by requiring consistency among grantor agencies in their dealings with grantees.

Solicitation – Preparation

Overview

Once the Contract Developer has conducted a needs assessment, obtained a cost estimate, developed an Acquisition Plan, chosen the proper procurement method, and determined that a solicitation is required, the next step is to begin drafting the solicitation. For some procurements, like spot purchases or purchases using a set aside program or Term Contract, the solicitation development activities by the Contract Developer may be comprised of an administrative due diligence review of the requirements listed on the requisition for compliance with applicable procurement law and agency best practice before initiating the purchase.

For other procurements, the solicitation drafting phase of the Procurement Cycle involves a collaborative multi-departmental approach. For these procurements, it is common for there to be a kick-off meeting with the key stakeholders (such as the Contract Developer, end-user, subject-matter experts, Contract Manager, legal personnel, and informational technology representatives, if applicable) to discuss the requirements for administering the contract from solicitation issuance to contract closeout. The number of key stakeholders involved in the solicitation drafting activities increases relative to the complexity of the procurement.

Each solicitation is unique, so for the solicitation to be successful, the Contract Developer must not only be familiar with the requirements of the agency's needs, in terms of what is being procured, but also the applicable industry standards as well as the statutory requirements and procurement practices associated with the selected procurement method. For example, if an agency is procuring medical staff, the Contract Developer must be knowledgeable that

- an IFB, which does not permit negotiation, would not be a suitable procurement method to acquire these services, and
- the solicitation and any resulting contract must include a requirement for the medical staff to hold and maintain proper professional licenses and certifications, a means for the Contract Manager to monitor the requirement during the contract term, and a remedy for vendor noncompliance.

Procurement Lead Time

One of the first steps in the solicitation process is to consider the procurement lead time. Procurement lead time is the interval between a decision to purchase a product or service to when the contract is awarded. The suggested lead time is 180 days from start to completion, but this time frame will vary depending on the specific requirements of the agency and the complexity of the procurement.

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

- The actual preparation of the solicitation document can affect lead-time. Coordination and collaboration between members of the various agency teams, as well as structured planning and thorough research can shorten this period. On the other hand, inadequate planning and research along with lack of communication among team members, each with subject matter expertise, may cause the preparation of the solicitation document to be prolonged.
- The time required for the Contract Developer to finalize the solicitation document can vary depending on how well the scope of work or specifications are written by the end users. The Contract Developer is responsible for ensuring the solicitation documents are complete, allow for competition, and follow all applicable statutes, rules, and procedures.
- A 30-day solicitation period is recommended for RFPs, while RFOs may necessitate a longer posting time. Individual agencies are encouraged to consider the solicitation posting times on a case-by-case basis, keeping the statutorily mandated minimum time periods in consideration. A particularly complex or unusual scope of work may result in many vendor questions, in which case, an extended solicitation period would be recommended. Evaluation of the proposals may take more or less time, depending on the size of the evaluation committee and the complexity of the procurement. Likewise, the number of proposals to be evaluated impacts the evaluation time frame. The evaluation period could also be extended if there are presentations, discussions, or best and final offers.
- Contract negotiation and contract formation timeframes may vary depending on the complexity of the procurement and the skillset of the agency's negotiation team. Also, personnel unavailability may also be a factor as delays may occur due to inclement weather events, national and local holidays, illness, scheduled vacation, and the like.
- The actual process of award may be quick in smaller agencies but lengthier in larger agencies with more detailed approval processes, or where board approval is required. This timeframe may also differ significantly between a PO and a formal executed contract. Depending on the signature requirements of the agency and the contractor, the contract execution lead-time may need to be adjusted.

As part of the solicitation planning process, it is best practice to use the table below or similar tool to document the procurement lead time. The chart below is a guideline for documenting procurement lead time in simple procurements with minimal vendor negotiation required.

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

Internal Calendar of Events

It is prudent for an agency to develop an internal calendar of events for the procurement. The internal calendar of events should include not only the dates detailed in the external calendar of events, but also the milestone dates of activities or events occurring pre- and post- solicitation identified by the agency to be critical to the success of the procurement.

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

The internal calendar of events must be included in the Acquisition Plan or other procurement monitoring tool that is used as a gauge to keep the procurement on schedule. In developing the internal calendar of events, Contract Developers should be mindful of the amount of the time scheduled for document review. Contract Developers must allow sufficient time for oversight reviews, such as SPD Delegation, CAT review, and QAT review (if necessary), and meaningful evaluation and negotiations. A procurement value threshold chart is located in Appendix 7.

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

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

Drafting Tips

A solicitation is effective when the agency's requirements are clearly articulated to the vendor community. In contrast, a solicitation is ineffective if it is awkwardly worded, disorganized, or contains errors or visual distractions. A poorly drafted solicitation may prompt responses that are not aligned with the agency's actual requirements or include unnecessary costs due to vendor confusion. It is imperative that the solicitation be written in a manner that attracts responses that meet the agency's business need.

The following are techniques which are commonly used in effective solicitation drafting.

1. **Organize Content for Readability.** Present the information in a logical manner. Include relevant documents (*e.g.,* organizational charts, site plans, work flow diagrams) as attachments to the solicitation to facilitate readability and ease of reference.
2. **Use Short, Precise Sentences.** The information contained in the solicitation should be presented in a direct manner. For example, the text should plainly state who is to do what:

   In its Response, Respondent must include….

   The Awarded Vendor shall provide….

   The Solution delivered by the Awarded Vendor shall include the following….

   Within five (5) business days of receipt of the Project Plan, the Agency shall….

3. **Use Active Voice.** Active verbs assign responsibility to a particular entity more clearly than passive verbs.

Example of Active Voice:	Contractor shall develop the Solution to be scalable to X standard.
Example of Passive Voice:	The Solution shall be scalable to X standard.

   In the passive voice example, it is not apparent whether the contractor, the agency, or both parties are responsible for the referenced standard. The preferred writing style for solicitations is to use active rather than passive verbs.

4. **Use "Shall," "Must," "May," and "Should" Appropriately.**

   Shall and Must. The words "must" and "shall" are used to describe a command or mandatory condition. Care should be taken when stating mandatory conditions as inappropriate use could result in a restrictive specification or disqualification of a response.

   May and Should. The words "may" and "should" are used to describe an advisory or permissible action. These words do not represent a mandatory condition for which the vendor must comply.

5. **Use Terms Consistently.** The use of consistent terminology throughout the solicitation helps the reader understand the scope of work as well as the terms and conditions of the procurement. In contrast, using multiple terms to describe a particular person, function, activity, item, or entity is likely to cause confusion. For example, it is not advisable to use the following terms interchangeably within the solicitation to indicate the same entity: successful respondent, selected vendor, awarded vendor, vendor, selected contractor, awarded contractor, and contractor.
6. **Avoid Ambiguity.** Do not use terms that have the potential for more than one interpretation. Define terms, even industry terms, to ensure there is no misunderstanding as to the meaning of the term.
7. **Avoid Repetition.** State the requirement one time. Stating a requirement more than once does not emphasize its importance, but it does increase the likelihood of confusion especially if there are slightly different variations of the requirement stated in different parts of the solicitation.
8. **Proofread.** The solicitation should be proofread to ensure that the requirements are clearly and accurately described, extraneous statements that have no practical value are removed, and there are no spelling errors. The final version of the document should have a professional look and feel.

Use of Hyperlinks in Solicitations. Agencies may use hyperlinks within solicitations as a convenient means to deliver electronic content to potential respondents. However, the incorporation of 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 issues which include, but are not limited to, the following:

- **Inaccurate or Extraneous Information.** 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. Consequently, the issued solicitation may contain errors or otherwise convey information that is not consistent with the drafter's intent.
- **Inadvertent Amendment to Solicitation or Contract.** Information on web pages may change over time. The terms

of a solicitation or resulting contract may be inadvertently amended depending upon the nature of the information provided by way of hyperlink in the solicitation.

- **No Record of Hyperlink Content.** Hyperlinks may become inactive because web pages are moved or no longer exist. This is of particular concern after contract award as uncertainty of contract terms may lead to service delays, disputes, and possibly litigation.

The best practice for most solicitations may well be to avoid the use of hyperlinks altogether. If hyperlinks are used, the electronically linked information should be downloaded, included in the procurement file, and properly retained in accordance with applicable records retention schedule. Guidance regarding the use of hyperlinks within solicitations should be sought from agency legal counsel.

Content

OVERVIEW

The solicitation must contain all information required for vendors to respond to the agency's procurement opportunity. The content of a solicitation will vary depending on what is being procured, the complexity of the transaction, and the identified risks associated with the procurement. Care must be taken to identify all of the agency's requirements in the solicitation, because the agency will not be able to hold a vendor accountable for performance of a requirement that is not specified in the solicitation or resulting contract.

Contract Developers must not only ensure that the solicitation contains all of the agency's requirements but also that those requirements are presented in an organized manner. Because there is not a statewide solicitation template that is mandated for agency use, agencies have developed their own agency-specific solicitation templates. For reference, examples of CPA solicitation templates are available in the Procurement Forms Library located on the CPA website.[274]

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

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

[274] The CPA website is located at Comptroller.Texas.Gov.

INTRODUCTION

The introduction section of the solicitation provides the vendor community with a high-level summary of the procurement. This portion of the solicitation may contain a brief narrative description of the historical events relevant to the agency's business need and, if appropriate, the agency's future intentions that may have bearing on the products or services to be procured. Care must be taken that contractual requirements are not included in the informational text.

Solicitation Calendar of Events. It is best practice to incorporate a calendar of events in the solicitation. Ideally, the calendar of events should be located near the front of the document so vendors can quickly determine how long they have to submit questions, prepare responses, and plan for the anticipated date of award.

The Contract Developer must ensure that the timeframes provided in the solicitation calendar of events are appropriate to the complexity and cost of the solicitation. The solicitation period should allow a reasonable time for interested eligible vendors to respond. The Contract Developer should be mindful that shorter response deadlines may limit the number of vendor responses or even discourage participation by vendors.

The following example lists the events that are typically included in the solicitation calendar of events.

Solicitation Calendar of Events	
1	Date of Solicitation Issuance
2	Pre-Bid/Offer/Proposal Conference
3	Due Date for Written Questions
4	Date of Issuance of Agency's Written Answers
5	Due Date for Responses
6	Anticipated Date for Commencement of Services

MINIMUM VENDOR QUALIFICATIONS

Vendor qualifications relate to the characteristics of the vendor. Care must be taken to ensure that the minimum vendor qualifications are tailored to the business need. Examples of minimum vendor qualifications include the following:

- specified technical skill, certification, or licensing requirement;
- minimum number of years' experience (business and/or personnel);
- production facility requirements;

- projects of similar size and scope;
- not presently debarred from participation in state contracts, and
- demonstration of adequate financial capability based on standards that are defined within the solicitation.

Prequalification Criteria. If the agency determines that certain vendor qualifications must be met for the response to be eligible for consideration, these qualifications must be clearly stated in the solicitation. These criteria are reviewed by the agency on a "pass/fail" basis. The solicitation must provide notice to interested vendors of the threshold condition(s) which, if not satisfied, will result in the agency's rejection of the response. If these criteria are not clearly evident from the context of the solicitation, it is recommended that prequalification criteria be identified by a statement similar to the following: "Failure to meet this mandatory qualification shall result in disqualification of the response and the response shall receive no further consideration."

SCOPE OF WORK

Overview

The scope of work is a description of the products and services to be provided by the vendor who is awarded the contract. The Contract Developer should use the business requirements identified in the Needs Assessment as the starting point for drafting the scope of work. The success or failure of a contract can usually be linked to the adequacy of the planning, analysis, and thoroughness of the scope of work. Time spent planning, analyzing, and drafting the scope of work will result in savings of time, resources and money, and will improve the quality of products and service provided.

The scope of work should be written in a manner which provides a clear and thorough description of the products and services to be provided while at the same time fostering competition. A scope of work should be logically organized and tailored to the agency's business need.[275] Matters customarily addressed in a scope of work include the following:

- Vendor responsibilities
  - Provide compliant deliverables by the due date
  - Furnish services using qualified personnel
  - Perform tasks at a specified location
- Constraints on the vendor
  - Limited availability of agency resources (*e.g.,* Mon.-Fri. 8 a.m. to 1 p.m. CT access only)
  - Agency security policies (*e.g.*, state building admittance procedures, email encryption protocols)
- Agency responsibilities
  - Permit reasonable access to agency personnel
  - Grant suitable access to agency facilities (including storage space for vendor materials and supplies), equipment, and computer systems
- Evaluation of vendor performance (*e.g.*, standards of performance, inspection, testing, and deliverable acceptance and rejection process)
- Communication protocol (*e.g.*, designated points of contact, routine communications, and escalation plan for problem resolution)

When drafting the scope of work, the Contract Developer should select the appropriate specification type, consider utilizing deliverables and milestones, and include applicable professional license and certification requirements and established standards. The Contract Developer should also incorporate into the scope of work the strategy for monitoring vendor performance and all applicable transaction-specific requirements. As appropriate, the Contract Developer should seek the assistance of agency information security personnel and legal counsel regarding the suitability of internal, possibly confidential, agency information being included as part of the solicitation.

Specifications

A specification is a description of a product or service the agency seeks to procure and is also what the vendor must offer to be considered for contract award. The most common types of specifications used in government procurements are

- performance-based,
- design-based, or
- mixed (*i.e.*, a comingling of both performance- and design-based specifications).

Performance-Based Specifications. Performance-based specifications focus on outcomes or results rather than the process by which the products and services are produced. Respondents bear the burden of choosing the approach that will be utilized to accomplish the agency requirement. Performance based specifications allow respondents to bring their own expertise, creativity, and resources to satisfy the agency requirement. Agencies must ensure that performance specifications are reasonable and measurable.

[275] *See* General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(1) (directing agencies to modify contract statements of work to remove non-essential services or requirements).

Design-Based Specifications. Design-based specifications focus on how the vendor must perform the service or how the product is made rather than what the product or service does. Respondents have very little discretion as to the methods or detailed processes to be used. Agencies must ensure that processes are in place to properly inspect and test for compliance with the specifications.

Examples of Performance-Based, Design-Based, and Mixed Specifications	
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 by a minimum of 10 percent. These figures will be measured as reported by the Texas Chamber of Commerce.
	Contractor shall provide a pen that precisely writes with no skipping or smearing. Ink shall not penetrate through paper. Minimum writing distance of ink shall be 500 miles.
Design-based specification	Contractor shall conduct at least seven media campaigns for Texas Tourism during the fiscal year. Three of these campaigns must be directed to out-of-state tourists.
	Contractor shall provide a pen that has a white round plastic barrel of ¼-inch-diameter. Length of pen, including cap, shall not exceed 5-¾ inches. Ink cartridge shall have a tungsten carbide ball in stainless steel tip. Point shall not exceed 0.3 mm fine point. Ink shall be black.
Mixed specification	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 in tourist dollars of 3 percent in the next fiscal year as measured and reported by the Texas Chamber of Commerce.
	Contractor shall provide a 0.3 mm fine point, black ink pen. The pen shall precisely write with no skipping or smearing.

Descriptive Specifications – Referenced Brand or Equal. Descriptive specifications for products must provide those principal physical, functional or other characteristics that are essential to the minimum business needs while providing open and competitive bidding. The specifications should not include minimum or maximum restrictive dimensions, weights, materials or other characteristics that are unique to one brand name or would eliminate competition of other products. As a best practice, a minimum of two known acceptable manufacturer/brand names and model numbers that are currently being manufactured should be referenced as "or equal." Restrictive descriptive characteristics which are essential to the intended use may be included only if all the manufacturer/brands referenced in the solicitation can qualify.

An example of a referenced brand or equal is as follows: Referenced Manufacturer/Brand, Product/Model Number or Equal: ABC Mfg No. 1234 or XYZ Mfg. Co. No. 556677. The solicitation should include a clause citing the purpose for the references as "or equal" and the submittal requirements for evaluation. For example, a solicitation clause for a referenced brand is as follows:

> Catalogs, brand names, or manufacturer's references are descriptive only and indicate type and quality desired. Bids on brands of like nature and quality will be considered. If proposing other than the referenced brands/model number, Bidder must provide the manufacturer, brand, or trade name, product number and provide complete descriptive information of product offered and include it with the bid.

The evaluation of "or equal" offers shall be given full consideration and offers meeting the specification shall not be rejected for minor differences in design, construction or features from the reference models that do not affect the suitability of the product for its intended use.

Restrictive Specifications. Restrictive specifications have the potential to limit competition. Agencies must be careful not to inadvertently customize a product or service when drafting specifications. As an example, consider an agency purchase of 4-inch resealable bags when the agency's business need could be satisfied with the industry standard of a 5-inch resealable bag. In this scenario, the agency requirement of a non-standard bag size will reduce the eligible vendor pool to only those vendors capable of providing the customization as well as result in increased cost to the State due to the customization. Regardless of whether the specification is performance-based, design-based, or mixed, restrictive specifications which result in proprietary procurements are not permitted unless the procedures for Proprietary Purchases are followed.

Deliverables and Milestones

Deliverables and milestones are often used in projects to assess whether required tasks are being provided in accordance with an agreed timeline. Depending on the procurement, the Contract Developer may decide to utilize deliverables and milestones for certain contractor activities described in the scope of work. One of the benefits to specifying key deliverables and milestones in the solicitation is that it establishes the agency's expectations regarding timeline and payment (*e.g.*, major deliverables should be tied to a milestone payment schedule) and ensures that all respondents will submit responses using the same agency-designated service parameters.

Deliverable. A deliverable is a measurable task or outcome (*e.g.*, product, service). A report is one of the most common contractor-provided deliverables. There are various types of agency-requested reports. For example, a status report is used by the agency to assess whether products and services are being provided by the contractor on schedule; a time sheet, however, is used by the agency to track time spent by contractor personnel in performance of the contract.

Milestone. A milestone is a scheduled event associated with a deliverable. Milestones are a means to gauge progress. For instance, a milestone may be the date when a specified percentage (*e.g.*, 10 percent) of work is complete or mark the occurrence of the installation of a critical piece of equipment.

Professional Licenses and Certifications

If the type of service to be procured requires a professional license or certification, the solicitation must describe the applicable licensing and certification standard. Failure to include the appropriate license and certification in the solicitation places the agency at risk of receiving a deliverable that does not conform to generally accepted standards. The solicitation must require the contractor to maintain the license and certification during the term of the contract, notify the agency if there is a change in status, and specify the remedies available to the agency for contractor non-compliance.

Established Standards

Depending on the procurement, using an established standard (*e.g.*, international, national, state, local, industry) is an effective means of defining performance requirements. Examples of national and international standards include American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM), International Organization for Standardization (ISO), Occupational Safety and Health Organization (OSHA), and National Institute of Standards and Technology (NIST).

Agencies may also reference published standards maintained by entities representing particular industries such as Generally Accepted Accounting Principles (GAAP), Institute of Electrical and Electronic Engineers (IEEE), National Electrical Manufacturers Association (NEMA), and Payment Card Industry (PCI). If a standard is incorporated by reference, the scope of work must 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, the scope of work should specifically identify the industry standard by name and number.

Monitoring Activities

When developing the scope of work, the agency should consider the strategy it will utilize to monitor the quality of the contractor's performance. The methods used to monitor contractor performance should be clearly stated in the solicitation. Requiring a contractor, without prior notice, to produce time-consuming reports or maintain stringent testing standards outside normal industry parameters is grounds for legal challenge.

The monitoring activities chosen by the agency should be balanced in type, scope, and frequency to achieve the desired result for the particular procurement. Overly restrictive oversight may interfere with the contractor's ability to accomplish the work and may unnecessarily and inadvertently increase costs. Examples of monitoring activities which may be included in the scope of work include an established timeline for completion of major tasks, scheduled meetings, and submission of status reports. To the extent that particular vendor performance monitoring activities are mandated by an applicable funding source, such as federal funds, these must be specified in the scope of work.

Additional Considerations

Agencies should be mindful of any requirements that may have aspects which are unique to public sector transactions. If applicable to the procurement, issues such as the following must be addressed in the scope of work as they may affect pricing:

- Use of agency equipment;
- Storage space for contractor materials and supplies;
- Required permits;
- Subcontractor responsibilities;
- Texas Public Information Act obligations;
- Conflict of interest disclosures and/or organizational restrictions;
- Criminal background investigation requirements;
- Agency security policies (*e.g.,* state building admittance procedures, email encryption protocols);
- Intellectual property/copyright issues;
- Lease (operating/finance) conditions;
- Trade-in equipment option;
- Records retention period;
- Disposal of property requirements; and
- Special conditions imposed by funding source (*e.g.,* federal funds).

PAYMENT AND PRICING TERMS

Overview

Payment and pricing terms are included in the solicitation to provide all competing respondents with the same information detailing how payment will be remitted or costs reimbursed under the contract. In order to develop the appropriate payment and pricing terms, the Contract Developer must have a thorough understanding of the business requirements as well as the applicable industry standards.

For an effective solicitation, the scope of work and pricing terms must be aligned and the agency's pricing terms must be consistent with industry standards. It is common practice for solicitations to include a price sheet or other agency-created form which describes the products and services to be procured and the unit of measure that will be the basis for payment (*e.g.,* job, lot, month). The pricing terms selected by the agency will vary depending on what is being procured. For example, in an equipment purchase, the agency will determine whether its pricing terms are (1) a lump sum price that includes the cost for the equipment, shipping, and installation, or (2) a separate line item price for each individual component.

An essential component to the payment terms is the timing of the payment. When and how the agency will make payments must be clear in the solicitation. For example, will the entire amount be paid at the end of the project or will the contractor be permitted to bill for work performed monthly or quarterly in arrears?

Best practice suggests that each payment should reflect the value of the work performed. For projects with a long-term implementation schedule, an agency may control the payment process by dividing the overall contract payments into smaller amounts that each reflects an increment of work or deliverable. This is an effective technique for managing financial risk. The scope of any dispute between agency and contractor can be contained to a discrete deliverable rather than the entire contract.

Disclosure of Budget. The State does not typically disclose its budget in the solicitation because it may either (1) result in all vendors bidding to the agency's identified budget rather than offering competitive pricing or (2) discourage vendor participation if the established (initial) budget is not commercially reasonable. However, there are certain procurements, such as marketing services, in which it is customary for the budget to be disclosed.

Reimbursement Methodologies

Payments should be structured to fairly compensate the contractor and encourage timely and complete performance of work. The following table provides a summary of the three most common reimbursement methodologies.

REIMBURSEMENT METHODOLOGIES			
	Fixed Price	**Time & Materials**	**Cost Reimbursement**
Payment Terms	Payment to vendor is total price for well-defined product or service	Payment to vendor of a pre-determined amount per unit (*e.g.*, service or item)	Payment to vendor of direct and indirect costs actually incurred
When to Use	Requirements are precisely defined	Project scope cannot be precisely defined Off-the-shelf products or standard services are required but quantity is uncertain	Project Scope cannot be precisely defined and costs cannot be accurately determined
Benefits	Vendor assumes most of the risk because vendor will be paid the same regardless of actual cost	Payment based on quantity of work actually completed Large quantities may lead to volume price discounts	Allows forward movement when the scope of work details are uncertain Purchaser obtains full cost information from vendor
Drawbacks	Vendor is motivated to look for "out of scope" items	Requires significant monitoring effort by purchaser Payment not linked to vendor's achievement of a goal	Purchaser bears burden of cost overruns (*e.g.*, market fluctuations) Vendor does not have an incentive to control costs Administrative burden of validating all costs

Advance Payment

An agency may not pay for goods or services before their delivery to the agency unless the advance payment is necessary and serves a public purpose. A list of exceptions to the advance payment prohibition is located on eXpendit State Purchase Policies on the CPA website.[276] Exceptions include, but are not limited to, lease costs, subscriptions, and maintenance contracts. An agency that makes an advance payment to a contractor is responsible for pursuing appropriate legal remedies to recover the payment if the contractor fails to provide the good or service.

Early Payment

When it is possible, an agency shall negotiate a prompt payment discount with a vendor.[277] The State's policy on payment scheduling prohibits agencies from making payments earlier than the payment due date unless it is required by law, contract, or other obligation to the contractor to process the payment before the payment due date. A contractor's request on an invoice that the invoice is paid immediately upon receipt is not an obligation to make an early payment to the contractor. Accordingly, the contract must specify any early payment discounts available to the agency.[278]

It is best practice to request the respondent to indicate in the response whether any early payment discount (also referred to as a cash discount) is offered to the agency for early payment. For example, if a repondent offers 2/10 Net 30, an agency can take the 2 percent discount if it pays before or by the 10th day.

Note that an early payment discount and the terms of the offer presented in a solicitation response must not be considered in the evaluation.

Retainage

If permitted by the contract, an agency may withhold an amount or percentage of each payment due as retainage. The entire retainage amount will be payable upon successful completion of the project. Upon completion of the project, the contractor will invoice the agency for any outstanding work and for the retainage.

Invoice Requirements

The solicitation must specify any invoice procedures that apply to the procurement. The Contract Manager will monitor these procedures to ensure that payment for authorized products and services is remitted only in accordance with the contract terms. Although recommended for all procurements, for certain procurements, agencies must design and implement procedures to detect and report double-

[276] The CPA website is located at Comptroller.Texas.Gov.
[277] TEX. GOV'T CODE § 2251.030(a).
[278] TEX. GOV'T CODE § 2251.030(a).

billing by vendors[279] and review their payment and reimbursement methods and rates biennially.[280]

State and Federal Taxes

Purchases made for the State are exempt from the imposition of certain taxes. The following clause is recommended for solicitations:

> *"Purchases made for state use are exempt from the Texas state sales tax, and certain purchases are exempt from federal excise tax."*

In addition, it is recommended that a tax exemption statement appear on the front of each PO. State and Federal Tax Exemption Certificate forms are available in the Procurement Forms Library located on the CPA website.[281]

In situations where solicitations require both labor and materials, the State is exempt from the tax paid by contractors on behalf of the State for the incorporated materials they supply. The contractor must always pay the tax unless the materials will be used entirely for the State's project. When fulfilling a state contract, contractors must pay any applicable tax on the purchase and rental of equipment, accessories, and repair or replacement parts for equipment.[282]

State and Local Sales Tax. The State is exempt from paying state sales tax and local sales tax (city, transit authority, etc.).[283] Taxes of other states are not applicable to the purchase if a free on board (FOB) destination in Texas is specified.

Federal Excise Taxes. The State is exempt from paying federal excise taxes for specified commodities.

State Motor Fuels Tax. Agencies are required to pay the state motor fuels tax on gasoline and diesel fuel. However, agencies holding either a Dyed Diesel Fuel Bonded User permit or Dyed Diesel Fuel Signed Statement registration are not required to pay the state motor fuel tax on dyed diesel fuel bought to use in off-highway equipment. Agencies may request a refund of state motor fuels taxes paid on gasoline and diesel fuel used in off-highway equipment. Agencies should contact SPD for information on obtaining a diesel fuel permit or requesting a refund.

CONTRACT TERM AND TERMINATION

The term of a contract is a definite period of time that the contract will remain in effect. All contracts must have a commencement date and a specific expiration date. A reasonable contract term compliant with applicable law must be included in the solicitation. Indefinite contracts are generally prohibited.

As a general policy, it is recommended that the maximum duration for a contract without reissuing a competitive solicitation is three[284] to four 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.

The solicitation must include a termination for non-appropriations clause if the term of the contract will cross a fiscal year. A termination for non-appropriations clause is an Essential Provision for agency contracts. Refer to the Termination section of this Guide for a discussion of the following termination provisions: (1) termination by mutual agreement, (2) termination for convenience, (3) termination for cause, and (4) termination for non-appropriations.

TERMS AND CONDITIONS

Overview

Clearly stated terms and conditions are the most effective means of protecting the agency from unintended risk. It is a common practice for contracts to include standard terms and conditions that are often referred to as "boilerplate." Refer to the Contract Terms section of this Guide for information about the Essential and Recommended Provisions of a State contract. It is recommended that

[279] TEX. GOV'T CODE § 2261.201.
[280] TEX. GOV'T CODE § 2261.151.
[281] The CPA website is located at Comptroller.Texas.Gov.
[282] TEX. TAX CODE § 151.311.
[283] TEX. TAX CODE § 151.309(4).

[284] General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(b) (providing that an agency or institution of higher education may not use funds appropriated elsewhere in this Act to pay for a contract for goods or services unless it:

(1) Seeks competitive bids before renewing or extending a contract that has been in effect more than three fiscal years as of August 31, 2017 and is valued at the lesser of $10,000,000 or 10 percent of the agency's All Funds budget for the 2018-19 biennium. The following contracts are exempt from the requirements of Subsection (b)(1) of this § 17.10:

(A) Texas SmartBuy, Term Contracts, and cooperative contracts administered by the CPA or DIR;

(B) grants;

(C) interagency contracts;

(D) contracts that relate to a construction project as defined by Section 2166.001 of the Texas Government Code;

(E) contracts that relate to highway construction or highway engineering;

(F) contracts that relate to developing information resource applications or information resource technologies; and

(G) contracts not required by law to be competitively bid.

(2) Conducts a cost-benefit analysis to compare canceling or continuing any contract related to a major information resource project subject to QAT monitoring that is more than 50 percent over budget or over schedule. QAT must re-approve the cost-benefit analysis for the project to continue.).

public procurement professionals work closely with agency legal counsel when developing boilerplate for the agency's solicitation and contract templates. In addition to the agency's boilerplate terms, the solicitation should include terms tailored to the specific procurement which address change control, risk mitigation measures, and remedies.

Change Control

It is best practice for an agency to designate a process in the solicitation that will be used to manage any anticipated and unanticipated changes to scope, schedule and pricing that may occur during the contract term. This change control process should describe the communication protocol and documentation required to make agreed changes (*e.g.*, amendment, change order).

Change during the contract term may be managed several ways. For a non-complex procurement, the change control process may be to simply designate the agency's purchasing division as the point of contact for proposed changes and those changes may be exclusively handled by issuing Purchase Order Change Notice (POCN) or signed contract amendment.

For more complex procurements, the change control process may involve a formal routing procedure with prescribed forms, minimum review periods, and named individuals with approval authority. Other change control processes may be documented as plans (*e.g.*, transition plans) to be implemented if a specific event occurs.

The benefit of a well-defined change control process is that of uninterrupted performance while the parties investigate proposed changes to the contract. Regardless of the change control process selected, the process should expressly state the circumstances under which the change is approved. For instance, many service contracts provide that a change will not be implemented until both parties agree to the change in writing. In contrast, contracts with pricing formulas may authorize changes to take effect immediately upon the occurrence of a particular external event, or within a designated time period following a price index change.

Transition Plans. It is best practice for transition plans to be included in a solicitation when there is a business requirement of uninterrupted service during the transfer between the outgoing and incoming service providers. The transition-in and transition-out plans describe the coordination activities for both service providers and the agency.

The transition plans identify the tasks to be completed, the roles and responsibilities of each entity, resource requirements, dependencies, and the timelines for key activities. As applicable, provisions for the safeguarding of confidential information should be included in the transition plans. Service providers should also perform the transition activities in good faith and in a cooperative and expeditious manner.

Because ambiguity may lead to service delays, the solicitation must identify which entity will bear the burden of the transition costs. The payment and pricing terms selected by the agency should facilitate the efficient and effective transition of services with minimal or no disruption to agency operations. Depending on the service and whether the vendor is performing outgoing or incoming activities, the transition activities may be provided to the agency at no additional cost, for a fixed fee, or on a cost-recovery basis.

Price Adjustment Based on an Index. For certain contracts, pricing adjustments (upward or downward) may be correlated to a published price index such as the Consumer Price Index (CPI) or Producer Price Index (PPI). The CPI and PPI, both published by the Bureau of Labor Statistics, measure price change over time for different sets of goods and services. They may be used to account for inflation in long term contracts without the necessity of frequent re-solicitation.

The price adjustment section of the solicitation must identify the applicable index such as the following:

- Producer Price Index: number/description – Pertains to commodities
- Consumer Price Index: number/description – Pertains to labor and services
- Other Price Index or Market: number/description

In addition, the solicitation must designate the formula to be used. The Bureau of Labor Statistics recommends this formula when using the most recent monthly information from the index, where:

A = Index from the month of the due date for the response; OR the effective date/month of the most recent 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 solicitation must specify how frequently price adjustments may occur during the term of a contract — quarterly, annually or other time period that best fits the commodity or service.

If a price adjustment is allowed only at the time of contract renewal, then the agency will conduct a review of the current index pricing to

determine whether there will be a price increase or decrease since the last baseline. This review will be conducted within the 30-day period prior to the renewal date because the most recent index pricing must be used for the calculation. It is best practice for the solicitation to require the respondent to specify the maximum amount of the price increase. The respondent may offer price decreases in excess of the allowable percent change at any time during the term of the contract.

Risk Mitigation Measures

Financial Capability

For high-risk or high dollar procurements, it is best practice to require each respondent to provide evidence of financial capability to perform all the services required by the solicitation as well as all services offered in the response. For capital-intensive projects, the solicitation should also require disclosure of the source of any outside financial resources the respondent will utilize to enable it to perform under the awarded contact.

For high risk procurements, it is recommended that agencies reserve the right to determine the financial integrity and responsibility of a respondent and to reject a response on the grounds of respondent's lack of financial soundness. The agency may require submission of the following information in the response to assess the financial viability of a respondent:

- A copy of the most recent audited financial statements, including financial statements with all sub-schedules and footnotes, to include balance sheets, profit and loss statements, change in financial position and management letters, with findings and responses to findings; or
- If audited financial statements are unavailable, unaudited financial statements compiled, reviewed and attested by an independent certified public accountant or certified public accounting firm.

Depending on the procurement, the agency may determine that the financial statements certified as accurate by the firm's chief financial officer are acceptable.

Insurance

Insurance is a common risk mitigation measure. Insurance coverage should be sufficient to cover all claims against the contractor as well as any costs the agency might incur. The insurance coverage must be effective from the commencement of the contract and remain in place with no lapse at any time during the life of the contract. It is recommended that the solicitation specify that all insurance policies must be obtained from insurance companies licensed in Texas with at least an "A" rating from A.M. Best Co. to reduce the likelihood of a vendor being represented by a financially unsound insurance carrier.

There are many types of insurance policies. Contract Developers must be knowledgeable about which insurance policies are suitable for the purchase and ensure that dollar values are consistent with the risk of non-performance by the contractor.[285] Care must be taken not to inadvertently require unnecessary coverage as it may add cost to the contract.

A list of common insurance policies is below:

- **Commercial General Liability** – A policy that protects business organizations against liability claims for bodily injury and property damage arising out of premises, operations, products, and completed operations; and advertising and personal injury liability.

  The standard general liability policy excludes coverage for damage to the work performed by the insured or to personal property in the care, custody, and control of the insured. It is intended to address damage incurred by a third-party. An agency can be sued for vicarious liability for these damages.
- **Professional Liability** – A policy designed to protect professionals against liability in performing their professional services. Most professional liability policies only cover economic or financial losses suffered by third parties and exclude bodily injury and property damage, which is intended to be covered by the general liability policy.
- **Workers' Compensation** – An insurance program that helps people with work-related injuries and illnesses. Employees covered by workers' compensation obtain medical care necessary to treat their injuries and illnesses. It may also provide payments to replace some of an injured employee's lost income, up to time and dollar limits set by law, compensation for burial expenses for employees killed on the job, and death benefits for dependents of employees killed on the job. As a best practice, agencies should always ask contractors to carry workers' compensation. This coverage does not apply to sole proprietors.
- **Commercial Umbrella Excess Liability Coverage** – A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy, general liability policy, watercraft and aircraft liability policies, and employer's liability coverage. The umbrella policy serves three purposes:

[285] *See* General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(6) (directing agencies to ensure dollar values of insurance are consistent with risk of nonperformance and reduce requirements if it is prudent to do so).

1. it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims,
2. it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims, and
3. it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention.

- **Automobile** – A policy that protects the insured against financial loss because of legal liability for automobile-related injuries to others or damage to their property by an automobile. Automobile coverage may include liability coverage of bodily injury, property damage, medical payments, and physical damage.

Depending on the procurement, the agency may require that the contractor provide specialized insurance policies such as the following:

- Cyber liability
- Medical malpractice
- Builder's risk
- Business interruption

If guidance is needed on selecting the appropriate level of insurance, consult with agency legal counsel or the State Office of Risk Management (SORM).[286]

Surety Bonds

The three most common forms of surety bonds used in the procurement process are bid bonds (deposits), performance bonds, and payment bonds. The solicitation must provide notice if a bond is required and what forms are acceptable (*e.g.*, irrevocable letter of credit or cashier's check). SPD discourages the use of performance bonds unless there is a compelling need or statutory requirement.[287] The use of a bond should be carefully considered as a bond requirement may restrict competition, delay the award and raise the cost of the contract as the cost of the bond is typically passed to the agency by the vendor.[288] Questions regarding bonding requirements should be directed to agency legal counsel.

Warranties

A warranty is an assurance that specific facts or conditions are true or will happen. A warranty may be either *express* or *implied* and is legally binding.[289] Warranties, among other things, may protect a buyer against poor workmanship, intellectual property violations of third parties, malfunctioning products and debts. Warranties become effective once the buyer has accepted the product or service and generally require the vendor to either repair or replace a product, or re-perform a service, for no cost during the warranty period.

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,[290] a warranty that the goods shall be merchantable,[291] or a warranty that goods are fit for a particular purpose.[292] Agency legal counsel should be consulted before drafting or negotiating warranty provisions.

Extended Warranty; Maintenance Agreement

An extended warranty, sometimes referred to as maintenance agreement or service contract, is a repair and replacement service offering that is available to the buyer by a manufacturer or dealer for an additional cost. It is typically available for products such as machinery, appliances, and electronics. Care should be taken in reviewing an extended warranty as the terms may differ from the warranty provided by the manufacturer for the new item. For example, the coverage may not extend to specified parts or damage caused by certain events.

286 The SORM website is located at www.sorm.state.tx.us.

287 TEX. GOV'T CODE §§ 2156.004, 2156.011.

288 *See* General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(6) (directing agencies to ensure dollar values of performance bonds are consistent with risk of nonperformance and reduce requirements if it is prudent to do so).

289 Generally, a warranty describes then "character, quality or title" of that which is being sold and "by which seller promises or undertakes to ensure 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.2d 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).

290 TEX. BUS & COM. CODE § 2.312.

291 TEX. BUS. & COM. CODE §§ 2.314, 2A.212.

292 TEX. BUS. & COM. CODE §§ 2.315, 2A.213.

Limitations of Liability Clauses

Limitations of liability (LOL) clauses are used to limit potential breach-of-contract damages. Under common law, parties are only liable for damages that are reasonably foreseeable at the time of contracting.[293] Often, an LOL clause is a simple restatement of the common law principle that neither party would be liable for unforeseeable losses suffered by the other. More robust LOL clauses can go further, to limit even foreseeable losses, either losses arising out of certain kinds of claims, such as infringement or disclosure of confidential information, or putting a dollar cap on the total losses for which the party can be liable.

LOL clauses are used to alter the extent of liability otherwise recoverable at common law. Such clauses generally establish the maximum liability or exposure of one party for damages that may be recovered against a contracting party if there is a valid claim. In the absence of controlling public policy, Texas courts, which have a long history of supporting freedom of contract, consistently recognize that parties to a contract should be permitted to draft legally enforceable agreements with minimal judicial intervention[294] and that LOL clauses are generally not considered to violate public policy.[295] LOL provisions are generally enforceable in Texas if they meet a conspicuousness requirement[296] and there is nothing otherwise unconscionable about the contract.[297] The Texas Business and Commerce Code expressly provides that an agreement for the sale of goods may limit or alter the measure of damages recoverable, provide exclusive remedies for breaches, and, absent unconscionability, limit or exclude the recovery of consequential damages .[298]

[293] *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Exch. Ct. 1854).

[294] Barbara J. Slotnick, 10-A Tex. Jur. 204, CONTRACTS, § 103 (Texas law permits the utmost freedom of contract between parties of full age and competent understanding and requires that their contracts, when freely and voluntarily entered into, shall be held sacred and enforced by the courts). *See also* TEX. BUS. & COM. CODE § 2.303.

[295] *See e.g.*, *Martin v. Lou Poliquin Ents., Inc.*, 696 S.W.2d 180, 186 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (a LOL "may waive a party's right to recover under the common law theory of breach of contract"). When determining whether a limitations of liability provision violates public policy, courts will generally consider whether there was a disparity in bargaining power between the parties. *Fox Elec. Co. v. Tone Guard Security*, 861 S.W.2d 79, 82-83 (Tex. App. – Ft. Worth 1993, no writ) (upholding the LOL clause stating "liability shall be limited to a sum of [$250]; and … the provisions of this section shall apply if loss or damage … results from … negligence, active or otherwise…"). Some courts have also applied an unconscionability analysis. *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748- 749 (Tex. App.—Fort Worth 2005, no pet.). However, a party cannot insulate itself from tort or contractual liability for its own deliberate wrongful conduct because that is against public policy. *Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 116 (Tex. 2014).

[296] TEX. BUS. & COM. CODE § 1.201(b)(10).

[297] *See Mickens v. Longhorn DFW Moving, Inc.*, 264 S.W.3d 875 (Tex. App. 2008). Note that certain professionals such as physicians and attorneys cannot completely limit liability.

[298] TEX. BUS. & COM. CODE § 2.719.

Remedies

Remedies provide protection to an agency if there is a contract breach. The agency will invest a significant amount of time and resources to develop and award a contract, so each key deliverable within the contract should have a corresponding remedy for contractor non-performance. Although contract termination is an effective remedy, it may not be an appropriate remedy for every contract breach. For example, an agency may determine that the most suitable remedy for late delivery is to impose liquidated damages that require the contractor to compensate the agency for the contract breach by paying a pre-determined amount for each hour/day/week beyond the scheduled due date.

Examples of remedies are as follows:

- **Liquidated Damages** entitle the agency to demand a set monetary amount determined to be a fair and equitable repayment to the agency for loss of service due to contractor's failure to meet contract requirements. Liquidated damages are useful when compensatory (or "actual") damages are difficult to calculate. The terms of the liquidated damages must be clearly specified, identifying a deliverable, monetary amount, duration and any other necessary information.

  Including liquidated damages in the solicitation will focus the vendor's attention on the deliverables that have been identified as most important to the agency. Care should be taken to ensure that liquidated damages are associated with the correct deliverable. For example, consider a contract for a 24/7 call center where it is imperative that calls are answered in a timely manner. The solicitation only includes a liquidated damages provision tied to the due dates for the contractor's submission of quarterly reports detailing average time calls are in queue and average call abandonment rate, but not metrics for the timeliness of the call center responses, which is the agency's primary concern. A more appropriate remedy would be for liquidated damages to accrue for a specified percentage of calls not answered within a set time frame.

  Public procurement professionals are advised to seek assistance from their agency legal counsel when developing liquidated damages provisions. Courts will enforce a liquidated damage provision only if it is not a penalty, meaning the clause attempts to estimate actual damages rather than penalize a breaching party by awarding damages far greater than those actually suffered.[299]

[299] TEX. BUS. & COM. CODE § 2.718 (providing that liquidated damages clause will be enforced only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty).

- **Compensatory Damages** are the monetary amount necessary to compensate the injured party for the loss. Examples of compensatory damages include the following:
  - **Expectation damages** are intended to cover what the injured party expected to receive from the contract, also called the "benefit of the bargain." This is the typical measure of damages in contract. Expectation damages are equal to the value of the defendant's promised performance, generally the contract price, minus any benefit received from not having to complete the defendant's own performance. In the case of defective performance by vendor, the buyer can recover the cost of remedying or completing the performance. However, diminution of value will be awarded where the cost of completion is clearly disproportionate to the value of the performance to avoid economic waste.
  - **Reliance damages** cover the loss that the non-breaching party incurred in reliance on performance of the contract and are designed to put the injured party back where they were before they entered into the contract. Reliance damages are usually used when expectation damages cannot be accurately calculated, including without limitation when profits are too speculative or where no contract exists, but some relief is justifiable.
  - **Consequential damages**, also called "special damages," are intended to cover any loss incurred by a breach that is not directly related to the contract, but arose naturally, was reasonably foreseeable or had been specially communicated and should have been included in the scope of what would be reasonably be expected to arise.[300]

  A contractor can monetarily compensate the agency while continuing to fulfill the contract; examples of such compensatory damages include:

  - **Discounts** on products and services within the scope of the contract can be provided to the agency when certain performance measures are not met.
  - **Credits** can be provided to the agency when performance measures are not met. Credits can be applied as a dollar amount deducted from the contractor's subsequent invoice, or additional products or services within the scope of the contract.
  - **Refunds** or reimbursement of previous payments by the agency.
  - **Waiver of fees** the agency was due to pay for products and services that are either within scope of the contract or for substitute products and services.
- **Restitution Damages** are the value to the defendant of the plaintiff's performance and are utilized to prevent unjust enrichment. Restitution damages may be awarded if the innocent party incurred a loss that benefited the other party. The recovery is based on the market value rendered to the defendant and are not limited by the contract price
- **Equitable Remedies** such as injunctions, declaratory relief and specific performance can be exercised even when they are not specified in the contract. Types of Equitable Remedies include:
  - **Injunctions** are utilized when the agency needs the contractor to stop doing something or continue working. The court may issue injunctive relief to require the contractor to continue working, or to stop until the case is resolved. For example, in the case of a contractor burning tires in violation of EPA regulations rather than recycling them in accordance with the contract, the court would issue an injunction requiring the contractor to stop burning the tires until the issue with the EPA was resolved.
  - **Specific performance** is a remedy in which the promisor is ordered to render the promised performance. There is a general hostility and reluctance to award specific performance due to a number of factors, including without limitation the concern that specific performance may overcompensate the injured party.

  Limits on Equitable Remedies include:

  - **Inadequate Damages.** Damages must be inadequate to protect the injured party for an equitable remedy to be awarded. This usually occurs if the damages cannot be calculated with sufficient certainty or if money cannot substitute for the performance.
  - **Definiteness.** The contract terms must be definite enough to allow a court order to be framed.
  - **Difficulty of Enforcement.** Courts must be able to enforce and supervise the court order.
- **Punitive Damages** are a rare type of damage and used in breach of contract cases when the sole point is to punish the wrongdoer. These damages are typically discouraged in breach of contract cases.
- **Nominal Damages** are utilized when the injured party has not suffered a financial loss but the injured party wants to show they were in the right.

[300] *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Exch. Ct. 1854).

If an agency is not able to resolve the contractual dispute with the contractor, the agency's legal counsel must contact the Office of the Attorney General (OAG) for assistance if the agency wants to pursue legal action for breach of contract. The most common recovery in a breach of contract case is compensatory damages that are the "actual damages" designed to cover the loss of the agency as a result of the breach. The amount awarded is intended to "make the injured party — the agency — whole again," and it is not meant to give the injured party a windfall.

RESPONSE SUBMISSION REQUIREMENTS

Response Content, Format, and Delivery Instructions

The solicitation must clearly indicate the submission requirements such as the response content, format, and delivery instructions that include the following:

- the due date and time,
- delivery address,
- acceptable delivery method (*e.g.,* email, fax, USPS),
- container labeling (*e.g.*, name and address of respondent, solicitation number),
- required number copies of the response, and
- format of response (*e.g.*, electronic file type, bound, tabbed, paginated, size of paper, page number limitations).

If the solicitation requires the vendors to utilize agency-specific templates in their responses, the templates must be appropriately referenced and, as applicable, attached as exhibits or appendices to the solicitation. All costs associated with the preparation of the response must be borne by the respondent.

If electronic submission of responses is permitted, the solicitation should contain instructions that state how the agency will treat an email or fax submission that is not timely received. For example, the agency may state that if all or any portion of a response submitted by email or fax is received late, is illegible, or is otherwise non-responsive due to equipment failure or operator error, the response or the applicable portion of the response will not be considered. In addition, the agency must not be liable for equipment failure or operator error. If email submission of responses is permitted, it is best practice for the agency to establish a generic email box to receive responses; this provides consistency for respondents and minimizes the impacts from employee turnover.

Execution of Bid/Offer/Proposal

An execution of bid/offer/proposal document must be included in the solicitation as it holds the respondent accountable for performing any duties submitted in the response. Although it is not required to be part of the execution of bid/offer/proposal, it is common for agencies to include the list of statutory preferences.

HUB Subcontracting Plan Requirements

Agencies are required to make a good faith effort to assist Historically Underutilized Businesses (HUBs) to receive a portion of the total contract value that the agency expects to award in a fiscal year in accordance with the following statewide goals:

- 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.[301]

These goals can be achieved through contracting directly with HUBs or indirectly through subcontracting.

For any procurement with an estimated contract value of $100,000 or more, including all renewals and amendments, the agency must determine whether subcontracting opportunities are probable under the contract.[302] Subcontracting opportunities can be realized through expenditures on materials, supplies, equipment and services. If subcontracting opportunities are probable, the agency must state this determination in the solicitation and require a HUB Subcontracting Plan (HSP) to be submitted with the response. If an HSP is required by the solicitation, the completed HSP must be submitted by the response due date and time in order for the response to be considered responsive. A response containing an incomplete or missing HSP must be disqualified. Once accepted by the agency, the HSP will become a part of the contract. Vendors must amend their HSPs if there is any change in their planned subcontracting during the performance of the contract.

Agencies are not permitted to make HUB subcontracting or HUB certification status of a vendor a scoring criteria that is assigned weight in the agency solicitation.

[301] 34 TEX. ADMIN. CODE § 20.284(b).
[302] TEX. GOV'T CODE § 2161.252.

EVALUATION CRITERIA FOR AWARD

The primary objective for every acquisition is to obtain best value for the State. To ensure fairness in the agency's evaluation of the responses, the solicitation must notify the potential respondents of the basis for contract award. The solicitation must identify the evaluation criteria and the relative weight assigned to each criterion. If the evaluation criteria and associated weights are not thoughtfully designed, then the procurement will fail because the basis of the award will not correctly identify the response that offers best value to the State.

The evaluation criteria must reflect the essential qualities or performance requirements necessary to achieve the objectives of the contract. The weight assigned to each evaluation criterion must correlate to its importance. The Contract Developer must ensure not only that the evaluation criteria and the associated weights are clearly stated, but also that information submitted in the response directly relates to the criteria. The Contract Developer should be careful to ensure that the respondents and the evaluation committee have no opportunity to be confused about which portion of the response applies to each criterion.

Evaluation Criteria	Solicitation Requirement	Submission Requirement
Respondent Qualifications	Specified professional license or certification.	Copy of current license or certificate applicable to specified profession or trade.
Respondent Experience	Specified number of projects of similar size and scope.	Detailed information regarding project size, dollar amount and scope of project for each individual project and any additional information necessary to evaluate vendor 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.

Purchase price and evidence that the goods or services meet specifications are the most important considerations when goods and services are procured through competitive bidding.[303] As a matter of practice, SPD encourages the use of other evaluation factors in addition to price and meeting specifications. It is common for there to be at least three evaluation criteria which broadly address the following:

1. the respondent's proposed scope of work;
2. the respondent's past performance and experience; and
3. the respondent's proposed price.

Examples of additional and more detailed evaluation criteria may be found in the best value standards found in statute.[304]

It is best practice for agencies to include a general description of the evaluation process in the solicitation. The agency should also finalize, prior to solicitation issuance, the evaluation scoring matrix, including any objective criteria, and the composition of the evaluation committee.

The scoring method used to assess the price criterion should be carefully considered. Typically, the price criterion is evaluated based on either "reasonableness" or objective criteria. A reasonableness assessment of a proposed price considers various factors such as the appropriateness of the cost metric chosen by the respondent and the impact of any identified assumptions or constraints on the proposed price. In contrast, an assessment of proposed price based on objective criteria relies on a mathematical formula, rather than independent judgement, to calculate the score.

[303] TEX. GOV'T CODE § 2155.074(b).
[304] Best value standards include, but are not limited to, the following: Sections 2155.074, 2156.007, 2157.003, 2254.003, and 2254.027 of the Texas Government Code.

The scoring method used for the price criterion should be reviewed for each solicitation to ensure it is appropriate for the products and services to be procured. For instance, objective criteria are not suitable for consulting services procurements because state law requires that price is evaluated on the reasonableness of the proposed fee for the services.[305] Exclusive reliance on objective criteria for pricing may also not be suitable for highly complex procurements.

There are several mathematical formulas that may be considered for the evaluation process and the Contract Developer must ensure that any formula used is appropriate for the procurement. A commonly used formula for simple purchases is as follows:

Price Score = (Lowest Price / Price of Response Being Evaluated)
x Maximum No. of Available Points

There are several schools of thought about how much information is to be provided to the respondents regarding the evaluation criteria. At a minimum, the solicitation must identify the criteria and their corresponding weight. Some agencies prefer to provide detailed information in the solicitation as to how each base criterion is broken down into smaller units or subcriteria or they include a copy of the evaluation scoring sheets as an attachment to the solicitation. Either approach is acceptable. Sample evaluation criteria and scoring strategies are located in Appendix 12.

Failure to adhere to the published evaluation criteria during the evaluation process may result in a protest. Evaluation criteria that were not included in the solicitation may not be used to rank or select responses. For example, if respondents are to receive additional points for possessing a national accreditation, this criterion must be stated in the solicitation so that all the respondents are notified there is an opportunity to achieve a higher score by submitting the appropriate documentation in its response. Likewise, if the national accreditation information was not requested in the solicitation, respondents who fail to demonstrate this accreditation cannot be penalized.

[305] TEX. GOV'T CODE § 2254.027.

Solicitation – Reviews and Approvals

CAT – Review of Solicitations With a Value of $5 Million or More

Prior to posting to the ESBD or publishing in the *Texas Register*, an agency[306] must submit solicitation documents for contracts that have a value of $5 million or greater to the Contract Advisory Team (CAT) for review regardless of procurement method.[307] For CAT submissions, the contract value means the estimated dollar amount that an agency may be obligated to pay over the life of the contract including all executed and proposed amendments, extensions and renewals.[308] Agencies should not artificially split the procurement to avoid the $5 million threshold for CAT review.

Solicitation documents include the solicitation (*e.g.*, IFB, RFP, RFO, RFA) as well as any other documents that supplement the solicitation (*e.g.*, Proprietary Purchase Justification) or are incorporated by reference. The solicitation documents and a completed form are submitted to CAT through the Procurement Oversight & Delegation portal maintained by SPD and located on the CPA website.[309] Requests for assistance relating to the Procurement Oversight & Delegation web application may be submitted to spd.oversight@cpa.texas.gov.

As a general guideline, grant agreements where the recipients eligible for award are governmental entities or non-profit business entities are not subject to a CAT review. CAT will review grants when the recipients eligible for award are for-profit business entities because these contracts provide public funds to entities that could profit from the award. RFAs based solely on federal funding are not subject to CAT review.

[306] The term "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 of the 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. TEX. GOV'T CODE § 2056.001(a). Chapter 2262 of the Texas Government Code does not apply to (1) an institution of higher education as defined by Section 61.003 of the Education Code or (2) contracts of the Texas Department of Transportation that either relate to highway construction or highway engineering or are subject to Section 201.112 of the Transportation Code. TEX. GOV'T CODE § 2262.002.

[307] TEX. GOV'T CODE § 2262.101(a)(1).

[308] 34 TEX. ADMIN. CODE § 20.25(b)(13).

[309] The CPA website is located at Comptroller.Texas.Gov.

When Procurement Oversight & Delegation receives the solicitation documents, the agency will receive an acknowledgement e-mail that provides a web link to monitor status. Requests for CAT reviews will be processed in the order received. CAT reviews may take up to 30 days to complete. Requests for expedited CAT reviews must be sent to spd.oversight@cpa.texas.gov. Even if the review period exceeds 30 days, the agency does not have the authority to issue the solicitation until it receives a letter from CAT. Publishing a solicitation without receiving a letter from CAT may result in an audit finding.

CAT's review period begins when it receives all information needed to conduct its review. It is recommended that agencies submit their solicitation documents after internal agency approvals have been obtained. In addition, CAT recommends that agencies incorporate a 30-day period for CAT review into the procurement schedule to avoid potential delays to the agency's solicitation, evaluation, and award process.

Prior to posting or publishing the solicitation following CAT review, an agency is required to either

- comply with CAT recommendation(s); or
- submit to CAT a written explanation regarding why the recommendation is not applicable to the procurement under review.

The agency's responses to the CAT recommendation must be kept within the procurement file.

Substantial Changes to CAT Submission. If the initial solicitation documents submitted for CAT review change substantially, the agency is required to resubmit the solicitation documents for additional CAT review. Changes to the solicitation documents for a major contract 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, scope of work, set(s) of deliverables, performance measures, payment methodology, or other elements of the solicitation.

QAT – Review of Major Information Resources Projects

Procurements, regardless of the procurement method chosen by the agency, associated with a major information resources project are subject to QAT oversight. A "major information resources project" is any information resources technology project which is:

- specifically designated as such by the Legislature in the General Appropriations Act; or
- identified in an agency's biennial operating plan whose development costs exceed $1 million and that
  - requires one or more years to reach operation status;
  - involves more than one state agency; or
  - substantially alters the work methods of state agency personnel or the delivery of services to clients.[310]

An agency is required to notify QAT when it advertises any solicitation of a major information resources project regardless of the solicitation method (*e.g.*, RFP, IFB, RFO).[311] This notification is required to include the requisition number for each solicitation advertised.

Certain Texas Project Delivery Framework Documents must be filed with QAT before a major information resources project can be initiated. After QAT approves the project to proceed and before the agency spends more than 10 percent of allocated funds or issues a solicitation for the project, it is required to file a Project Plan with the QAT; if the major information resources project involves a procurement, an Acquisition Plan must also be filed. A contract for a major information resource project valued over $10 million is not valid without written approval from QAT prior to its execution. Information regarding the steps involved in initiating, monitoring, completing, and submitting deliverables to the QAT for a major information resources project is available on the Project Delivery Framework page located on the DIR website.[312]

[310] TEX. GOV'T CODE § 2054.003(10).
[311] General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 9.02(c)(2).
[312] The DIR website is located at www.dir.texas.gov.

Solicitation – Advertisement

Electronic State Business Daily (ESBD)

The Electronic State Business Daily (ESBD), managed by SPD, is the State's online directory listing procurement opportunities. Agencies are required to post procurements with a contract value of more than $25,000 to the ESBD, regardless of the source of funds to be used for the contract.[313]

The contract value for posting to the ESBD means "the estimated dollar amount that an agency may be obligated to pay during the life of the contract and all executed and proposed amendments, extensions and renewals."[314] Vendors may browse agency procurement opportunities and find recent awards by searching for solicitations using various criteria including agency name, NIGP Class/Item code, posting date, and solicitation closing date.

ESBD Posting Timelines[1]	
Contract value estimated to be greater than $25,000	**Minimum Posting Time for Advertisement**
Entire solicitation package (including all parts, exhibits and attachments posted to the ESBD.	14 calendar days
If not posting the entire solicitation package to the ESBD, then notice must be posted that includes all information necessary to make a successful bid, proposal, or other applicable expression of interest for the procurement contract, including at a minimum the following information: (1) a brief description of the goods or services to be procured and any applicable state product or service codes for the goods and services; (2) the last date on which bids, proposals, or other applicable expressions of interest will be accepted; (3) the estimated quantity of goods or services to be procured; (4) if applicable, the previous price paid by the agency for the same or similar goods or services; (5) the estimated date on which the goods or services to be procured will be needed; and (6) the name, business mailing address, and business telephone number of the agency employee a person may contact to inquire about all necessary information related to making a bid or proposal or other applicable expression of interest for the procurement contract.	21 calendar days

TABLE NOTES

1 TEX. GOV'T CODE § 2155.083(h)-(i); 34 TEX. ADMIN. CODE § 20.215.

While a 14-day posting may satisfy the statutory minimum period for posting on the ESBD, it is best practice to advertise a solicitation for 30 days or longer. When determining the appropriate solicitation posting period, the Contract Developer should consider what timeframe affords interested eligible vendors the opportunity to submit quality proposals. Publishing solicitations for time periods that are not commercially reasonable may have the effect of artificially limiting the vendor pool.

It is best practice for Contract Developers to schedule realistic procurement timelines that take into account holidays, the complexity of the procurement, and the fulfillment of any statutory requirements. For example, Contract Developers should consider advertising the solicitation where subcontracting opportunities are probable for longer than the statutorily mandated minimum ESBD posting period to allow suf-

313 TEX. GOV'T CODE § 2155.083(a); 34 TEX. ADMIN. CODE §§ 20.109, 20.214. There are certain exceptions to this requirement for institutions of higher education, the University of Houston, and certain agreements between state agencies, local governments and other governmental entities. TEX. GOV'T CODE § 2155.083(n); 34 TEX. ADMIN. CODE § 20.109(d).

314 34 TEX. ADMIN. CODE § 20.25(b)(13).

ficient time for all interested eligible vendors to comply with the HUB Subcontracting Plan requirements. One of the Good Faith Effort requirements is for the respondent to allow at least seven working days for HUBs to respond. Weekends, holidays, agency closures, and the date the respondent routed the solicitation to the HUBs are excluded from the seven working day computation.

For solicitations requiring delegated authority, a letter of delegation must be obtained from SPD prior to posting to the ESBD. The Contract Developer must include proof of the ESBD posting and documentation from SPD authorizing the delegated purchasing authority in the procurement file. A contract award is void if an agency violates the applicable statutorily required minimum time for posting on the ESBD.[315]

Computation of Time. In computing the period of days, the first day is excluded and the last day is included. In addition, if the last day of any period is a Saturday, Sunday, or legal holiday, the period must be extended to include the next day that is not a Saturday, Sunday or legal holiday.[316]

Texas Register

The *Texas Register*, maintained by the Secretary of State (SOS), records agency rulemakings, governor's appointments, attorney general opinions, and requests for proposals. The *Texas Register* is published every Friday and is available to the public online on the SOS website.[317] Solicitations using certain procurement methods, such as for major consulting services contracts, must be advertised in the *Texas Register*. For procurement methods not addressed in this Guide, it is recommended that agencies refer to their enabling legislation to determine if publication in the *Texas Register* is required. A copy of the *Texas Register* notice must be placed in the procurement file. *Texas Register* posting requirements are in addition to ESBD posting requirements.

Centralized Master Bidders List

The Centralized Master Bidders List (CMBL), maintained by SPD, is an online directory of vendors registered to receive bidding opportunities from State of Texas purchasing entities. Agencies, colleges, universities and local governments use the CMBL to find vendors for products and services. The CMBL may also be used to gather information for noncompetitive procurement processes and for vendor performance data. SPD does not endorse, recommend, or attest to the capabilities of any business or individual listed on the CMBL.

Agencies must use the CMBL to select bidders for competitive bids or proposals and to the fullest extent possible for purchases exempt from SPD's purchasing authority.[318] For purchases between $5,000 and $25,000, the agency must solicit from a minimum of three active vendors on the CMBL including two current Texas-certified HUBs. For procurements exceeding $25,000, an agency must use the CMBL to solicit from each eligible vendor on the list that serves the agency's geographic region.[319] A copy of the bid list (with date) must be placed in the procurement file.

If agencies are required to use the CMBL, they must send a copy of the solicitation to all vendors on the CMBL bid list for the advertised commodity code(s). There may be several hundred vendors associated with a particular commodity code. Accordingly, announcements are an efficient way to reduce mailing costs when publishing large solicitations. A solicitation announcement is a one-page document sent, usually by email, to all vendors on the CMBL for the advertised commodity code(s) which provides notice of the upcoming procurement opportunity and ESBD posting information. The vendor is requested to return a completed form to the agency via email or fax if the vendor desires to receive a hard copy of the solicitation. A sample solicitation announcement is located in Appendix 13. When the solicitation is mailed by the agency, it is only mailed to the vendors who responded to the announcement with a request for a hard copy of the solicitation.

As part of the registration process, vendors provide their contact information and identify the goods and services they offer by NIGP Class/Item codes. The annual registration fee for the CMBL is currently $70. For more information regarding CMBL registration, visit the CMBL Program located on the CPA website.[320] A vendor is not required to be registered on the CMBL to conduct business with the state agencies.

Supplementing the CMBL. An agency may supplement the CMBL with State of Texas certified HUBs at any time if the agency determines that it may enhance competition or increase the number of HUBs that submit bids. In addition, an agency may solicit from vendors that are not on the CMBL by obtaining approval from its agency head or designee to add non-CMBL vendors to the final bid list to increase competition.[321] The non-CMBL vendors may be added to the final bid list for specific solicitations to increase competition where the requirement to solicit only CMBL vendors is not

315 TEX. GOV'T CODE § 2155.083(j); 34 TEX. ADMIN. CODE § 20.215(e).
316 TEX. GOV'T CODE § 311.014(a)-(b).
317 The SOS website is located at www.sos.state.tx.us.
318 This requirement does not apply to the Texas Department of Transportation or to an institution of higher education as defined by Section 61.003 of the Education Code, but an institution of higher education should use the CMBL when possible. 34 TEX. ADMIN. CODE § 20.107(g).
319 TEX. GOV'T CODE § 2155.264.
320 The CPA website is located at Comptroller.Texas.Gov.
321 TEX. GOV'T CODE § 2155.269; 34 TEX. ADMIN. CODE §20.107(h).

adequate.[322] Documentation regarding the additions to the CMBL bid list, including the written approval from the agency head or designee of the supplemented CMBL bid list, must be maintained in the procurement file.

Removal from the CMBL. A vendor may be removed or temporarily suspended from the CMBL for one or more of the following reasons:

- failure to pay or unnecessarily delaying payment of damages assessed by SPD;
- failure to remit the annual CMBL registration fee; or
- any factor set forth in Sections 2155.070 or 2155.077 of the Texas Government Code.

Solicitation – Agency Communications With Potential Respondents

Pre-Bid/Offer/Proposal Conferences

An agency may choose to hold a pre-bid/offer/proposal conference. A pre-bid/offer/proposal conference occurs after solicitation issuance and before the solicitation closing deadline. A conference provides a forum for potential respondents to pose questions about the solicitation in a face-to-face setting or by conference call or web conference. It also provides an opportunity for vendors to develop subcontracting relationships and lets the agency gauge industry interest in the procurement.

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

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. Accordingly, mandatory pre-bid/offer/proposal conferences are required when the agency determines that disqualification is appropriate for any response from a vendor that did not receive certain information pertaining to the solicitation at an agency-designated time and location.

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

A pre-bid/offer/proposal conference is usually held no earlier than 10 days after the solicitation issuance to allow sufficient time for respondents to receive and review the solicitation prior to the conference. If a mandatory conference is required, the Contract Developer should consider multiple conference dates if it is expected that there will be a high number of conference attendees. All conferences attendees must be documented on a sign-in sheet which is the official record used by the agency to verify respondent attendance. For mandatory conferences, the sign-in sheet will be collected at the beginning of the conference.

The Contract Developer should conduct the conference in coordination with the program staff. Pre-Bid/Offer/Proposal Conference Guidelines are located in Appendix 14. Conference attendees should be advised that the verbal responses provided by the agency during the conference are not binding until confirmed by the agency in writing. All changes to the solicitation must be in writing and published through an addendum to the solicitation. ESBD posting requirements apply.

Question and Answer Period

It is best practice for all solicitations to include a formal process for potential respondents to submit questions to the agency to clarify their understanding of the solicitation. If questions are permitted by the agency, the solicitation must specify the due date when questions must be submitted to the agency as well as the anticipated release date of the agency's answers.

The benefit of a Question and Answer (Q&A) period is that it provides the first indication to an agency of possible ambiguities, errors, or lack of critical information in the solicitation. If there are major deficiencies to the solicitation discovered at this stage, it is advisable to cancel the solicitation and issue a revised solicitation at a future date.

[322] TEX. GOV'T CODE § 2155.269; 34 TEX. ADMIN. CODE §20.107(h).

Written questions submitted to the agency as directed in the solicitation must be compiled, verbatim (with any spelling and grammatical errors) into a Q&A document. Every question received, even similar questions submitted by different vendors, must be accounted for in the Q&A document. The name of the entity submitting the question and identifying information should be omitted from the agency's published answers. The Contract Developer has discretion for organization of the questions (*e.g.*, chronological by receipt, by topic). A sample Q&A document is located in Appendix 15.

The Q&A document is published with each question being listed with its corresponding response. The Contract Developer will compose answers to each question and consult with agency subject matter experts as needed. If two or more similar questions are submitted (*i.e.*, redundant questions), the Contract Developer should be mindful to not provide two inconsistent answers. In this situation, it is best practice to either provide the exact same answer to both questions or answer the first question and then include a cross reference to the first answer when responding to the second question.

Once the Q&A document is finalized, the agency will publish it with the solicitation documents on the ESBD and/or in the *Texas Register* as applicable. Any answer that would result in a material change to the solicitation must be identified in a solicitation addendum.

Solicitation Addenda

A written addendum identifying the addition or correction to a solicitation must be issued by the agency in the same manner as the solicitation (*e.g.*, ESBD, *Texas Register*) if a change to the solicitation occurs before the response due date. A solicitation addendum is used to clarify an ambiguous provision, correct an error or oversight, extend the response due date, or alter a public opening date. Rather than using a Q&A document, a solicitation addendum may also be used to answer questions by respondents even though the answers do not result in a modification or change to the solicitation. For addenda other than just an extension to the response due date, it is best practice to require that the responses include an acknowledgement of each addendum to the solicitation.

Respondents must be given a reasonable time to respond to a solicitation addendum. The Contract Developer, therefore, must consider the period of time remaining until the solicitation closing date prior to issuing an addendum. Depending on the content of the addendum, the Contract Developer may determine that the response due date should be extended. If an addendum results in substantial changes to the original solicitation, it is recommended that the response due date be extended and the revised solicitation to be issued for at least 14 calendar days following the addendum date.

Each addendum is numbered. If more than one addendum is issued, each subsequent addendum is sequentially numbered. Each addendum to the original solicitation must be posted to the ESBD no later than the next business day following its release to the public.[323] A sample solicitation addendum is located in Appendix 16.

Communication with Agency Personnel

All communication with potential respondents should be made only through the agency's Purchasing Department or other designated staff. To maintain a level playing field among all potential respondents, program staff or other non-purchasing personnel should not have contact with potential respondents outside of pre-bid/offer/proposal conferences. Refer to the Vendor Communications section of this Guide. The solicitation should provide the agency's designated point of contact and identify the acceptable forms of communication to the agency such as telephone, or email. If a potential respondent contacts program staff or other non-purchasing personnel, staff should politely decline to discuss the procurement and forward the inquiry to the assigned Contract Developer.

Solicitation – Receipt and Control of Responses

Receipt

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

To ensure fairness to all respondents, no submitted responses should be opened or reviewed before the due date and time has passed; an agency may confirm that a sealed submission, faxed document or email(s) have been received.

Upon receipt by the agency, the sealed response must be marked with a date and time stamp directly on the envelope, when possible, or on the express delivery label, and the response must remain sealed and kept in a secure place to prevent misplacement, loss, or tampering, until after the published response due date and time.

Delivery by Email, Fax, or Other Electronic System. When allowed by the solicitation, responses received by email, fax, or any other electronic system must be treated as sealed response documents and kept secure until after the response due date and time. A copy of the email received with the response documents

[323] 34 TEX. ADMIN. CODE § 20.214(b)(3).

attached must reflect the date and time of receipt. If multiple emails are sent by the respondent, a copy of each email must be included in the procurement file. The faxed documents must be accompanied by a fax receipt notice. If the faxed document(s) do not have a date/time stamp, one must be affixed manually immediately upon receipt.

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

Late Responses

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

The only exception to the prohibition against accepting a late response is if an agency's written internal policy permits the acceptance of a late response due to extenuating circumstances. For example, if an agency has a practice of accepting responses received for up to two business days following the solicitation closing date whenever the agency's main office is closed due to inclement weather events, then this practice must be documented as written policy.

Withdrawal of Response

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

Cancellation of Solicitation

The agency may cancel a solicitation at any time. If a solicitation is cancelled, the agency must provide notice of the cancellation in the same manner as the issuance of the solicitation. For example, the agency will post a notice of the cancellation to the ESBD if the original solicitation was posted to the ESBD.[324] Cancellation notices must contain, at a minimum, the following information:

- agency name, business address, and contact name,
- purchase requisition number or solicitation number, and
- reason for the cancellation.[325]

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

Public Opening Option

Each agency has discretion whether to conduct a public opening on the closing date of the solicitation. Public openings do not usually occur for purchases of $25,000 or less. If an agency elects to open responses received in public, the solicitation must clearly state the time and place of the public opening. A change to the public opening date and time must be published through an addendum to the solicitation. ESBD posting requirements apply.

A public opening gives members of the public an opportunity to hear, at a minimum, the verbal recitation of the following:

- the solicitation number; and
- the name of each respondent.

If bids received in response to an IFB are to be evaluated solely on objective criteria, then the public opening will normally include the following additional information: price or amount for each item number and model number (if different from the specified model). Agency staff will not discuss whether a product or model meets the written specifications.

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

[324] 34 TEX. ADMIN. CODE § 20.214(b)(3).
[325] 34 TEX. ADMIN. CODE § 20.219(c).

The procurement file must contain the attendance log with each attendee's name, signature, and if representing an organization or entity, the name of the entity and attendee's title.

Internal Procedures

The agency must have documented internal procedures outlining the responsibilities and steps for the receipt and control of responses. Such procedures include, but are not limited to, the following:

- identifying the official timepiece that will be used for determining timely receipt of responses, such as mail room clock, time stamp machine, or email server time stamp;
- specifying the marking process that will be used to document the date and time each response was received by mail, hand delivery service, fax, or email;
- maintaining a log of responses received which contains the following information: solicitation number, due date and time, respondent name, date and time response received, and delivery method and, if applicable, tracking number (*i.e.*, email, fax, hand delivery, USPS or other delivery service);
- securing responses until published response due date and time;
- outlining the processes to be followed after inadvertent opening of responses received hard copy, email, or fax; and
- designating agency staff responsible for each task.

VENDOR SELECTION

Overview

The third step of the procurement process is to select the vendor that provides best value to the State. Agencies must conduct evaluations in a fair and impartial manner consistent with Texas law and in accordance with either the evaluation procedure published in the solicitation or, for informal bidding situations, established by the agency's written procedure. Agency legal counsel should be consulted to ensure the use of the proper evaluation process for each procurement.

TCI Program, State Use Program, and Term Contract Purchases

Agency purchases using the following procurement methods have been determined to be best value to the State by statute or SPD rule: the TCI Program, the State Use Program and Term Contracts. Accordingly, an agency does not conduct an evaluation process when selecting a vendor for these purchases.

Administrative Review of Responses

After the responses are opened and recorded, the Contract Developer must determine whether the submitted responses are responsive to the solicitation. Only responses that are responsive to the solicitation are evaluated.

At a minimum, this administrative review includes an examination of each response to verify that the minimum vendor qualifications are satisfied and all required forms and documents were submitted, such as the signed execution of bid/offer/proposal or similar document, price sheet, bid bond, signed HUB Subcontracting Plan, and signed non-disclosure agreement.

The administrative review is conducted on a "pass/fail" basis. Consultation with legal counsel may be necessary to determine whether a response is responsive to the solicitation requirements. It is recommended that the Contract Developer use a checklist to document the results of the administrative review. A sample Administrative Review Checklist is provided in Appendix 17.

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

"Responsive" Response. A response is "responsive" if it conforms in all material respects to the solicitation requirements (*e.g.*, timely submitted, signed response, completed forms). The Contract Developer will make the initial determination as to whether a response is responsive to the solicitation. The initial determination of responsiveness is subject to change during the course of the evaluation process.

Technical Assistance in Specification Preparation. A respondent or contract participant may provide free technical assistance to an agency.[326] However, an agency may not accept a response or award a contract to a vendor that received compensation from the agency to participate in the preparation of the specifications or solicitation on which the proposal or contract is based.[327]

Single Response. Before evaluation begins, the Contract Developer may investigate why the agency received only one response to a competitive solicitation by:

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

If it is determined that there were unduly restrictive specifications in the solicitation such that the specified product or service is only available for purchase through a single vendor, the agency should either re-advertise the solicitation or prepare a Proprietary Purchase Justification for the proprietary sole source purchase. Otherwise, the agency should consider the reasons that potential eligible respondents did not participate in the agency's competitive solicitation in order to assess whether it is in the best interest of the State to proceed with the evaluation process or re-advertise with a revised solicitation. If the agency decides to proceed with the procurement, the Contract Developer will either tabulate the bid, only if objective criteria are used for informal bidding or an IFB, or direct the evaluation committee to evaluate the response.

326 TEX. GOV'T CODE § 2155.004(e).
327 TEX. GOV'T CODE § 2155.004(a).

Evaluation – Bid Tabulation Process

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

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

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

It is best practice for the bid tabulation to be reviewed by a second Contract Developer prior to finalization to ensure that the evaluation was conducted in conformance with applicable purchasing procedures. Particular care should be taken to ensure that the raw data is accurately transcribed into the mathematical formulas and that the mathematical formulas are properly loaded into electronic spreadsheets/workbooks when such electronic aids are used. After contract award, the bid tabulation must be available for release through the Texas Public Information Act.

The Contract Developer must conduct a due diligence inquiry as to actual and potential conflicts of interest related to the submitted bids. As an agency internal policy, the agency may utilize an agency specific conflict of interest statement for compliance with conflict of interest disclosure requirements specified by law or agency policy.[328] For procurements with an expected value of $1 million or more, the SAO Nepotism Disclosure Statement for Purchasing Personnel must also be utilized. Any actual or potential conflicts of interest must be reported promptly to agency legal counsel.

Evaluation – Evaluation Committee Process

Evaluation Committee

The evaluation committee is composed of subject matter experts and stakeholders. The committee should have a diverse relevant disciplinary expertise and knowledge of the product or service being procured. Because service on an evaluation committee involves a significant time commitment, care should be taken to ensure that each member selected as a scoring member is able to attend the committee meetings, oral presentations, and site visits to respondent premises.

Evaluation committee selection should occur prior to receipt of the responses. It is common for the evaluation committee members to have been involved in the procurement planning activities. The Contract Developer is usually designated as the committee chair, serving as a non-scoring member of the evaluation committee. Depending on the procurement, the Contract Manager may participate as either a scoring or non-scoring member. The scoring and non-scoring members of the committee must be noted in the procurement file.

The recommended size of an evaluation committee is three to five scoring members. To avoid potential individual bias, the committee should not have fewer than three scoring members. Depending on the procurement, the agency may determine that a larger committee is necessary. There is no restriction as to how many individuals the agency may include on an evaluation committee; however, good judgement dictates that the number of individuals on the committee be limited to the minimum required to accomplish its purpose.

Each evaluation committee member will independently assess the content of each response using only the evaluation criteria and weights published in the solicitation and, if applicable, unpublished subcriteria (*i.e.*, a smaller component of the published base criterion).

[328] TEX. GOV'T CODE § 2261.252(a) (Each state agency employee or official who is involved in procurement or in contract management for a state agency shall 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); TEX. GOV'T CODE § 2261.252(a-1) (A state agency employee or official is required to disclose any potential conflict of interest specified by state law or agency policy that is known by the employee or official at any time during: (1) the procurement process, from the initial request for bids for the purchase of goods or services from a private vendor until the completed final delivery of the goods or services; or (2) the term of a contract with a private vendor.).

Accordingly, the evaluation committee members must fully understand the solicitation, be able to critically read and evaluate the responses, and document their decisions in a clear and concise manner.

Each committee member will be expected to score each response on how it meets, exceeds or fails to meet the standards established in the solicitation. If the agency plans to use individuals during the evaluation process (*e.g.*, evaluation committee members, technical advisors) who are not agency employees, it is recommended that agency legal counsel be consulted to ensure that appropriate procedures are implemented to protect the interests of the State.

Non-Disclosure Agreements and Conflict of Interest Disclosures

To safeguard the integrity of the evaluation process, individuals serving on an evaluation committee or as technical advisors must sign a non-disclosure agreement prior to receiving the responses or participating in evaluation committee activities. Committee members may not communicate with respondents or anyone else outside the committee regarding the responses received or the evaluation process without prior approval of the Contract Developer or the agency legal counsel, as appropriate. Examples of permitted communications may include the Contract Developer's coordination of the committee's consultation with authorized technical advisors and the committee's attendance at oral presentations.

The agency must also conduct a due diligence inquiry as to the evaluation committee members and technical advisors' actual and potential conflicts of interest related to the submitted responses. It is best practice for the Contract Developer to provide the names of the respondents and proposed subcontractors to the committee members and any assigned technical advisors prior to providing access to the responses. As an agency internal policy, the agency may utilize an agency specific conflict of interest statement for compliance with conflict of interest disclosure requirements specified by law or agency policy.[329] For procurements with an expected value of $1 million or more, the SAO Nepotism Disclosure Statement for Purchasing Personnel must also be utilized. Any actual or potential conflicts of interest must be reported promptly to agency legal counsel.

[329] TEX. GOV'T CODE § 2261.252(a) (Each state agency employee or official who is involved in procurement or in contract management for a state agency shall 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); TEX. GOV'T CODE § 2261.252(a-1) (A state agency employee or official is required to disclose any potential conflict of interest specified by state law or agency policy that is known by the employee or official at any time during: (1) the procurement process, from the initial request for bids for the purchase of goods or services from a private vendor until the completed final delivery of the goods or services; or (2) the term of a contract with a private vendor.).

Evaluation of Responses

Overview

Prior to evaluating the responses, the Contract Developer will schedule a meeting with the evaluation committee and any authorized technical advisors to provide guidance on the evaluation process and the scoring matrix. If the agency utilizes a numbering system to identify evaluation committee members and/or track the responses, this system should also be explained. This meeting may be held as a separate meeting before the first committee meeting or at the beginning of the first committee meeting.

The committee members should be instructed as to their responsibilities including the critical nature of confidentiality and the integrity of the evaluation process. Care must be taken not to engage in technical leveling, technical transfusion, or other improper activities. The evaluation committee may not commence any discussions until each committee member has signed a non-disclosure statement and a preliminary assessment regarding actual and potential conflicts of interest has been conducted. Evaluation Committee Guidelines are located in Appendix 18.

The evaluation committee members must be provided with the following documents, as applicable to the specific procurement:

- the entire solicitation, including all issued addenda and Q&A documents;
- a list of responses submitted; and
- a copy of each response determined to be responsive by the Contract Developer following the Administrative Review (clearly marked with the assigned reviewer's number, if a numbering system is used by the agency).

Each response must be evaluated independently against the evaluation criteria published in the solicitation and not compared to any other submitted response. The evaluation committee members must not conduct independent research; each member's evaluation must be based solely on his or her personal review of the response and other information specifically authorized by the Contract Developer or assigned legal counsel that is consistent with the solicitation (*e.g.*, written clarifications received from the respondents, oral presentation material, and reference check information).

If assistance is requested from authorized technical advisors, the evaluation committee's inquiry should be limited to areas related to the evaluation criteria. Evaluators and technical advisors must never attempt to communicate with or reply to a communication from a respondent during the evaluation process. In the event one of the respondents is a current service provider, it is recommended

that the evaluator consult with the Contract Developer on the appropriate practices to be utilized to ensure that there is no appearance of impropriety. To protect the integrity of the evaluation process, only the Contract Developer or an assigned attorney may communicate with respondents.

Discussion of the responses must only occur at an evaluation committee meeting with all scoring members present. It is common for the evaluators to conduct their evaluations at the same time in the same room; this can facilitate questions by committee members with each other as well as to the Contract Developer and technical advisors. However, it is an acceptable practice for the evaluators to review the responses from their respective workspaces and to engage in group discussions only at scheduled meeting times.

Communication between two or more committee members related to evaluating responses or the content of responses is not permitted outside the presence of the entire committee. Committee members must attend all scheduled evaluation meetings and participate as required by completing all committee responsibilities in the time allotted. Absence from meetings or failing to meet deadlines to complete evaluations may result in the removal of a member from the evaluation committee or removal of the evaluator's scoring from consideration.

The evaluators will record their individual scores for each response on the scoring matrix provided by the Contract Developer. If permitted by the solicitation, the agency may waive minor technicalities of submitted responses. If an evaluator determines that a waiver of minor technicalities is appropriate during evaluation, this approach should be brought to the attention of the entire committee to ensure that all the evaluators are using the same evaluation standards.

Some procurements may involve multiple scoring rounds to narrow the competitive field (*e.g.*, second scoring round following oral presentations). Evaluators must record their scores on the scoring matrix following each scoring round. It is best practice to label each scoring matrix with the applicable scoring round number or date.

Under no circumstances must any committee member attempt to pressure other members to change evaluation scores. However, if it is apparent that one or more committee members' evaluations differ significantly from the majority, the committee chair should schedule a meeting with the entire committee to discuss the outliers to ensure the evaluation criteria were clear to all scoring members and that information was not overlooked or misunderstood. If after this discussion, a committee member determines that there was a misunderstanding of the criteria, the requirement, or information overlooked that was included in the response, the evaluator may provide a revised scoring matrix.

Scoring Matrix

The scoring matrix is a standardized form used by all of the evaluation committee members to record the scores for each the response based on the evaluation criteria and weights published in the solicitation and, if applicable, unpublished subcriteria. It is best practice for the scoring matrix to be finalized prior to publishing the solicitation. However, if time does not permit the scoring matrix to be finalized prior to publication of the solicitation, the scoring matrix must be completed prior to the receipt of responses. A sample Evaluation Committee Member Scoring Matrix is located in Appendix 19.

Technical Advisors

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

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

Price Component

The price component of the response is usually assessed by using either a "reasonableness" standard or objective criteria. For a price criterion assessed using a reasonableness standard, the evaluation committee conducts the evaluation. If the price criterion is to be evaluated using only a mathematical formula, such as for an IFB, then it may be scored by the Contract Developer. Unless prohibited by statute or agency policy, it is recommended that the evaluation committee review and score the entire response, including the price component, to facilitate a more comprehensive evaluation of the response (*e.g.*, ensure that the proposed pricing aligns with the proposed products and services).

Reference Check

If required by the solicitation, respondents may submit customer references with their responses. The Contract Developer may conduct the reference checks or authorize a subcommittee of the evaluation committee to conduct reference check activities. All information obtained during the reference checks 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. The list of reference check questions must be prepared prior to the solicitation closing date. When developing the questionnaire, the Contract Developer should keep in mind the types of questions to which its agency would respond. For example, many entities will not participate in business reference activities that involve a lengthy questionnaire or questions that appear to ask for an endorsement. A sample Reference Check Form is provided in Appendix 20.

An agency should not request submission of customer references that the agency does not intend to verify. However, events following solicitation issuance may shorten the procurement timeline such that reference check activities cannot be conducted by the agency in a timely manner. When the solicitation requires the submission of references or references are considered as part of the evaluation criteria, the agency must decide whether or not it will verify customer references before the solicitation closing date. If reference checks will not be conducted by the agency, this determination should be documented and placed in the procurement file.

Vendor Performance Tracking System Check

Contractor performance information is located in the Vendor Performance Tracking System (VPTS) on the CPA website.[330] VPTS is maintained by SPD. Agencies are required to use the VPTS to determine whether to award a contract to a vendor reviewed in the tracking system.[331]

Clarification of Responses

As part of the initial evaluation, the evaluation committee may determine that clarification of a response is necessary prior to scoring. Accordingly, the evaluation committee may pose clarifying questions to a respondent in order to resolve conflicting information, apparent ambiguities, or minor clerical errors within the response. If a clarification to the response is necessary, the Contract Developer or agency legal counsel will contact the applicable respondent and distribute to the evaluation committee the written clarifications received by the respondent. A respondent's clarification must be in writing and signed by an authorized representative.

The evaluation committee should be mindful that a respondent's clarifications may not be used to "cure" deficiencies in the response or to revise the response. The clarifications may only be used to understand the information provided in the response. It is important to note that a request for a respondent to clarify its response is not the same as negotiations of the specifications or terms and conditions because the request to clarify does not provide one respondent an advantage over another. Therefore, care must be taken not to inadvertently engage in negotiations.

Competitive Range Determination

After the initial scoring, the Contract Developer will determine the competitive range. The competitive range refers to those responses determined to be reasonably considered for award selection and is an objective means of narrowing the field of respondents that will participate in subsequent evaluation activities such as oral presentations.

Agencies should look for a "natural break" in the scores that will determine the competitive range. An example of how to determine competitive range from maximum score of 100 is illustrated 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	86

- In scenario 1, 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.

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

330 The CPA website is located at Comptroller.Texas.Gov.
331 TEX. GOV'T CODE § 2262.055(d).

Oral Presentations

If expressly permitted by the solicitation, an agency may elect, after reviewing the responses, to conduct oral presentations. Oral presentations provide an opportunity for respondents to highlight the strengths and unique aspects of their responses and to provide answers to clarification questions the agency may have regarding the responses. Presentations which include demonstrations of product functionality are recommended when appropriate, such as information technology procurements or solution-based procurements.

Oral presentations may be scheduled for all respondents or limited to the top ranked vendors in the competitive range. The agency shall follow the process outlined in the solicitation to notify the respondents of the time and place for the oral presentations. Before the oral presentation, the evaluation committee should prepare its list of clarification questions for the presenting respondents.

Oral presentations and demonstrations must be fair to all parties. The time allowed and the agenda format should be the same for all presenters. Because some presenters may believe there is an advantage to the order in which they present, it is best practice to draw names for the presentation order to ensure impartiality of the process.

Following the oral presentation, it is best practice for the agency to submit written questions to the respondent to document in writing the verbal clarifications provided by the respondent during the presentation. The answers to these clarification questions should be signed by an authorized representative of the respondent. Following all oral presentations, the evaluation committee will complete another scoring matrix using the evaluation criteria and weights published in the solicitation. To protect the integrity of the evaluation process, the evaluation committee which evaluated the written responses should also evaluate the clarifying information obtained from the respondents during the oral presentations and site visits.

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.

Evaluation Committee Recommendation

Once the evaluation process is completed, the committee chair will prepare, sign and date the master scoring matrix, and proceed with a recommendation to either award the contract the highest ranked respondent without discussion, tentatively award the contract to the highest ranked respondent subject to successful completion of negotiations or cancel the solicitation. It is recommended that each committee member review the master score sheet to verify the accuracy of the scoring. Particular care should be taken to ensure that the raw data is accurately transcribed into the mathematical formulas and that the mathematical formulas are properly loaded into electronic spreadsheets/workbooks when such electronic aids are used. If the solicitation allows, the evaluation committee may recommend a contract award to more than one respondent; provided, however, that the awarded respondents are the highest ranked in the evaluation.

Preferences

Overview

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

Any price adjustment that results from application of a preference occurs only during the evaluation process. The application of a preference does not alter the price to be paid by the agency under an awarded contract. A non-exhaustive List of Preferences is located in Appendix 21.

Reciprocal Preference Law

Texas law requires that responses from nonresidents from a state that grants resident bidder preferences for that state's purchases must be reciprocated in the same manner when competing against a bidder residing in Texas. In other words, the State of Texas will respond in kind to resident bidder preferences made by other states.

Under the Texas reciprocal preference law, a governmental entity may not award a governmental contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the greater of the following:

1. the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located; or
2. the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which a majority of the manufacturing relating to the contract will be performed.[332]

For purposes of the reciprocal preference law, "resident bidder" refers to a person whose principal place of business is in Texas, including a contractor whose ultimate parent company or majority owner has its principal place of business in Texas.[333]

If another state grants a preference to its resident bidders, a corresponding percentage increase is added to the nonresident bidder's response when bidding in Texas. For example, State A grants its in-state bidders a 10 percent preference when bidding on agricultural products. By granting a 10 percent advantage to in-state bidders, State A is essentially penalizing Texas bidders 10 percent for not being residents. Texas reciprocates by adding a 10 percent non-residency penalty to the response from the bidder from State A, which essentially gives a 10 percent preference to bidders residing in Texas.

Reciprocity and resident bidder preferences do not apply when evaluating responses that involve the use of federal funds.[334] The reciprocity preference is only applied during the evaluation process and only in situations where the out-of-state bidder is from a state that has a residency preference. SPD maintains a Summary of Other State Bidder Preference Laws on the CPA website.[335]

Resolving Tie Bids

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

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

Same Price – Same Preferences

The award for any tied item is determined by drawing lots, tossing a coin, or drawing names with two witnesses to oversee the tie-breaking activity.

Same Price – Different Preferences

If two bidders propose the same price, but the preferences checked are different, the award is based on the priority for goods and/or for services.

Examples of Using Preferences to Break a Tie for Goods and Services.

EXAMPLE 1: The award is made to Bidder A. Priority is given to the Texas-produced product over the U.S.-produced product.

Product	Bidder A	Bidder B
Texas Agricultural Product		
Texas Product	X	
Texas Bidder		
U.S. Product		X

EXAMPLE 2: The award is made to Bidder B. Because both bidders show preference to Texas agricultural and Texas products, priority is given to the Texas bidder.

Product	Bidder A	Bidder B
Texas Agricultural Product	X	X
Texas Product	X	X
Texas Bidder		X
U.S. Product		

EXAMPLE 3: The award is made by drawing lots, tossing a coin, or drawing a name.

Product	Bidder A	Bidder B
Texas Agricultural Product		
Texas Product		
Texas Bidder	X	X
U.S. Product		

332 TEX. GOV'T CODE § 2252.002.
333 TEX. GOV'T CODE § 2252.001(3).
334 TEX. GOV'T CODE § 2252.004.
335 The CPA website is located at Comptroller.Texas.Gov.

CONTRACT FORMATION AND AWARD

Overview

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

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

Negotiations

Overview

An agency may negotiate terms and conditions during the procurement process. Not all procurement methods, however, allow for negotiation.[336] Prior to commencing negotiations, the Contract Developer must verify that negotiations are permitted under the applicable procurement method.

Negotiations are permitted for the following:

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

[336] 34 TEX. ADMIN. CODE § 20.206(d).

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

Public procurement professionals should be mindful that negotiations involving public sector entities (*e.g.*, state government) are different than between private sector entities. For example, negotiations with an agency must not materially alter requirements of the published solicitation. Care must be taken by the agency to avoid inadvertently changing the advertised procurement objectives. If the procurement objectives are changed through the negotiation process, an unlevel playing field occurs when respondents could have bid differently had they been aware of the changed procurement objectives. An unlevel playing field also results when the composition of the eligible vendor pool would have been different (*e.g.*, the vendor pool may have been larger) if the changed objectives had been incorporated into the original solicitation. Whenever it appears that the procurement objectives may have been changed, agency legal counsel should be consulted before proceeding further.

Negotiation Team

The agency should strive to place employees with effective negotiation and communication skills on negotiation teams. For complex procurements involving high-dollar or high-risk projects, it is recommended that the negotiations also be conducted by an experienced team of agency employees.

A lead negotiator should be designated to establish an organized and controlled negotiating environment to support an efficient, coordinated, and unified team effort. Rarely will the lead negotiator also be the Contract Developer in a complex procurement. For example, it is not recommended that a Contract Developer single-handedly negotiate a procurement of a major information technology system. Instead, this type of negotiation should be undertaken by a team that includes representatives from the end-user department with subject matter expertise, the agency's technology and information security departments, and legal counsel.

Team members should be chosen, or excluded, based on their leadership style, negotiation skills and subject matter expertise. Too often agencies are at a disadvantage during contract negotiations simply because the right people are not present during negotiations. It is

important that the negotiation team includes agency personnel who have decision-making authority appropriate for the procurement.

Preparation

The key to successful contract negotiations is preparedness by agency personnel. Preparedness represents the degree to which the Contract Developer, prior to the commencement of negotiations, has obtained negotiation-relevant information and has engaged in formal planning activities with the negotiation team. Depending on the particular transaction, negotiation-relevant information may include data on prevailing prices, supply conditions, and production costs.

To develop an effective negotiation strategy, the negotiation team must be familiar with the documentation submitted by the vendor and be well-versed in the respective division's business requirements, constraints, and any applicable overarching agency objectives. The negotiation strategy should be tailored to suit the particular facts and circumstances of each procurement. Formal planning activities include:

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

Technical Leveling, Technical Transfusion, and Other Improper Activities

Care must be taken not to engage in technical leveling and/or technical transfusion activities. Technical leveling is helping a respondent to bring its response up to the level of other responses through successive rounds of discussion, usually by pointing out weaknesses in the response. Technical transfusion, which is prohibited by statute,[337] is the disclosure of technical information or approaches by one respondent to other competitors in the course of discussion. Prohibited auctioneering techniques include:

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

[337] TEX. GOV'T CODE § 2156.123(a).

Performance Focused Negotiations

When negotiating a contract, it is recommended to focus on performance results as opposed to focusing exclusively on purchasing goods and services. If the agency is aiming to reduce the cost, examine the various methods of reducing cost and do not just focus on respondent's profit reduction. If the agency negotiator is willing to be creative during the negotiations process, within the bounds of the published solicitation, the successful respondent is much more likely to collaborate in finding ways to reduce costs to the agency. The end goal in a negotiation focused on performance results is a mutually beneficial agreement where the successful respondent makes a reasonable profit but also delivers the products/services on time with the highest possible quality.

Negotiation is based on the willingness of each party to compromise. From time to time, however, negotiations may be highly stressful, time sensitive, and take an unexpected turn. The agency's negotiation team should remain professional and cordial at all times. Effective listening, establishing goodwill, and the ability to leverage negotiations are important components to creating value and bargaining power.

Contract Formation

Overview

When negotiations are complete, a contract documenting the parties' negotiation and the terms and conditions of the performance must be finalized. Texas courts define a contract as a promise or a set of promises to which the law attaches legal obligation.[338] The law regards the performance of these promises as a duty and provides a remedy for the breach of this duty. Contracts that deviate substantially from requirements defined in the solicitation are open to challenge from unsuccessful respondents. Awarding a different project from the one solicited undercuts competition and the contract could be considered void due to a violation of ESBD posting requirements. For example, if a solicitation was for bicycles, but the award was given for scooters, that award would undermine the specifications of the solicitation and would be considered a substantial deviation from requirements.

Approach to Contract Formation

Fundamentally, the purpose of a written contract is to serve as a reference document that records the terms of an agreement to prevent misunderstanding or conflict, and creates a legal, binding and enforceable obligation. Most often, conflicts over contracts arise

[338] *C & H Transportation Company v. Wright*, 396 S.W.2d 443, 446 (Civ App.-Tyler 1965, ref. n.r.e.).

well into a contract period when memories may be unreliable and representatives of the agency or vendor may have changed. With this in mind, clarity of the terms and completeness of the issues addressed are of primary importance. The individual drafting 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 to determine the scope of a contract because contract law does not allow parties to add terms not part of the original contract without the consent of both parties. This rigidity in contract law is mostly seen as an advantage to both parties. However, this advantage may become a liability if the agency does not include all necessary language in the in the contract when executed.

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 must always be the benefit of the contract to the State as a whole, or more specifically, the taxpayers of the State.

When negotiating in the best interest of the State, care should be taken not to include unnecessarily harsh provisions in the contract; while such provisions may be legal, they usually have negative future consequences that outweigh the initial gains. Contractors who feel they have been aggrieved by the State are less likely to provide good service and are more apt to engage in legal action. In addition, these contractors may decide to not pursue future State contracts, thus limiting future competition. Contractors that hear of bad experiences with State contracts from incumbent or previous contractors 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 follows:

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

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.

Acceptance – 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. An acceptance must not change the terms of an offer. If it does, there is no "meeting of the minds" and the offer is rejected. A material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party for there to be a binding contract between the parties. Generally, agencies structure their contract process so that they have the last look at the document and the last opportunity to accept or reject.

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. A contract for which the agency does not have statutory authority may be considered void.

Consideration – Consideration is present when each party receives something under the contract. The same concept can be described as "mutuality of obligation." Mutuality of obligation refers to the idea that both parties make binding promises under the contract. If one person says to another, "For your birthday tomorrow, I will bring you a cupcake," that is a promise. However, because only one party has made a promise, it cannot be considered as a contract. There is no consideration. If the parties agree that one will sell the other a cupcake for $2, each party has made a promise. The promises depend on each other, and each party will receive something of value as consideration. This is a mutual obligation and could be a contract. Consideration can take many forms other than money. For example, the promise not to do something can be a valid and valuable consideration.[339]

Certainty of Subject Matter – To be enforceable, the parties must have agreed on the essential terms of the contract. A contract is legally binding only if the essential terms are sufficiently defined to enable a court to understand the parties' obligations. For example, in an agreement to lease office space, the location of the offices is an essential term. The lack of non-essential terms will not

[339] It should be noted that there are limited circumstances where consideration may not be required in order to have a binding contract. For example, promises to pay past debts are usually enforced without consideration, although most states required signed writing. Additional examples, among others, are promises to pay for benefits or services previously received (especially requested services or emergency) and promises which foreseeably induce reliance. Promises which foreseeably induce reliance will be enforceable without consideration under promissory estoppel doctrine if injustice can only be voiding by doing so.

typically void a contract.[340] For example, if an office lease fails to specify how rent will be paid, a court would likely say that the rent can be paid by cash or check or other generally accepted methods. 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.

A contract that includes an agreement to reach an agreement on an essential term will not be upheld. For example, the amount of monthly rent could be an essential term in a lease agreement. If the contract merely says that the parties will agree on that amount, the court cannot order them to agree. The court cannot supply an essential term. Because an essential term is missing, there is no contract. If the contract says, instead, that the rent will be calculated from a certain benchmark, or determined by a third-party expert, that is not merely an agreement to agree. The contract references an objective method for determining the rent, and thus it could be enforced.

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

Contract Terms

As directed by Section 2262.051(d)(1) of the Texas Government Code, this Guide must provide model contract provisions which distinguish between essential provisions that an agency must include in a contract to protect the interests of the State and recommended provisions that an agency may include in a contract. This Guide must also recognize the unique contracting needs of the individual agencies and provide sufficient flexibility to accommodate those needs, consistent with protecting the interests of the State.[341]

The Essential Provisions that must be included in every contract are as follows:

1. Terms Necessary for the Formation of a Legally Binding Contract. The necessary elements of a contract are offer, acceptance, legal purpose, consideration, certainty of subject matter, and competent parties. Accordingly, each contract must include terms which address the following:
    - Scope of work,
    - Financial provisions (*e.g.*, price and payment terms),
    - Contract term and termination provisions, and
    - Identification of the contracting parties.

    By their nature, these terms are transaction-specific; therefore; the text will vary for each contract.
2. Texas Required Contract Clauses. The most common statutorily required contract clauses are compiled on the list of Texas Required Contract Clauses located in Appendix 22. For each required contract clause, the compendium provides both standard and alternate text that serves as a safe harbor for compliance with the applicable statute. It is recommended that public procurement professionals seek assistance from agency legal counsel prior to modifying the standard or alternate text specified for the Texas Required Contract Clauses as slight variations may result in the agency's non-compliance with applicable statutes and rules.

Provisions that are recommended for inclusion in agency contracts are located in Appendix 23. While the Recommended Clauses are not mandated by statute to be included in every contract, they should not be treated as "optional." Rather, the Recommended Clauses are provisions that are typically included in most contracts. Recommended Clauses include, but are not limited to, the following:

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

Agencies, therefore, are strongly encouraged to include the appropriate Recommended Clauses in each contract. The determination as to the appropriateness of a particular contract term is dependent on the characteristics of the transaction. The list of Recommended Contract Clauses located in Appendix 23 comprises "sample" text because it is expected that the wording of the Recommended Clauses included in each contract will vary due to the unique contracting needs of the individual agencies.

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

Each agency must ensure that the contract terms suit the particular purchase. Purchases made with federal funds, for instance, may have specific contract requirements. Agencies are encouraged to

[340] TEX. BUS. & COM. Code § 2.204 (providing (a) contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract, (b) an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined, and (c) even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy).

[341] TEX. GOV'T CODE § 2262.051(d)(2).

ask federal agencies administering the particular grant programs to designate the contract terms required to be included in the State's subrecipient agreements. Except for contract terms that are contrary to public policy or 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.

Authority to Contract

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

Form of the Contract

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

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

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

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

A PO should contain at a minimum the following:

- Agency name and address
- Agency contract or Purchase Order number
- Date of the order
- Term of contract (delivery period after receipt of order or beginning and ending dates of service)
- Contractor's name, payee/vendor identification number, and address, including zip code
- NIGP Class/Item code for each item
- Purchase Category Code
- List of contract documents and their order of precedence:
    - The "four-corner" contract or PO with listing of awarded items
    - The original solicitation documents, as modified by addenda
    - The proposal submitted by the contractor as modified by any best and final offer
    - The assumptions and exceptions as agreed upon by the agency and the contractor
- Listing of awarded items with quantity, unit of measure, and unit price with extended totals
- Signature of authorized/certified purchasing representative

Contract Award

Overview

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

Pre-Award Contract Reviews & Approvals by Oversight Agencies

QAT – Major Information Resource Project

A contract for development of a major information technology project with a value expected to exceed $10 million shall not be valid unless the agency:

1. provides a copy of the final version of the contract including all appendices and attachments, signed by the contractor but not the state agency, to QAT; and
2. obtains prior written approval of the contract from QAT.[342]

Information regarding the steps involved in initiating, monitoring, completing, and submitting deliverables to the QAT for a major information resources project is available on the Project Delivery Framework page located on the DIR website.[343]

DIR – Statements of Work

Agencies are required to prepare and submit to DIR certain DIR SOW for contracts that exceed $50,000. A DIR SOW executed by an agency under a contract for an IT commodity item is not valid and money may not be paid to the contractor under the terms of the DIR SOW unless DIR first signs the DIR SOW.[344] Following execution of the final DIR SOW by the agency and vendor, the agency must submit it to DIR for its signature. DIR will review the signed DIR SOW and determine whether it will be signed or rejected by DIR. If DIR rejects the DIR SOW, DIR will notify the agency of the reason(s) for rejection. DIR must sign the DIR SOW before it becomes valid and any money is paid to a vendor.

Pre-Award Contract Compliance Checks

Agency Reviews and Approvals

AGENCY VERIFICATION OF USE OF BEST VALUE STANDARDS

The Contract Manager or Procurement Director of the agency must

1. approve each agency contract for which the agency is required to purchase goods or services using the best value standard;
2. ensure that, for each contract, the agency documents the best value standard used for the contract;
3. acknowledge in writing that the agency complied with the agency's contract management guide and this Guide in the purchase; and
4. ensure that the agency shall evaluate the contractor's performance based on:
   - information prepared by the agency in planning the procurement that assessed the need for the purchase together with the specifications for the good or service and the criteria to evaluate the responses resulting in an award and contract;
   - compliance with the material terms of the contract;
   - ability to correct instances of contractual non-compliance; and
   - other evaluation criteria presented in the on-line vendor performance tracking system.[345]

AGENCY SIGNATURE - CONTRACTS WITH A VALUE EXCEEDING $1 MILLION

An agency may enter into a contract for the purchase of goods or services that has a value exceeding $1 million only if the governing body of the agency approves the contract and the approved contract is signed by the presiding officer of the governing body.[346] If the agency is not governed by a multi-member governing body, the officer who governs the agency is required to approve and sign the contract.[347] The approval and signature authority for contracts with a value exceeding $1 million may be delegated by the governing body or governing official of the agency to the executive director of the agency.[348]

AGENCY VERIFICATION - CONTRACTS WITH A VALUE EXCEEDING $5 MILLION

An agency that develops a contract for the purchase of goods or services that has a value exceeding $5 million 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.[349] 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.[350]

342 General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 9.01(d).
343 The DIR website is located at www.dir.texas.gov.
344 TEX. GOV'T CODE § 2157.0685.
345 34 TEX. ADMIN. CODE § 20.217(a).
346 TEX. GOV'T CODE § 2261.254(c).
347 TEX. GOV'T CODE § 2261.254(c).
348 TEX. GOV'T CODE § 2261.254(d).
349 TEX. GOV'T CODE § 2261.255.
350 TEX. GOV'T CODE § 2261.255.

Agency Review of Required Disclosures

SAO NEPOTISM DISCLOSURE STATEMENT FOR PURCHASING PERSONNEL

For contracts that are valued at $1 million or more, all purchasing personnel working on the contract must disclose the relationship (if any) with the selected vendor (or any employee, stockholder, contractor, etc.) to the administrative head of the agency on a form prescribed by SAO.[351] The SAO Disclosure Statement for Purchasing Personnel is located on the SAO website.[352]

TEC DISCLOSURE OF INTERESTED PARTIES (FORM 1295)

Certain contracts with a value of $1 million or more or that require an action or vote by a governing body require vendors to complete the Form 1295 Certificate of Interested Parties which is located on the TEC website.[353] Before contract award, the vendor must submit to the agency a completed and signed form with the certificate of filing number and date.[354] The Contract Developer then acknowledges the Form 1295 at the TEC website. It is best practice to include a reference to Form 1295 in the solicitation in order to allow the vendor to gather the pertinent information early in the process.

PROCUREMENT AND CONTRACT MANAGEMENT CONFLICT OF INTEREST DISCLOSURE

Each state agency employee or official who is involved in procurement or in contract management for a state agency shall 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.[355] A state agency employee or official is required to disclose any potential conflict of interest specified by state law or agency policy that is known by the employee or official at any time during (1) the procurement process, from the initial request for bids for the purchase of goods or services from a private vendor until the completed final delivery of the goods or services, or (2) the term of a contract with a private vendor.[356]

[351] TEX. GOV'T CODE § 2262.004.
[352] The SAO website is located at www.sao.texas.gov.
[353] The Texas Ethics Commission website is located at www.ethics.state.tx.us.
[354] TEX. GOV'T CODE § 2252.908.
[355] TEX. GOV'T CODE § 2261.252(a).
[356] TEX. GOV'T CODE § 2261.252(a-1).

Vendor Compliance Verifications

DEBARMENT CHECK

The Contract Developer (purchaser) must check the debarred vendor list posted on the CPA website[357] to establish that the vendor has not been debarred by SPD. An agency may not award a contract to a debarred vendor.[358]

SAM CHECK

The Contract Developer (purchaser) must check the SAM (System for Award Management) database to verify that the vendor is not excluded from grant or contract participation at the federal level. A contract cannot be awarded to a vendor named on the U.S. Treasury Department, Office of Foreign Assets Control's master list of Specially Designated Nationals & Blocked Persons (with limited exceptions set forth in the Order).[359]

IRAN, SUDAN, & FOREIGN TERRORIST ORGANIZATION CHECK

Governmental entities[360] may not contract with a company doing business with Iran, Sudan, or a foreign terrorist organization.[361] Prior to award, the Contract Developer (purchaser) must check the divestment lists[362] to determine if the potential awardee is in violation of this requirement. The divestment lists are maintained by the Texas Safekeeping Trust Company and posted to the CPA website.[363] If the business is in violation, the contract may not be awarded to that vendor.

[357] The CPA website is located at Comptroller.Texas.Gov.
[358] TEX. GOV'T CODE § 2155.077.
[359] Executive Order 13224 – Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism prohibits U.S. individuals or entities from making any contribution of funds to, or for the benefit of, entities or persons named on the U.S. Treasury Department, Office of Foreign Assets Control's master list of Specially Designated Nationals & Blocked Persons (with limited exceptions set forth in the Order).
[360] TEX. GOV'T CODE § 2252.001(2) (defining the term "governmental entity" to include the state; a municipality, county, public school district, or special-purpose district or authority; a district, county, or justice of the peace court; a board, commission, department, office, or other agency in the executive branch of state government, including an institution of higher education; the Legislature or a legislative agency; and the Supreme Court of Texas, the Texas Court of Criminal Appeals, a court of appeals, or the State Bar of Texas or another judicial agency having statewide jurisdiction.).
[361] TEX. GOV'T CODE § 2252.152.
[362] These lists are maintained by the Texas Safekeeping and Trust Company in accordance with TEX. GOV'T CODE §§ 2252.153, 2270.0201.
[363] The CPA website is located at Comptroller.Texas.Gov.

BOYCOTT ISRAEL CHECK

Governmental entities[364] may not contract with a company for goods or services unless the contract contains a written verification from the company that it does not boycott Israel and will not boycott Israel during the term of the contract.[365] Prior to award, the Contract Developer (purchaser) must check the divestment lists[366] to determine if the potential awardee is in violation of this requirement. The divestment lists are maintained by the Texas Safekeeping Trust Company and posted to the CPA website.[367] If the potential awardee is on the list, the contract may not be awarded to that vendor.

WARRANT/PAYMENT HOLD CHECK

The Contract Developer (purchaser) must check warrant hold status of the vendor in the following circumstances: (1) transaction involves a written contract, (2) payment is made with local funds, or (3) payment card purchase is over $500.[368] The agency cannot proceed with a purchase made with local funds or a payment card purchase over $500 until the warrant hold has been released.

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

1. the contract requires the agency's payments under the contract to be applied directly toward eliminating the person's debt or delinquency, and
2. the requirement described in paragraph (1) specifically applies to any debt or delinquency, regardless of when it arises.[369]

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

FRANCHISE TAX CHECK

It is recommended that the Contract Developer (purchaser) search the vendor's franchise tax account status using the online Certificates of Account Status Directory located on the CPA website.[370] Not all vendors are required to pay franchise tax. The Texas franchise tax is a privilege tax imposed on each taxable entity formed or organized in Texas or doing business in Texas. CPA is required by law to forfeit a company's right to transact business in Texas if the company has not filed a franchise tax report or paid a franchise tax required under Chapter 171 of the Tax Code.[371] If the corporate privileges are forfeited, the entity will be denied the right to sue or defend itself in a Texas court and each director or officer will be liable for the debt of the entity.[372] It is recommended that the Contract Developer (purchaser) seek assistance from agency counsel prior to proceeding with an award to a vendor that does not have the right to transact business in Texas.

Preparation of Access to Agency Premises

Prior to contract award, the Contract Manager may initiate certain activities to facilitate both parties' timely performance under the contract. For instance, the Contract Manager may notify internal personnel of the pending contract award so that end user personnel and, if assigned, the project manager may prepare for the commencement of the contract. In addition, the Contract Manager may coordinate communications between the contractor and the agency that are necessary for the contractor's performance under the contract. For instance, before gaining access to the agency's premises, the contract may require that contractor personnel sign non-disclosure agreements and provide certain information that will be used by the agency to issue building identification badges, assign agency equipment and onsite workspace, or conduct criminal background investigations.

Contract & Amendment Notifications

Overview

Depending on the transaction, the agency may be required to provide one or more notifications of the contract award. These notifications may be in the form of a notice of award published to the ESBD or *Texas Register*, a report to an oversight agency, or a website posting. Agencies must timely comply with all required notifications.

364 TEX. GOV'T CODE § 2270.001(3) (refers to TEX. GOV'T CODE § 2251.001 which defines "governmental entity" to mean a state agency or political subdivision of this State).
365 TEX. GOV'T CODE § 2270.002.
366 TEX. GOV'T CODE § 808.051.
367 The CPA website is located at Comptroller.Texas.Gov.
368 Restricted Expenditures – Persons Indebted to State policy located in eXpendit State Purchase Policies posted on the CPA website.
369 TEX. GOV'T CODE § 2252.903.
370 The CPA website is located at Comptroller.Texas.Gov.
371 TEX. TAX CODE § 171.251.
372 TEX. TAX CODE § 171.255.

ESBD Notice of Award

After the contract is awarded, a notification of award must be posted to the ESBD if the contract is expected to exceed $25,000.00.[373] The ESBD notice of award includes the following information:

- Requisition Number (as it was listed on the ESBD solicitation posting)
- Class/Item Code
- Agency Name
- Response Title (as it was listed on the ESBD solicitation posting)
- Dollar Amount Awarded
- Response Status (*e.g.*, full award, partial award, multiple award, canceled).
- HUB Certification Status
- Vendor Name
- Vendor Address

Depending on the procurement, an agency may also notify choose to notify each respondent in writing of the non-selection. The Contract Developer must maintain proof of the ESBD posting in the procurement file.

Texas Register Notice of Award

Solicitations using certain procurement methods, such as for major consulting services contracts, must be advertised in the *Texas Register*. If an agency does not comply with the *Texas Register* solicitation and/or award posting requirements for consulting services contracts, the consulting contract, including amendments, extensions, and renewals, is void.[374]

For procurement methods not addressed in this Guide, it is recommended that agencies refer to their enabling legislation to determine if publication in the *Texas Register* is required. A copy of the *Texas Register* notice must be placed in the procurement file. *Texas Register* posting requirements are in addition to ESBD posting requirements.

[373] TEX. GOV'T CODE § 2155.083(k)(2); 34 TEX. ADMIN. CODE § 20.214. *See also* 34 TEX. ADMIN. CODE § 20.114.

[374] TEX. GOV'T CODE § 2254.034.

QAT Notification of Award of Major Information Resource Project

A state agency must notify QAT within 10 business days when the agency awards a contract for a major information resources project that is equal to or greater than $10 million for QAT review.[375]

In addition, prior to amending a contract for development of a major information resources project, when the expected total value of the contract subsequent to the amendment exceeds the total value of the initial contract awarded by 10 percent or more, the agency shall notify the Governor, Lieutenant Governor, Speaker of the House, Senate Finance Committee, House Appropriations Committee, and QAT.[376]

LBB Reporting

Contracts that have a value that exceeds certain thresholds must be reported to the LBB. The submission must include any required documentation such as the solicitation documents, contract documents, and attestation letters.[377] These reporting requirements are fulfilled through the LBB Contracts Database located on the LBB website.[378] The database is the single point of data entry for all contract information that state entities are required to report to the LBB either by statute or the General Appropriations Act. The LBB Contract Reporting Guide[379] provides details on the types of contracts that must be reported to the LBB via the contracts database.

[375] General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 9.01(e).

[376] General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 9.01(d).

[377] TEX. GOV'T CODE § 322.020. (The requirement to provide contract and solicitation attachments does not apply to a university system, an institution of higher education, the Texas Department of Transportation, or the Health and Human Services agencies.).

[378] The LBB website is located at www.lbb.state.tx.us.

[379] http://www.lbb.state.tx.us/Documents/Instructions/Contracts/Major_Contract_Reporting2015.pdf.

The chart below shows the reporting requirements for contracts that exceed certain dollar thresholds.

LBB Reporting Requirements					
Dollar Threshold	>$14,000	>$50,000	>$100,000	>$1M	>$10M
Type	• Construction[1] • Professional Services[2] • Consulting Services[3]	All Contract Types[4]	Major Information Systems [5]	• Non-Competitive/ Sole Source[6] • Emergency[7]	All Contract Types[8]
Deadline	Within 10 days of award or modification	Within 30 Days of contract execution or modification	Within 10 days of award or modification	Due prior to first payment but no later than 30 days after contract execution Due 48 hours after first payment (Emergency)	Due prior to first payment but no later than 30 days after contract execution

TABLE NOTES

1 TEX. GOV'T CODE § 2166.2551.
2 TEX. GOV'T CODE § 2254.006.
3 TEX. GOV'T CODE § 2254.0301.
4 General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 7.04. See exceptions noted in Section 7.04(b).
5 TEX. GOV'T CODE § 2054.008.
6 General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 7.12(b)(2)(B).
7 General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 7.12(b)(2)(A).
8 General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 7.12(b)(1).

Additional information on exemptions, reporting requirements, and attestation letters required under the General Appropriations Act is posted on the LBB website.[380]

Agency Website Postings

Certain Agency Contracts

For contracts not posted to the LBB contracts database, an agency must post the following information about each private vendor contract to the agency's website:

1. the contract until the contract expires or is completed;
2. the statutory or other authority under which a contract that is not competitively bid under is entered into without compliance with competitive bidding procedures; and
3. the request for proposals related to a competitively bid contract until the contract expires or is completed.[381]

The agency must redact the following from the posted contract:

1. information that is confidential under law,
2. information that the OAG has determined can be excepted from public disclosure under exceptions to Chapter 552 of the Texas Government Code, commonly known as the Texas Public Information Act, and
3. the social security numbers of any individuals.[382]

For agency contracts for the purchase of goods or services from a private vendor that are valued at less than $15,000, the agency may post the required information monthly instead of upon award of contract.[383] Expressly excepted from the agency website posting requirement are contracts posted to the LBB contracts database, memoranda of understanding, interagency contracts, interlocal agreements, contracts for which there is not a cost, and institution of higher education contracts valued at $15,000 or less and paid with money other than funds appropriated to the institution.[384]

DIR Statements of Work

Upon execution of the DIR SOW, each DIR SOW entered into by the agency must be posted on the agency's internet website as follows:

1. post the DIR SOW in its entirety, subject to the exceptions in the Texas Public Information Act and opinions of the Office of Attorney General;
2. maintain the posting, at a minimum, throughout the term of the DIR SOW, including any renewals or extensions;
3. maintain a listing of the DIR SOWs in alphabetical order by vendor name or numerical order by contract number in a central location; and
4. maintain a current agency contact person with related email address and phone number to contact for information regarding the DIR SOW.[385]

380 The LBB website is located at www.lbb.state.tx.us.
381 TEX. GOV'T CODE § 2261.253.
382 TEX. GOV'T CODE § 2261.253 (e) and (f).
383 TEX. GOV'T CODE § 2261.253(b).
384 TEX. GOV'T CODE § 2261.253(d) and (g).
385 1 TEX. ADMIN. CODE § 212.41(c).

Contracts Exceeding $100,000

Each agency, other than an institution of higher education, that receives an aggregate of $175 million or more in the General Appropriations Act for a state fiscal biennium shall post on a generally accessible website maintained by or for the agency a listing and description of all contracts with vendors that have a value exceeding $100,000 that the agency has entered into and that are currently being performed or for which performance has not yet begun.[386]

Debriefings

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

It is not uncommon for several vendor representatives to attend the meeting, which may be conducted by phone conference. A list of the vendor attendees should be requested in advance of the scheduled meeting. If the vendor's legal representative will attend the meeting, the Contract Developer should promptly notify agency legal counsel.

Debriefing meetings are limited to a discussion of the vendor's response — the Contract Developer must not engage in discussions about how the vendor's response compared to other responses. Care must be taken not to divulge confidential information regarding a competitor's response.

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

Protest of Award

Each agency must adopt rules that provide an unsuccessful vendor with the opportunity to protest procurement actions.[387] When a protest is received, the agency must follow its rules to assess the merits of the vendor's protest and correct any unlawful procurement actions. Agencies should never assume that protests are frivolous; it is expected that most vendors would be reluctant to file a protest against an agency with which it wants to conduct business unless they believe that egregious errors occurred during the solicitation process. Even if the protest is not sustainable under the agency's protest rules, an agency should proactively make appropriate improvements to its procurement practices if any shortcomings are uncovered during the protest.

[386] TEX. GOV'T CODE § 2054.126(d)(4).

[387] TEX. GOV'T CODE § 2155.076.

CONTRACT MANAGEMENT

Overview

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

Transition from Contract Developer to Contract Manager

One of the first post-contract award activities is for the Contract Developer to transition the procurement to the Contract Manager. For relatively simple and routine procurements, like purchases using the set aside programs, Texas SmartBuy, or informal bidding, the transition activities may be documented as an agency procedure.

For high-risk and/or high-dollar procurements, it is best practice for internal staff to hold a post-contract award meeting. At a minimum, the meeting attendees should include the Contract Developer, the Contract Manager, end-users, and, if assigned, the project manager. During this meeting, the Contract Developer must ensure that the Contract Manager, as well as other stakeholders, have an understanding of the key procurement activities that have occurred prior to contract execution.

To the extent that the Contract Manager did not participate in pre-contract award procurement activities, the Contract Developer should facilitate the transition of documents and foundational knowledge of the solicitation and contract. Specifically, the Contract Developer must provide a thorough review of the scope of work and relay the contract terms and conditions, agreed-upon inspections and acceptance criteria, extension and renewal potential, and articulated remedies. After the agency team has been briefed on the events preceding the contract award, it is incumbent on the Contract Manager to begin the administration of the contract.

Contract Manager Responsibilities

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

All guidance provided to a contractor must be within the scope of the contract. 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 its responsibility to perform.

The primary responsibilities of the Contract Manager include the following:

- Participating with the procurement team in solicitation development and the review of contract documents;
- Serving as the primary point of contact for agency communication with the contractor regarding all matters pertaining to the contract;
- Managing any state property used in contract performance, (*e.g.,* computers, telephones, identification badges);
- Implementing a quality control and contract monitoring process;
- Monitoring the contractor's progress and performance to ensure goods and services procured conform to the contract requirements and keep timely records of findings;
- Consulting with agency legal counsel in a timely manner to address any legal concerns and/or issues;
- Managing, approving, and documenting any changes to the contract through the amendment process authorized by the terms of the contract;
- Inspecting and approving the products and/or services by submitting a written document accepting the deliverables or obtain documentation from the end users responsible for receipt that inspection and approval have been completed;
- Verifying accuracy of invoices and authorizing payments consistent with the contract terms;

- Monitoring the contract budget to ensure sufficient funds are available throughout the term of the contract;
- Identifying and resolving disputes with the contractor in a timely manner;
- Exercising state remedies, as appropriate, when a contractor's performance is deficient;
- Maintaining appropriate records in accordance with the records retention schedule;
- Confirming all products and/or services have been delivered and delivery is completed prior to the expiration date of the contract; and
- Performing contract closeout processes by ensuring the contract file contains all necessary contract documentation, vendor performance reported to VPTS, and document lessons learned.

Contract Managers are not authorized to

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

The number of participants in the contract administration process will vary from one to many depending on the size, level of risk and complexity of the contract. Early in the procurement process, the agency should identify staff, in addition to the assigned Contract Manager, who will participate in contract management. The assignment of roles and responsibilities should be documented in the contract file.

The Contract Manager is responsible for maintaining a master contract file of records produced throughout the life of the contract. A sample Master Contract File Checklist is located in Appendix 26.

Planning and Risk Assessment Tools

Risk is the possibility that an event will occur and adversely affect the achievement of objectives.[388] Risks are inherent in all the stages of the procurement process. Appropriate planning and effective risk assessment are components of successful contract management. To aid agencies in the development of a procurement planning tool and risk assessment model, SPD has implemented two National Association of State Procurement Officials (NASPO) concepts: the Contract Administration Plan,[389] also known as an Acquisition Plan, and the Quality Assessment Plan (QAP).[390]

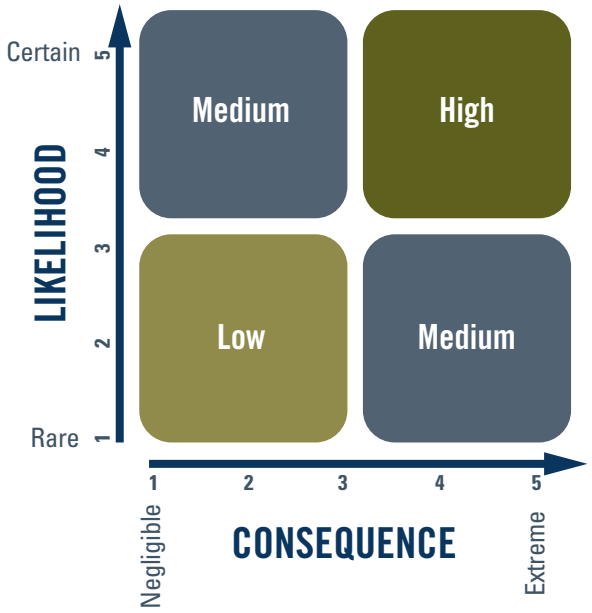
The Acquisition Plan is essentially a roadmap for achievement of the agency's business needs. The Acquisition Plan must be utilized early in the procurement process and will be provided by the Contract Developer to the Contract Manager during the post-award meeting to ensure a smooth transition from contract development to contract management. A sample Acquisition Plan is located in Appendix 6.

The QAP, on the other hand, is a tool that assists the Contract Manager in the assessment of risk and the monitoring of deliverables following contract execution. QAP tools include contract monitoring schedules and findings reports. Sample QAP tools are located in Appendix 24.

The analysis in risk assessment requires the following two estimates:

1. The likelihood of the event is estimated (*e.g.,* rare to almost certain).
2. The consequence of the event is estimated (*e.g.,* negligible impact to extreme).[391]

Various methodologies may be used by agencies to assess risk.



[388] National Association of State Procurement Officials, *State and Local Government: A Practical Guide* 71 (Lexington 2nd ed. 2015).

[389] National Association of State Procurement Officials, *State and Local Government: A Practical Guide* 222 (Lexington 2nd ed. 2015).

[390] National Association of State Procurement Officials, *State and Local Government: A Practical Guide* 222 (Lexington 2nd ed. 2015).

[391] National Association of State Procurement Officials, *State and Local Government: A Practical Guide* 72 (Lexington 2nd ed. 2015).

Risk models may assess risk associated with each contract that is a part of the Contract Manager's workload as well as risk associated with each deliverable that is to be received from the contractor. An effective risk assessment model will focus monitoring resources on contracts with the highest risk of noncompliance.

The first step in risk assessment is to identify the risk factors. Risk factors are indicators that the contract or project objectives will not be achieved.

General risk factors include, but are not limited to, the following:

- The contractor's previous experience with the type of work to be performed;
- The contractor's past performance (and past performance of similar contractors);
- The dollar value of the contract;
- Reimbursement methodology (*e.g.*, fixed price, time and materials, cost reimbursement);
- Acquisition complexity (*e.g.*, office supplies, temporary staff, design/build/implementation project, outsourcing project);
- Acquisition involves (agency and/or contractor) confidential and/or propriety information;
- Acquisition involves products or services that are relatively new in the marketplace;
- Acquisition involves the use of technology or implementation of processes that are new to the agency;
- Acquisition has an interdependency with other contracts;
- Acquisition has statewide impact (*e.g.*, involves large number of constituents, a vulnerable client population);
- Findings from monitoring efforts, such as the variance between expected and actual performance;
- Turnover in key personnel of the agency and/or contractor;
- Significant problems with payment requests;
- Results of monitoring visits with the same contractor that are completed by other divisions within the same agency or other agencies;
- The length of time since the last monitoring activity;
- The agency personnel experience with the product provided or the type of work to be performed; and
- Available level of effort to support the monitoring activities (*e.g.*, Contract Manager workload).

After the risk factors are identified, the Contract Manager will assign weights to each factor. Weights describe how significant each factor is in identifying the contracts that should be monitored. However, weights may also be designed to ensure statutory or policy requirements. 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, the Contract Manager will rate each contractor on the risk elements. Consider using either a five point scale, where 5 is the highest risk and 1 is the lowest risk, or a three point scale, where 3 is high risk, 2 is medium risk and 1 is low risk.

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.

Sample Risk Assessment. The agency has contracts with many contractors for providing the same service. Only three contractors are rated in this example. Typically, there will be many different risk elements. For this example, only the following three risk elements are used: dollars, past performance, and experience.

1. Dollars:
    - 40 percent of the contractors receive less than $100,000 from the agency per year.
    - 50 percent receive between $100,000 and $250,000.
    - 10 percent receive more than $250,000.
2. Experience:
    - High Risk – the contractor has never done this type of work before.
    - Medium Risk – the contractor has contracted with the State before but not for this type of work.
    - Low Risk – the contractor has previously contracted with the State for the same type of work.
3. Past Performance: For this particular assessment, the agency has determined that the contractor is considered high risk if the contractor has at least one significant finding from a prior monitoring or three less significant findings.

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

The contractors with the highest risk level must be monitored more closely. In this example, Contractor #3 has the highest risk, followed by Contractor #2 and #1, respectively. 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.

Post Award Contractor Conference

A post award conference is a meeting scheduled by the Contract Manager which includes the contractor and agency stakeholders. Conducted soon after the contract is awarded, the conference 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. Although the contractor and the agency personnel should already be fully aware of the contract requirements, the post award conference ensures that anyone involved directly in the contract administration process understands all contract performance requirements.

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 that all parties are aware of the performance requirements and administrative procedures agreed in the contract. Care should be taken to ensure that discussions that occur during the post award conference do not result in performance expectations that do not align with the terms of the contract. A sample post award conference agenda is located in Appendix 25.

The Contract Manager should decide if a post award conference is necessary. For less complex, low risk, low-dollar value contracts, a telephone call with the contractor may be sufficient. During the telephone conversation, the agency should review the major points of the contract with the contractor, such as the value of the contract, major performance milestones, deliverables, reports, meetings) and time and place of delivery. Factors used to determine whether a post award conference is appropriate include:

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

- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

Monitoring Methods

Overview

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

The Contract Manager will use QAP tools as an aid in determining which monitoring method is appropriate. Small dollar value or less complex contracts normally require little, if any, monitoring. However, that does not preclude more detailed monitoring if it is deemed necessary by the agency. 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.

Agencies should implement a monitoring program that has well-defined follow-up actions. Follow-up is essential as a problem will not correct itself simply by identifying it in a monitoring report. The results for the monitoring efforts should be periodically reviewed by the Contract Manager to

- ensure corrective actions have been taken,
- identify common problem areas that might require training, and
- improve contract requirements for future contracts.

Agencies may select from different monitoring methods including desk reviews, site visits, and third-party monitoring, which are discussed in more detail in this section. Other monitoring methods include status telephone calls, expenditure document review, spot audits, and scheduled audits.

Telephone calls and meetings must be substantiated in writing and maintained as part of the contract file. Such documentation must include the date and time that phone calls or meetings occurred as well as a summary of topics discussed (*e.g.*, meeting minutes) including pending action items and decisions that were made.

Desk Reviews

Typically, desk reviews are agency examinations of reports submitted by the contractor to the agency. Various types of reports may be required by the contract; however, to be an effective monitoring tool, the "type" of report should be tailored to the contract requirements. Examples of reports include progress reports, status reports, activity reports and financial reports. A Contract Manager should also review VPTS reports filed by other agencies for the contractor.

Progress Reports. Progress reports describe what has been accomplished over time. Progress reports assist the contractor in correcting or reevaluating the work being performed. These types of reports work best when they are tracking deliverables tied to specific milestones, so that progress can be documented as contract deliverables are completed.

Status Reports. Status reports describe achievement or current standing. A status report should be consistent with the organizational structure of the scope of work (*i.e.* phases, segments, deliverables and products). It should clearly identify what work is completed and what remains pending and how the status of those deliverables compares to 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), care should be taken 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.

Activity Reports. 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.

Financial Reports. Financial reports include financial statements, timesheets, and similar data, that substantiates the contractor's financial resources and ability to perform.

Vendor Performance Reports. Agencies are required to report vendor performance using the Vendor Performance Tracking System (VPTS) maintained by SPD. Accurately reporting contractor performance allows agencies to share vendor information and facilitates better oversight of state contracts (*e.g.*, aid in identifying vendors that have exceptional performance, protect the State from vendors with unethical business practices).

Considerations During Review. Agencies should review the vendor performance reports for the following factors:

- Compare the actual performance against the contract requirements. Is the contractor performing in accordance with the contract requirements?
- Compare actual expenditures to the approved budget. Is the contractor following its approved budget plan?
- 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?
- Compare what the current contractor is doing in comparison with other contractors performing similar work.
- 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 with the submitted staffing plan.

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?

Site Visits

More complex contracts and any 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 may be used to verify actual performance against scheduled or reported performance. These visits can be an opportunity to verify that the contractor is dedicating sufficient resources and appropriate personnel to the contract. Although site visits are an efficient tool for monitoring, it is possible for a site visit to interfere with the contractor's ability to accomplish the work if monitoring is excessive or includes unnecessary checks; the Contract Manager should consider this when arranging visits.

Site Monitoring Checklist. To perform a site visit, the agency must develop a comprehensive site monitoring checklist that outlines the contract compliance requirements. The site monitoring checklist should be tailored for each contract. While there may be standard items that the agency will review for all contractors, each contract should be reviewed for specific site monitoring requirements that are unique to the contract and the Contract Manager should document findings from the site visit in a site monitoring report.

Site Monitoring Report. Upon completion of a site visit, the Contract Manager or designated site monitor must complete a standalone document that serves as a record of the site monitoring work. A copy of the site monitoring report should be sent to the contractor and any others who may benefit from the report.

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.

Enhanced Contract and Performance Monitoring

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, the following: frequency of site visits, contractor meetings, and documentation requirements deemed necessary by the agency to assess progress of the contractor toward meeting the identified goals and outcomes established in response to assessments of unsatisfactory performance.

Agencies are required to establish by rule a procedure to identify each contract that requires enhanced contract or performance monitoring.[392] 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.[393] 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.[394]

For contracts that have a value exceeding $1 million, agencies must develop and implement contract reporting requirements that provide information on (1) compliance with financial provisions and delivery schedules under the contract, (2) corrective action plans required under the contract and the status of any active corrective action plan, and (3) any liquidated damages assessed or collected under

[392] TEX. GOV'T CODE § 2261.253(c).
[393] TEX. GOV'T CODE § 2261.253(c).
[394] TEX. GOV'T CODE § 2261.253(c).

the contract.[395] In addition, each agency must verify (1) the accuracy of any information reported that is based on information provided by a contractor, and (2) the delivery time of goods or services scheduled for delivery under the contract.[396]

Inspection, Testing, and Acceptance

Overview

Agencies are required to (1) inspect and evaluate at the time of receipt all goods or services that the agency receives to determine whether the goods or services comply with the contract under which they were purchased, and (2) certify, if true, that the goods or services comply with contract requirements and that the invoice for them is correct.[397] If the goods or services are not compliant with the contract, agency personnel must notify the Contract Manager. For statewide contracts administered by SPD, the agency must provide prompt written notice to SPD of the deficiencies.[398] A defaulting contractor can be referred to the Office of the Attorney General for action against the contractor and repeated failures may make the contractor subject to statewide debarment if SPD determines it is appropriate.

Testing

All goods are subject to inspection and testing by the State. Authorized agency personnel shall have access to a contractor's place of business for the purpose of inspecting contracted merchandise. Latent defects may result in revocation of acceptance of any product. Agency legal counsel should be consulted if latent defects are discovered.

Tests may be performed on samples obtained by request of the agency or taken from regular shipments. SPD may also arrange for testing and inspection of goods and services before they are purchased. Other agencies may test and inspect goods and services before purchase under standard industry testing methods, or they may contract for testing. When products tested fail to meet or exceed all applicable specifications, the costs of the sample used and any testing performed shall be borne by the contractor.

Shipping and Receiving

At the State's option, goods that have been delivered and rejected in whole or in part may be returned to the contractor at contractor's risk and expense or disposed of in accordance with SPD rules or applicable statutes. The contractor may request that goods be held at contractor's risk for a reasonable period of time for later disposition at the contractor's expense.

For assistance in resolving issues for orders processed through Texas SmartBuy, Managed Term Contracts, or SPD Administered Contracts, contact the SPD Contract Management Office at spd_cmo@cpa.texas.gov.

Shipment Acceptance. Acceptance of a shipment must only occur when goods delivered match the items on the PO and corresponding receiving report meet the quantities ordered and the specifications required. Agencies must immediately inspect all shipments received as fulfillment of POs and report any discrepancies to the contractor. A contractor must be notified immediately or within the timeline outlined in the contract.

Inside Delivery and Pallets. If the PO specified "Inside Delivery," it is the sole responsibility of the contractor to deliver to the exact floor and room number on the PO. Inspection must include verification of the requirements for inside delivery and if the shipment was to be on pallets. If the shipment is not on pallets as required, the agency may either

1. request the contractor to palletize the shipment at the agency location for no additional charge or
2. accept the shipment with a notation on the receiving report and notify the purchasing department to process a Purchase Order Change Notice (POCN) to remove any additional charges for pallets.

Shipments Delivered in Error. When a shipment includes an item not ordered by the agency, the agency may refuse the shipment when the error has been confirmed by checking the PO and/or receiving documents.

Package/Container Count Discrepancy. The end user or purchaser must inspect the shipment for the number of containers listed on the Bill of Lading. If the number does not match, note the discrepancy on the Bill of Lading prior to the driver leaving. Document the same information on the agency receiving documents. Documentation is necessary to validate the receipt of the containers received by the transportation company.

Non-Conforming or Incorrect Items Received. The end user or purchaser must compare the items received with the PO for brand name and product number. If the items on the Bill of Lading and in the delivery do not match the items on the PO, the shipment may be refused. If the shipment is signed for before it is inspected and the error is discovered after the driver departs, contact the contractor for replacement and pick up immediately upon discovery.

395 TEX. GOV'T CODE § 2261.254(a).
396 TEX. GOV'T CODE § 2261.254(b).
397 TEX. GOV'T CODE § 2155.322.
398 TEX. GOV'T CODE § 2155.070.

Goods found to be non-conforming to specifications during inspection must be documented on all receiving reports and the contractor must be contacted by telephone and with an email confirmation of the telephone notice. It is recommended that the agency takes pictures of the incorrect or non-conforming goods for documentation.

Minor Visible Damage. Minor damage visible on the outside of the containers must be noted on the Bill of Lading prior to signing and prior to the departure of the driver. Recording the damage provides documentation if there is concealed damage. The contractor will be aware of the minor visible damage by the information provided on the Bill of Lading.

Severe Visible Damage to Container or Contents. The agency may refuse the entire shipment or refuse only the damaged containers upon discovery of severe damage to container and contents; however, SPD recommends that the agency either accept the entire shipment or a partial shipment, rejecting only the damaged containers, to prevent unnecessary delay of required goods. If the entire shipment is refused, record the reason for refusal on the Bill of Landing and notify the contractor that the shipment was refused and reshipment is required due to severe damage. It is recommended that the receiving agency takes pictures of the incorrect or non-conforming goods for documentation.

For FOB Origin, if the shipping containers are damaged enough that it is probable that the contents are also damaged, accept the shipment and then record the damage on the carrier's freight bill. The agency is responsible for filing freight claims with the carrier.

Concealed Damage to Contents. Damages to the contents found during inspection and unpacking of a container must be immediately documented and reported to the contractor by telephone and with an email confirmation of the telephone notice. It is recommended that the agency takes pictures of the incorrect or non-conforming goods for documentation. If the end user is not the Contract Manager, then the end-user must contact the Contract Manager as well as the agency accounting department so that payment is not made on the damaged goods.

Pickup and Return of Shipments. The contractor may be required to pick up the damaged goods and those not conforming to specifications and provide replacement in the timeline outlined by the agency or in the original terms of the PO/contract. This must be provided at no additional cost to the agency.

Internal Receiving Report. The shipment must be compared to the PO or receiving document. Locate the PO number on the shipping documents and after immediate inspections of the shipment when the containers are opened, check the following against the PO:

- order quantity per item;
- number of items per package or container; and
- unit of measure for each line item.

Quantity Overages. An agency is not obligated to pay for amounts over the stated quantity on the order unless allowed in the terms and conditions of the contract. If overages are accepted by the agency, a POCN must be processed. It is important to notate overages as well as shortages.

Partial Shipment Considered Complete. The contractor must be contacted to confirm the partial shipment; this step must be taken prior to processing a POCN. After confirmation that no other goods will be received, and by mutual agreement the partial order is considered complete, a POCN and/or contract amendment must be processed and an accurate payment must be based on the goods received at the time of shipment.

Partial Shipment. For partial shipments, the agency must request a timeline, in writing, from the contractor for the balance to be delivered. Free on Board (FOB) Destination, freight included, and the delivery for the balance must be at no additional cost to the agency. The remainder of the partial delivery must be received by the agency within the contracted delivery days after receipt of order for each item or the delivery will be considered late.

Carrier Shipping Methods

A summary of common carrier shipping methods is listed in the following chart.

Carrier Shipping Methods				
Shipping Method	**Carrier Paid By**	**Freight Listed on PO**	**Title Held in Transit By**	**Claims Filed By**
FOB Origin Freight Collect	Agency	Yes	Agency	Purchasing
FOB Origin Freight Allowed	Vendor	No	Agency	Purchasing
FOB Origin Freight Prepaid & Charged Back	Vendor	Yes	Agency	Purchasing
FOB Destination Freight Collect	Agency	No	Vendor	Vendor
FOB Destination Freight Collect & Allowed	Vendor	No	Vendor	Vendor
FOB Destination Freight Collect & Allowed	Agency	No*	Vendor	Vendor

* Freight charged to vendor by deducting freight charges from invoice

Invoice Review and Payment

Invoice Review

After goods and services have been inspected and accepted, invoices must be reviewed to verify that (1) the description of goods and services is in sufficient detail to identify the order relating to the invoice and that the quantities and unit measures correspond with the referenced PO and (2) the invoice conforms to CPA invoicing standards.[399]

Invoicing	
The contractor is billing only for goods or services received by the agency.	The goods or services have been inspected and accepted.
The invoice is correct and complies with the pricing, terms, and conditions of the contract.	The total payments do not exceed the contract limits.
Red flags that may indicate fraud include	
Invoices with no physical address for the vendor.	Frequent undocumented or unapproved adjustments, credits, and write-offs.
Invoices for services/goods not rendered.	Multiple remittance addresses for the same vendor.
Payments to the vendor that have increased dramatically for no apparent reason.	Inconsistent invoicing time periods.

[399] 34 TEX. ADMIN. CODE § 20.487.

Contract Managers must be familiar with the payment and pricing terms applicable to each contract. Contract Managers must also monitor performance under the contract to verify that comparable costs are being charged for comparable goods and services.[400] When an agency purchases through SPD contracts, the contractor must submit an invoice to the ordering agency at the address shown on the PO.[401] Agencies or other governmental entities purchasing through SPD contracts may only pay restocking or cancellation fees if the agency or governmental entity determines the charge is justifiable; the extent of these fees should be anticipated when drafting the contract.[402]

A payment is considered overdue on the 31st day after later of the date of:

- the receipt of the goods;
- performance of the services; or
- receipt of the invoice for the goods or services.[403]

In some cases, a vendor may suspend performance under a contract for nonpayment.[404] To avoid a possible suspension, the Contract Manager must promptly review invoices and, following the agency's internal procedures, notify the contractor of a disputed invoice if the invoice is determined to be inaccurate.

Withholding Payment

Although an agency must pay its contractor promptly, the agency also has the responsibility to protect the interest of the agency. Despite best efforts to resolve an invoice issue, some circumstances may require that payment approval be withheld.

Circumstances where it may be necessary to withhold payment include, but are not limited to, the following:

- invoice errors;
- undocumented and/or unsupported costs;
- remediating overpayments to the vendor; and
- contractor's performance is non-conforming or unacceptable.

If an invoice issue cannot be resolved, the Contract Manager should take the following steps to escalate the issue:

- notify the agency accounts payable division;
- notify division management and the agency's Contract Administration Office (CAO);
- notify the contractor of invoice issues as soon as possible;
- request assistance, if needed, from the agency legal counsel to timely send a disputed invoice letter; and
- maintain documentation for inclusion in VPTS regarding the incident resolution.

Payment

Purchase Order (PO)

A Purchase Order (PO) is the document most frequently used by agencies to authorize the purchase of goods and services. A requisition is entered with the good or service description. The requisition is then sourced to a purchaser who will write the PO that will be submitted to the contractor. Once the services are performed and/or goods are received, the contractor will request payment by submitting an invoice to the agency along with the PO.

Payment Card

An agency may only use payment cards issued under the SPD contracts. SPD has established several types of payment cards as follows: (1) Commercial Charge Cards used for general purchasing or specifically for travel-related expenditures and (2) State of Texas Retail Fuel Cards used for fuel, authorized maintenance, and roadside assistance purchases.

Each agency must ensure that the authorized cardholder adheres to all purchasing statutes, rules, policies, and procedures when the payment card or travel card is used. For instance, transactions that do not qualify as spot purchases must comply with requirements applicable to the requisite procurement method. The agency must adopt procedures that govern the issuance and use of payment cards by the agency's officers and employees. The agency must also include procurement policy guidelines in its internal procedures for payment card use and include documentation of these procedures in its Procurement Plan submitted annually to SPD. SPD requires these procedures as a part of the procurement audit review. The use of a payment card does not exempt an agency, its officers, or its employees from any purchasing requirement of state law or SPD.

The payment card may be used as a payment method for goods and services purchased for dollar amounts within an agency's purchasing authority and the cardholder's authorized charging limit. The following processes must be adhered to:

- Procurement File or Log: A procurement file or log must be maintained for each card transaction and must include the NIGP Class/Item code(s) and best value determination.

[400] TEX. GOV'T CODE § 2261.203.
[401] TEX. GOV'T CODE § 2155.381.
[402] TEX. GOV'T CODE § 2155.384.
[403] TEX. GOV'T CODE § 2251.021.
[404] TEX. GOV'T CODE § 2251.051.

- Receipts for Credit Card Transactions: Keep each payment card transaction receipt in the procurement file. Each receipt must contain a description of the good or service sufficient to support the comptroller expenditure object code used for the type of items being purchased. All receipts must be kept according to the commercial card guidelines and the agency's records retention schedule. Upon request, credit card receipts must be made available to CPA.
- Capital or Controlled Assets: The payment card may be used to pay for capital or controlled assets, utilizing the expenditure object code established for the type of assets being purchased. The Texas Identification Number (TIN), Payee Identification Number (PIN), or Vendor Identification Number (VIN) of the selling vendor must be entered into USAS, rather than the TIN/PIN/VIN of the state credit card issuer. (Note the PIN entered into USAS is not a personal identification number that a cardholder may have selected to conduct transactions with chipped payment cards; these card specific security codes must be kept confidential by the cardholder.)

A participating agency may not use a payment card nor reimburse an officer or employee who has uses a payment card for personal use, consulting services, cash advances, a purchase that SPD audits before payment, payments to certain defaulting debtors or debtors with certain delinquent debts, or any service or good not within statutory purchasing guidelines.[405] Agencies are liable for late payment fees.

Interagency Transaction Voucher (ITV)

An agency may process a payment between agencies for procured goods and services through an Interagency Transaction Voucher (ITV), which is used to transfer funds held in the State Treasury between two agencies. The interagency payment must be accompanied by a Recurring Transaction Index (RTI).[406] The transaction agency (the agency initiating the transfer of funds) must know the receiving agency's RTI Number to process the ITV. This is a common payment method when agencies have entered into an IAC for the exchange of goods and/or services between agencies.

Change Control

Overview

Throughout the term of the contract changes may become necessary. These changes may be minor, administrative changes such as a change of address, or they can be substantial changes that affect the price and delivery. Depending on the transaction, a formal change control process may be included within the contract. Regardless whether expressly stated in the contract, an agency should have an effective change control process in place. Failure to manage and control changes may 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. When modifying any part of the contract, the Contract Manager should coordinate with the Contract Developer, end-user and project manager.

An effective change management process includes, but is not limited to, the following:

- 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 the change is fully analyzed, documented and approved in writing in conformance with contract requirements.
- Evaluation of the impact of each change to the contracting objective, the corresponding product and/or service, the schedule, cost, and increase in agency overhead resulting from the change, impact to work in progress or completed work, standards, and acceptance criteria.
- If the contract contains a contingency allowance, develop a plan for how any draws against this allowance will be requested and approved.
- Documentation of all changes, no matter how small; avoid 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.

[405] 34 TEX. ADMIN. CODE § 5.57.
[406] https://fmx.cpa.texas.gov/fmx/pubs/afrrptreq/interfund/index.php?section=rti&page=rti12.

Types of Contract Amendments

Overview

There are two ways to change a contract. One is a bilateral amendment where 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 must be altered. The second is the right to unilaterally modify the contract — the terms and conditions in the contract determine how the agency may exercise a right to modify the contract without the contractor's consent. An amendment will either be administrative, substantive, or constructive in nature. Care should be taken not to inadvertently change contract terms through course of performance. All contract amendments should be appropriately documented and conform to the contract and agency processes.

Administrative Changes

Administrative changes occur within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed 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; and
- changes in agency personnel assigned to the contract.

Substantive Changes

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

- a change in the price of the contract;
- a change in the delivery schedule;
- a change in the quantity;
- a change of deliverables (*e.g.*, the specifications);
- a change of key personnel: or
- a change of any terms and conditions.

Constructive Changes

If a contractor perceives that work beyond the scope of the contract was ordered by 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:

- accelerate the delivery schedule;
- direct the work to be performed differently;
- change the sequencing of the work;
- postpone the acceptance or rejection of deliverables;
- delay reviewing invoices and approving payment; or
- interfere with or hinder performance.

Contract Amendment Analysis

Whether 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 a competitive process was used, the resulting contract must be consistent with what was solicited during the competition. Inconsistencies between the solicitation and contract can violate the competitive process requirements.

If a change is needed to a contract, the change has to be within the scope, or parameters of the solicitation. A significant difference in the scope of work would be a material or substantial change and would not be allowed because it was not 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.

For 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 the pool of vendors that competed for the original solicitation. Other vendors may have been interested in bidding on file cabinets that were not interested in bidding on desks.

When determining what constitutes scope changes to advertised specifications, the crucial question is whether the changes are material or substantial. Material or substantial changes are not measured by the number of changes made to the original specifications, they are measured by determining if the extent of the changes so substantially alters the original specifications that not re-advertising the revised specifications would deny a potential vendor an opportunity to respond to the revised specifications. If a revision is substantial, a new solicitation is needed to ensure compliance with the bidding statutes.[407]

[407] *See Roark v. Stallworth Oil and Gas Inc.*, 813 S.W.2d 492, 496 (Tex. 1991).

Assignment by Contractor and Contractor Name Change

Overview

Assignment occurs when one party to a contract (assignor) transfers its rights under a contract to another party (assignee). Contract law generally permits assignments.[408] It is recommended that agencies draft their contracts to require the submission of a written request from the contractor to the Contract Manager to change the contractor's name or to recognize a successor in interest to the contract. Agency legal counsel should be consulted if after the proposed assignment, the contractor will not be responsible for any performance under the contract.

Term Contracts, SPD TXMAS Contracts, and SPD-Administered Contracts. The SPD Contract Management Office is responsible for processing assignments for Term Contracts, SPD TXMAS Contracts, and SPD-Administered Contracts. Accordingly, agencies are directed to inform contractors to contact the SPD Contract Management Office.

Payment Assignment

It is a common business practice for a party to transfer the right to receive payment. The assignor is the party transferring the right to receive payment. The assignee is the party receiving the right to receive payment.

Once an agency receives a notice of a financial assignment, it is legally bound to make payment to the assignee. Assignments may be requested by the contractor to show changes in the payee on an order.

The following steps must be taken:

1. Requests for assignments must be in writing from the contractor receiving the order on the company letterhead with the signature of an authorized representative.
2. The agency must issue an assignment letter acknowledging the assignment. The vendor identification number (VIN) will remain that of the original awarded contractor, but the contractor name and payments will be mailed to the assignee.

For additional information refer to Setup Special Circumstances-Assignments in the TexPayment Resource Guide posted on the CPA website.[409]

Delegated Purchases. When a payment assignment is requested on a delegated purchase, the agency must receive a letter from the original awarded contractor assigning the order to the new contractor and a letter from the new assignee noting acceptance of the assignment. Any reference to an SPD order number should be deleted. A copy of the notice must be maintained in the agency's procurement file. The agency is responsible for setting up the assignment mail code for the VIN number of the original contractor in TINS so that the payment may be processed.

Authority to Assign. Generally, a person may assign the right to receive a payment from the State in the same way that the person may assign the right to receive a payment from a private person or entity. Additional information may be found in the eXpendit State Purchase Policies located on the CPA website[410] by selecting the "Miscellaneous Expenditures" tab, clicking on "Payment and Fees," and then choosing "Assignments of Payment from the State."

Questions regarding assignments should be directed to the CPA Claims Division at (512) 463-4850.

Name Change

Any name change requires documentation from the original contractor on company letterhead stating the circumstance of the name change and the new name. The letter should be signed by an authorized representative, showing the change and the effective date. A copy of the assumed name certificate filed with the Secretary of State or a sales tax permit may be obtained as proof of name change. The purchaser will issue a letter amending the PO to change the contractor's name and advise the contractor to contact CPA to set up a new VIN in order to secure payment, if applicable. The purchaser should change the name on the PO file copy and acknowledge the name change.

Buyout or Sale

A buyout or sale occurs when one company is purchased by another. The contractor of record must have the purchase order and, if applicable, formal contract amended to receive payment when the order is delivered. The contractor of record must send the agency a letter stating the circumstances of the buyout or sale. If the contractor has already ceased operating as a separate business, the agency should obtain a letter indicating the sale of the company to the new

[408] The general rule: all contract rights are assignable unless the assignment materially alters the obligor's duties (especially personal services contracts where there is a relationship of trust/confidence between parties), the assignment materially varies the risk (*e.g.*, insurance contracts), or the assignment impairs the obligor's ability to perform. For sales contracts under the TEX. BUS. & COM. CODE, Chapter 2, a party may assign or delegate a contract unless otherwise agreed upon or if the other party has a substantial interest in having the original promisor perform. TEX. BUS. & COM. CODE § 2.210.

[409] The CPA website is located at Comptroller.Texas.Gov.

[410] The CPA website is located at Comptroller.Texas.Gov.

contractor. To change the company name, the agency should then, as applicable, either issue a letter amending the PO or obtain an amendment to the contract. The new contractor should be directed to contact the CPA Tax Policy Division to obtain a new VIN, if applicable, in order to secure payment.

Replacement Contractor

If the contractor is requesting to recognize a successor, it is the Contract Manager's responsibility to keep the State's interest in mind. The contractor's successor must be responsible and adequately able to perform the contract requirements. The Contract Manager must perform all due diligence to evaluate the proposed new contractor's eligibility and ability to perform. It is also advisable to request and review the documents executed by the contractors that constitute the transaction underlying the proposed assignment. If the replacement contractor is acceptable, the old and new contractors must sign a novation agreement transferring all rights and responsibilities under the contract to the assignee. A sample Novation Assignment Agreement is located in Appendix 27.

Extensions and Renewals

If the contract has an option to extend or renew, the Contract Manager must assess whether the option will be exercised by the agency prior to the expiration of the current contract term. The number, length, and process for exercising renewals and extensions should be specified in the contract.

Force Majeure

Performance may be suspended when the failure to perform is due to excusable causes. An excusable cause must be beyond the contractor's control, and without the fault or negligence of the contractor. Such excusable causes, often referred to as force majeure, include, but are not limited to, Acts of God or of the public enemy, fires, floods, epidemics, strikes freight embargos, or 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 snowstorm in Amarillo in February would not be considered unusual, but it would be considered unusual in Austin. On the other hand, a snowstorm in Amarillo in June would indeed be unusual.

If the contractor's performance failure is due to a subcontractor, to qualify as an excusable cause, the default must arise out of a cause beyond the control and without the fault or negligence of either the contractor 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.

Dispute Resolution

Each agency that enters into a contract must include as a term of the contract a provision stating that the dispute resolution process provided for in Chapter 2260 of the Texas Government Code must be used to attempt to resolve any dispute arising under the contract.[411] The objective of any dispute resolution process is to resolve problems before they escalate. 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:

- Identify the problem - many times what may appear to be a problem can be resolved by providing the contractor with information or clarification. The agency must follow internal escalation points and the OAG must be included if a legal dispute arises.
- Research facts - the agency must obtain all the information regarding the potential problem from all relevant sources, including the project manager and the contractor.
- Evaluation - the agency must review all of the facts in conjunction with the requirements and terms and conditions of the contract. The agency must then determine the appropriate course of action.

Proper dispute resolution is a core skill of successful contract management. It is essential to identify problems early in the performance period and effectively communicate and formalize the process in writing via a cure notice procedure or less formal written procedure. Termination is the last resort; it is a failure by both parties to a contract.

Termination

Most contracts expire by their terms without any affirmative action on the part of the agency. There are times, however, where an agency may want to terminate a contract early. Termination of a contact may be accomplished by

[411] TEX. GOV'T CODE § 2260.004.

- termination by mutual agreement,
- termination for convenience,
- termination for cause, or
- termination for non-appropriations.

When a contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions.

Termination by Mutual Agreement

A termination by mutual agreement occurs when both parties consent to the termination of the contract before the expiration date. This type of termination may be documented by the exchange of formal written correspondence or as a contract amendment.

Termination for Convenience

A termination for convenience, also known as no-fault termination, allows 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. This option should be provided in every contract.

A Contract Developer should seek guidance from agency legal counsel if vendors seek to negotiate out termination for convenience to determine whether the omission of this clause is in the best interest of the agency. The consideration whether to waive the clause will be highly fact specific. For example, in long-term contracts involving extensive capital investment by a vendor, a 30 day termination for convenience by the agency may not be a realistic contract term.

The agency must provide the contractor with written notice specifying whether the agency is terminating all or part of the contract. The notice of termination must give the date of termination. If portions of the contract are being selectively terminated, the agency must specify which parts of the contract are being terminated.

The contract must specify the basis for settlement with the contractor upon a termination for convenience, and the agency must follow the contract terms. The contractor will generally be paid for allowable costs incurred up to the date of 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 must thoroughly review the invoice to ensure that no excessive costs are included. A sample Notice of Termination for Convenience is located in Appendix 28.

Termination for Cause

Overview

A termination for cause occurs when the agency concludes that the contractor has failed to perform or make progress, or in any way has breached the contract. An agency is not required to terminate a contract even though the circumstances permit such action. An agency may determine that it is in its best interest to pursue other alternatives and work with the contractor in getting the contract back on track.

Examples of such alternatives include extending the delivery or completion date, allowing the contractor to continue performance under the contract, or working with the contractor's surety to complete the outstanding work.

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

- Has the agency assisted the contractor in curing a default, if applicable?
- The provisions of the contract and applicable regulations.
- The specific contractual failures and the explanation provided for the failures.
- The urgency of the need for the contracted supplies or services. The agency may need to weigh the respective benefits and disadvantages of allowing a delinquent contractor to continue performance or re-soliciting for a new contractor.
- 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 requests to complete the work).
- Availability of funds and resources to re-purchase if 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 contract is terminated for cause, the contractor is liable for actual damages and costs incurred by the State unless otherwise stated in the contract. The contractor may be liable for cost associated with re-procuring the goods or services by the agency. The termination must be carefully drafted to state the facts pertinent to the cause for termination. A sample Notice of Termination for Cause is located in Appendix 28.

Cure Notices

Prior to terminating a contractor for default, depending on the type of breach, a cure notice may be sent to the contractor if the contract requires it. A cure notice is a letter provided to the contractor that specifies a period of time, such as 30 days, to correct or "cure" the deficiency or violation. Not all defaults can be cured. If the contractor fails to cure the situation or provide satisfactory explanation as requested, the contract may be terminated for cause. A sample Cure Notice is located in Appendix 28.

Corrective Action Plan

If there is a contract breach, the parties may implement a formal corrective action plan. A corrective action plan is a written document that identifies specific activities that must be performed by the contractor to restore compliance with the contract. The plan must be tailored to address the identified deficiency, clearly state the desired outcome, and establish a time frame for the contractor to demonstrate improved performance.

Termination For Non-Appropriation, Excess Obligations Prohibited

A termination for non-appropriations clause, or "funding out" clause, is an Essential Provision that must be included in a contract if the contract term will cross a fiscal year. Agencies are prohibited from incurring obligations in excess of amounts lawfully appropriated by the Legislature over the course of a biennium.

The Texas Constitution and the General Appropriations Act prohibit an agency from incurring obligations in excess of amounts lawfully appropriated by the Legislature over the course of a biennium.[412] Therefore, any installment purchase, lease or any other type of purchase which incurs an obligation beyond the current appropriation is strictly prohibited, unless the obligation is expressly conditioned upon continued legislative appropriation. There is one exception to the prohibition against incurring excess obligations. SPD may determine that a proposed installment purchase arrangement is cost effective and certify this finding in response to an agency request.

Any certification by SPD related to obligations incurred for the purchase or lease of automated information systems (AIS) equipment may only be made if the requesting agency has a Biennial Operating Plan (including any amendments) on file with the LBB, and the plan has been approved by the LBB.

Requests for Certifications should be directed to SPD. For CPA to make a certification as required by the General Appropriations Act, the following information must be provided with the purchase requisition and be signed by the agency's purchasing director or other proper authority of the submitting agency:

- A statement comparing the anticipated cost savings to be realized through the present acquisition of the equipment versus the outright purchase of the equipment at a later time when adequate funds become available;
- A statement affirming that the ordering entity expects to be able to make payments beyond the current biennium without having to rely on an increased level of general revenue appropriations;
- An estimate of the total anticipated interest charges over term of the installment contract; and
- A statement indicating that the lease (or installment) purchase is the most cost-effective means of obtaining the needed equipment despite the additional interest cost to the State.

In addition to the above requirements, any purchase agreement subject to this section must contain a clause that enables the agency to cancel the agreement if the Legislature curtails or fails to appropriate money to cover the term of the agreement; this is necessary to prevent any unconstitutional excess obligation. An example of a contract clause is as follows: "Any contract resulting from this solicitation is contingent upon the continued availability of lawful appropriations by the Texas Legislature."

Penalty for Requisitioning Officer or Employee. If General Appropriations Act, Article IX, Section 6.03 (2017) is violated, the State Auditor shall certify the fact of the violation and the amount of the over-obligation to CPA, and CPA shall deduct an amount equivalent to the over-obligation from the salary or other compensation due to the responsible disbursing or requisitioning officer or employee and apply the amount to the payment obligation.

Agency Reporting of Contracting Information in CAPPS

As stewards of public funds, all agencies are required to manage their 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 CPA. In 2007, to further financial and reporting uniformity, the Legislature required CPA to develop, maintain and support Enterprise Resource Planning (ERP) to ensure that the uniform statewide accounting system includes the administration of general ledger, accounts payable,

[412] TEX. CONST. art. III, § 49a; TEX. CONST. art. VIII, § 6; General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 6.03.

accounts receivable, budgeting, inventory, asset management, billing, payroll, projects, purchasing, grants and human resources. Since then, CPA 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. Agencies using CAPPS are required to provide information related to solicitations and contracting according to the requirements that are adopted in rule by CPA.[413]

Contract Close-Out

The contract close-out process is usually a simple but detailed administrative procedure. The purpose of the process is to verify that both parties to the contract have fulfilled their contractual obligations. Accordingly, contract close-out must be conducted in a timely manner.

As part of contract close-out, the Contract Manager must compare actual performance against performance measures, goals and objectives, to determine whether all required work has been completed. 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 materials have been returned;
- all property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract;
- final acceptance from the project manager has been received; and
- final payment has been made to the contractor.

The Contract Manager must also ensure that vendor performance is reported to VTPS and that the contractor is aware of and is in compliance with records retention requirements.

[413] TEX. GOV'T CODE § 2101.041(a).

Vendor Performance Reporting

Overview

A contractor's performance must be reported to VPTS once a contract with a value of over $25,000 is completed or otherwise terminated.[414] For information on how to use the VPTS, refer to the VPTS User Guide located on the CPA website.[415] The system provides many common instances of positive and negative performance for the reporter to choose from and a blank field is provided to report other performance positives or negatives, resolution codes, and general comments.

Best value criteria considerations are required when determining and reporting vendor performance grades[416] and are determined during the contract management phase of the Procurement Cycle.[417] The Contract Manager must request best value criteria from the purchaser and review contract documents.

In assessing contractor performance, the Contract Manager should consider the following:

- Did the contractor meet the requirements in the contract?
- Were there any other criteria besides meeting specifications in the contract and price?
- If so, the Contract Manager must consider those criteria in the vendor performance evaluation.

The Contract Manager must consult all agency personnel involved in the contract, including the Contract Developer and the end user, to determine the fulfillment of best value criteria. Ideally, the Contract Manager or end user would be providing the report.

Scoring a Vendor

Vendor performance reporting is important as it can affect the contractor significantly on current and future procurement initiatives, so the Contract Manager must consider all information collected when scoring a contractor.

If a contractor does not score lower than a "B," comments will not be posted publicly. All comments must be reviewed by agency staff and are typically used to explain low scoring vendors. Comments entered will be retained internally, and can always be requested from the program.

[414] TEX. GOV'T CODE § 2155.089; 34 TEX. ADMIN. CODE § 20.115.
[415] The CPA website is located at Comptroller.Texas.Gov.
[416] TEX. GOV'T CODE § 2155.0755(b); 34 TEX. ADMIN. CODE § 20.509.
[417] TEX. GOV'T CODE § 2155.075.

Contractors who do not fulfill the requirements of the contract or that are on corrective action plans must not be a given a grade higher than a "C."

General guidelines for scoring contractor's performance are illustrated in the following scenario.

Scenario: The agency purchases 25 chairs for a classroom setting. The contract specifications detail that the chairs must be red, at least 25 inches in height, have wheels, and adjustable arms. The delivery date is June 1, 2017. The agency has purchased these particular chairs because they both meet the best value criteria and the vendor can supply the chairs that meet the criteria requested.

Vendor Scoring Guide	
Letter Grade[1]	**Example**
A – Must be given to vendors who met best value criteria and fully complied with all contract material terms with complete or substantial customer satisfaction.	*The chairs are delivered on the delivery date and meet the specifications detailed in the contract.*
B – Must be given to vendors who met best value criteria and fully complied with all material terms – or promptly remedied any minor instance of non-compliance with those terms — with substantial or adequate customer satisfaction.	*Twenty-five chairs are delivered on the delivery date; however, only 24 meet the contract specifications. The contractor has delivered one blue chair. The blue chair is promptly replaced within 24 hours after notification and correspondence with the vendor.*
C – Must be given to vendors who met best value criteria and substantially remedied a majority of the instances of non-compliance with the material terms of the contract with adequate customer satisfaction.	*Twenty blue chairs and five red chairs are delivered on the delivery date. Within 48 hours of notification and correspondence with the vendor, all of the blue chairs are replaced with red. All chairs meet other contract specifications.*
D – Must be given to vendors who did not meet best value criteria or were in substantial non-compliance with material contract terms with the requirements of the contract and failed to remedy a majority of those instances of that non-compliance.	*Five red and twenty blue chairs are delivered a day after the delivery date. After correspondence with the vendor, the agency was notified that due to a manufacturing delay, the red chairs would not be available for delivery for another two weeks.*
F – Must be given to vendors who did not meet best value criteria were in substantial non-compliance with the material contract terms and failed to remedy a majority of those instances of non-compliance or displayed conduct that would be cause for debarment such as fraud, material misrepresentation, or contract breach.	*Twenty-five blue chairs are delivered after the delivery date. Upon delivery, the agency is notified that the red chairs had been discontinued months ago (prior to the establishment of the contract) and the agency was not made aware of this issue.*

TABLE NOTES

[1] 34 TEX. ADMIN. CODE § 20.509. *See also* TEX. GOV'T CODE § 2262.055.

Interpreting Existing Vendor Scores

Contract Developers and evaluation committees use vendor performance scores during the evaluation of responses. Contract Developers should read the reports in order to make their determination based on the notes left by reporting agencies utilizing the vendor being evaluated, not just not limit the review to the evaluation scores from the current solicitation. Vendor performance scores are available on VPTS.

It is important to note that there is a difference between the **report score** and the **vendor score**.

The **report score** is the score the agency assigns for one particular report. Historic reports (prior to February 2017) were graded on a satisfactory/unsatisfactory scale. The score is displayed as "Legacy Satisfactory" or "Legacy Unsatisfactory." New reports are graded by the agency on an A-F scale.

The **vendor score** is the score calculated by averaging all of a vendor's report scores to provide an overall vendor score. Vendors receive an overall grade that considers both historic reports (Historic Vendor Score) and new reports.

How Vendor Score is Calculated

All reports submitted for a vendor prior to February 6, 2017 have been averaged, creating a *historic vendor score*. The *historic vendor score* counts as one report score in the scoring formula within the vendor performance reporting system.

The scoring formula is H+R1+R2+R3…/n=S, where H= historic vendor score, R= new report score, n= [1 + (total number of new reports)], and S= Vendor Score.

Vendor performance grades range from A – F when entered into the system by an agency user. After the agency assigns a letter grade (*report score*), the system converts the letter grade to a number according to the scale below:

A = Excellent performance (score equivalent of 100)

B = Good performance (score equivalent of 85)

C = Satisfactory performance (score equivalent of 70)

D = Unsatisfactory performance (score equivalent of 65)

F = Extremely unsatisfactory performance (score equivalent of 50)

The system uses the *report scores* given by state agencies to determine a vendor's overall score. All of a vendor's *report scores* are added together, plus the *historic vendor score* when applicable, and then are divided by the total number of report scores (including the historic score). Then, to provide the vendor's overall grade on an A-F scale, the number is converted back to a letter grade according to the following scale:

90-100 = A

80-89 = B

70-79 = C

60-69 = D

59 or below = F

EXAMPLE: Vendor X has a *historic score* of 88. Vendor X then gets assessed a *report score* of "A" by one purchaser and another *report score* of "C" by another purchaser. The formula should work as follows: 88+100+70/3= 86. The vendor has a numeric score of 86, so the displayed grade would a "B".

Barring Vendors From Participating In State Contracts

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

Other reasons CPA may bar a vendor from participating in state contracts would be repeated unfavorable performance reviews under Section 2155.089 of the Texas Government Code or repeated unfavorable classifications received by the vendor under Section 2262.055 of the Texas Government Code 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 agency that provides an unfavorable performance review;
- whether debarment of the vendor is in the best interest of the State; and
- any other factor the SPD considers relevant, as specified by CPA rule.

SPD 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, SPD shall determine the period of debarment. The period for debarment must be commensurate with the seriousness of the vendor's action and the damage to the State's interests.[418]

Records Retention

Aside from the responsibility of maintaining the contract file, the Contract Manager, or designated responsible agency employee, is also responsible for ensuring that contract documents are retained by the agency for the appropriate amount of time as determined by applicable law and the agency's records retention schedule.

The Texas State Library publishes the Texas State Records Retention Schedule (RRS) to help agencies determine the minimum length of time that records must be retained by an agency before destruction. Each agency is also required to prepare its own records retention schedule.[419] The RRS does not take the place of an agency's retention schedule but is to be used as a guide by the agency in creating and updating its schedule. The retention periods given in the RRS are required minimums; agencies may retain records for a longer period.

The RRS must be read in conjunction with statute enacted in 2015 which requires an agency to retain its contract records until the seventh anniversary of the later date of (1) the contract completion or expiration or expires, or (2) the resolution of all issues that arose from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents.[420]

- If the contract was executed on or after September 1, 2015, most documents in the contract file will have a minimum retention period of AC[421] +7 years (after close of contract plus seven years).
- If the contract was executed before September 1, 2015, then the minimum records retention period is AC+4 years (after close of contract plus four years).

A state record must not be destroyed if any litigation, claim, negotiation, audit, public information request, administration review, or other action involving the record is initiated; all action involving the record must be completed and all issues arising from the action resolved before a state record may be destroyed. Although the RRS for contract files is AC + 7 years, a particular agency may opt to maintain contract files longer if there is a business justification for the retention. The reason for retention of records beyond the official retention schedule must be documented in writing.

Post-Payment Audits

CPA performs audits on documents submitted to the Uniform Statewide Accounting System (USAS).[422] CPA's Expenditure Audit Section plans audits on an annual basis and performs a risk assessment each year before initiating audit plans. Agencies are audited for compliance with certain state laws and rules concerning payroll, travel, purchase and procurement and with the processing requirements of the Centralized Accounting and Payroll/Personnel System (CAPPS), USAS, the Uniform Statewide Payroll/Personnel System (USPS), and the Standardized Payroll/Personnel Reporting System (SPRS).

The Expenditure Audit Section may utilize generally recognized sampling procedures to select a sample of transactions to be tested. The agency will supply the complete purchasing package applicable to each Purchase Category Code. The Purchase Category Code List and Post-Payment & Procurement Review Agency Document Checklist are located in Appendix 29 and Appendix 30, respectively.

Items determined to be exempt from competitive bidding must include the legal citation exempting the purchase. An Exemptions List (Document Type 9) is located in Appendix 31. Documents are audited for compliance with purchasing procedures to ensure continued delegation to agencies.

Each purchase is audited for items which include, but are not limited to, the following:

1. The invoice matches the PO/contract terms and conditions as well as the documentation showing the receipt of goods delivered or services rendered *i.e.*, the requirement is known as the "Three-Way Match" rule;
2. Final Bidder List (dated CMBL Listing – extracted from CMBL using NIGP Class/Item Codes and, if applicable, agency head or designee approval of supplements to Bidder List);
3. Printouts for the following vendor compliance checks:
   - Debarment
   - SAM
   - Iran, Sudan, and Foreign Terrorist Organization
   - Boycott Israel
   - Warrant/Payment Hold;

[418] TEX. GOV'T CODE § 2155.077.
[419] TEX. GOV'T CODE § 441.185.
[420] TEX. GOV'T CODE § 441.1855.
[421] The term "AC" means after completion, expiration, or termination of the instrument according to its terms.

[422] TEX. GOV'T CODE §§ 403.071, 2155.325; 34 TEX. ADMIN. CODE § 20.488.

4. Dated ESBD posting printouts for the solicitation, including addenda, and the Notice of Award, if purchase is over $25,000.00;
5. State Use Program and /or TCI Program waivers;
6. Acquisition Plan;
7. Complete HUB Subcontracting Plan (HSP);
8. Vendor responses to solicitation;
9. Documentation associated with vendor responses evaluated by committee or bid tabulation;
10. DIR Exemption printout;
11. Dated request for SPD Delegation of Authority and SPD response printout;
12. SAO Nepotism Disclosure Statement for Purchasing Personnel and TEC Disclosure of Interested Parties Form 1295, if contract is valued $1 million or more;
13. SPD-administered agency-specific procurement requirements;
14. NIGP Class/Item number are listed on purchase order;
15. The Purchase Category Code (PCC) is correctly selected;
16. The correct legal citation is noted on exempt purchases;
17. Verification of proprietary sole source status, authorized signature on Proprietary Purchase Justification, Direct Publication Declaration Statement;
18. Signed Emergency Justification letter;
19. Authorized signatures on all documents;
20. Purchase Order Change Notice (POCN) or contract amendment for extending/renewing a contract;
21. Verification that sales tax (and any other tax from which the State may be exempt) has not been paid by the agency;
22. Contracts crossing the biennium contain an Excess Obligations Prohibited contract clause;
23. The itemized sales receipt that supports the applicable point of sale purchase using a payment card;
24. PO/contract includes the Essential Provisions (including Texas Required Contract Clauses);
25. Most recent version of the agency's annual Procurement Plan;
26. Evidence of LBB reporting; and
27. Evidence of VPTS reporting.

VERSION HISTORY OF THE GUIDE

Release/Revision Date	Version	Summary of Revisions
June 1, 2018	1.0	Publication Date of the Guide
August 1, 2018	1.1	Non-substantive modifications (*e.g.*, format adjustments, inclusion of hyperlinks, correction of typographical errors) throughout the Guide. Non-substantive clarifications to the following sections: RFO Procurement Method, Procurement Method – Consulting Services, Evaluation – Evaluation Committee Process, and Appendix Nos. 1, 18, 22, 23, 24. Substantive revisions to the following sections: Proprietary Purchases, Fuel, Oil, and Grease Purchases, Emergency Purchases, Commercial Charge Card/Payment Card, Post-Payment Audits, and Appendix Nos. 5, 6, 12, 29, 30.

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APPENDIX 1

Glossary

Addendum
A written addition, change, or supplement to a solicitation issued prior to the opening date.

Advance Payment
The payment for goods or services before their delivery to the agency. See Early Payment.

Automated Information System (AIS)
Products and services that are associated with computers (automation) or telecommunications systems as defined in Section 2157.001(1) of the Texas Government Code.

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.

Award
The act of accepting an offer, thereby forming a contract between the State and a vendor.

Best Interests of the State
Most advantageous to the State in light of all relevant circumstances.

Bid
An offer to contract with the State, submitted in response to an IFB.

Bid Bond
See Bid Deposit.

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.

Bid Tabulation
The recording of bids and bid data submitted in response to an IFB. 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 entity that submits a bid, such as an agent, employee and representative. See Respondent.

Bidders List
A list of vendors that have expressed an interest in doing business with the State. See Centralized Master Bidders List.

Bid Sample
A sample required to be furnished as part of a bid, for evaluating the quality of the product offered.

Biennium (State of Texas)
A period of 24 consecutive months, beginning on September 1 of each odd-numbered year. Example: September 1, 2017 through August 31, 2019.

Bill of Lading
Document issued by a carrier identifying merchandise and transportation details.

Blanket Bond
A performance bond that insures a respondent's performance on two or more contracts in lieu of separate bonds for each contract.

Blanket Order
A purchase order to a contractor for a specified time period, specific product and an estimated minimum quantity; with actual delivery to only occur in conformance with subsequent authorization(s) by the ordering entity. Use of minimum estimated call out quantities is advised for this type of order. See Standing Order.

Brand Name
A trade name or product name which identifies a product as having been made by a particular manufacturer.

Breach of Contract
Failure to perform a contractual obligation.

Centralized Master Bidders List (CMBL)
An online directory, maintained by SPD, containing contact information and product categories of vendors registered to receive procurement opportunities from public entities.

Change Order
An amendment, clarification, change, or deletion to the original scope of work to a contract.

Class and Item
The classification system found in the NIGP Commodity Book.

Closing Date
The date and time that offers or proposals are due in response to a solicitation. Used interchangeably with the term "Opening Date."

Commodity
Generally, the term means supplies, materials or equipment. See IT Commodity Item.

Commodity Book
List of NIGP class and item numbers maintained on the CPA website.

Competitive Sealed Bidding
Process of advertising an Invitation for Bids (IFB), the evaluation of the submitted bids, and awarding of the contract 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 in accordance with state law.

Competitive Solicitation
The process of inviting and obtaining responses from competing vendors in response to advertised competitive specifications, by which an award is made based on best value. The process contemplates giving potential vendors a reasonable opportunity to compete, and requires that all vendors be placed on a level playing field. Each respondent must respond to the same advertised specifications, terms, and conditions.

Competitive Specifications
A specification stated in such a manner that two or more vendors can meet the specifications on a level playing field.

Confirmation Order
A purchase order issued to a contractor, listing the commodities and terms of an order placed verbally or otherwise, in advance of the issuance of the purchase order. The original date and contractor's representative's name should be included on the order. It is recommended the purchase order include the following statement: "Confirmation Order – Do Not Double Ship."

Consultant
A person who provides or proposes to provide the service of studying or advising a state agency under a contract that does not involve the traditional relationship of employer and employee. The term includes a political subdivision but does not include the federal government, a state agency, or a state governmental entity.

Consulting Services
The service of studying or advising a state agency under contract that does not involve the traditional relationship of employer and employee. See Major Consulting Services Contract.

Consumable Procurement Budget
That portion of an agency's budget as identified by comptroller expenditure codes attributable to consumable supplies, materials and equipment.

Contract
A legally enforceable agreement between two or more parties.

Contractor
A business entity or individual that has a contract to provide goods or services to the State.

Cooperative Purchasing
A program for qualified entities to use the SPD or DIR contract resources.

Debarment
An exclusion from contracting or subcontracting with state agencies on the basis of any cause set forth in statute or SPD rules, commensurate with the seriousness of the offense, performance failure, or inadequacy to perform.

Delegated Purchase
A purchase made by an agency under the authority of SPD and subject to SPD rules and procedures.

Discount-From-List
Unit prices that are based on a discount from a manufacturer's published price list. Ordering entity can validate the discount price by reviewing the price list or catalog from which the price reduction is figured.

Early Payment
The payment for goods or services after receipt but earlier than the payment due date set forth in Section 2251.021 of the Texas Government Code. See Advance Payment.

Early Payment Discount
A discount from the purchase price allowed to the agency if payment is made within a specified period.

Electronic State Business Daily (ESBD)
An online directory, administered by SPD, that publishes solicitations for the purpose of informing vendors of procurement opportunities and provides public notice of contract awards.

Equivalent Product
A product that is comparable in performance and quality to the specified product.

Escalation Clause
A clause in a contract providing for a price increase or decrease under certain specified circumstances.

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 entity. In other instances, the executive sponsor may be the division or program director with overall project responsibility.

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

Goods
The term means supplies, materials, or equipment.

Grant
An award of financial assistance, including cooperative agreements, in the form of money, property in lieu of money, or other financial assistance paid or furnished by the state or federal government to carry out a program in accordance with rules, regulations and guidance provided by the grantor agency. The term does not include technical assistance that provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, for which the grantee is not required to account. See Uniform Grant Management Standards.

Historically Underutilized Business (HUB)
A business as defined by Chapter 2161 of the Texas Government Code and 34 TAC § 20.282.

Informal Solicitation
An unsealed, competitive solicitation used to obtain offers submitted verbally or in writing for purchases with a value of $25,000 or less.

Inspection
Examination and/or testing of merchandise to determine whether it has been received in the proper quantity and condition and to verify that it conforms to the applicable specifications.

Inspection Report
A report made as a result of the agency's inspection, informing the buyer of a product's compliance with advertised specifications.

Interagency Contract (IAC)
Written understanding between two or more agencies as authorized by Chapter 771 of the Texas Government Code.

Interlocal Contract
Written understanding between local government entities, a local government entity and a federally recognized Indian tribe, or a local government entity and a state agency of Texas or another state as authorized by Chapter 791 of the Texas Government Code.

Invitation for Bids (IFB)
A written solicitation requesting the submission of bids; also referred to as a bid invitation.

Invoice
Document from a contractor requesting payment for goods delivered and/or services rendered.

IT Commodity Item
Commercial software, hardware, or technology services, other than telecommunications services, that are generally available to businesses or the public and for which DIR determines that a reasonable demand exists in two or more agencies. The term includes seat management, through which an agency transfers its personal computer equipment and service responsibilities to a private vendor to manage the personal computing needs for each desktop in the agency, including all necessary hardware, software, and support services.

Late Response
A response that is received after the date and time established for receipt of responses to a solicitation.

Lease Purchase
An installment sale which gives the lessee the right to purchase equipment or other fixed assets at an agreed upon price under certain conditions. Title passes from seller to agency if and at the time the option to purchase is exercised. See Operating Lease.

Life-Cycle Costing
A procurement cost analysis technique which considers operating, maintenance, acquisition price, and other costs of ownership in the award of contracts to ensure that the item acquired will result in the lowest total ownership cost during the time the item's function is required.

Liquidated Damages
A specified contract provision that 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 contractor's failure to meet contract requirements.

Local Government
A county, municipality, school district, special district, junior college district, or other legally constituted political subdivision of the State.

Major Consulting Services Contract
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.

Managed Contract
A SPD Term Contract that cannot be processed through Texas SmartBuy. The purchase order is prepared by the agency, referencing the contract number and pricing, and sent directly to the contractor.

Manufacturer's Price List
A price list published in some form by the manufacturer and available to and recognized by the trade. The term does not include a price list prepared especially for a particular solicitation.

Minor Technicality
A requirement in a solicitation which, if waived or modified by the agency when evaluating responses, would not give a respondent an unfair advantage over other respondents or result in a material change in the contract.

Multiple Award Contract Procedure
A purchasing procedure by which SPD establishes one or more levels of quality and performance and makes more than one award at each level.

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."

Nonresident Bidder
For purposes of the reciprocal preference law, a person whose principal place of business is not in Texas.

Notice of Award
An official announcement of an executed contract. For SPD, the term also refers to a letter signed by the Deputy Comptroller or designee which creates a contract.

Offer
A proposal to contract with the State submitted in response to an RFO.

Opening Date
The date and time that bids are due in response to an IFB. Used interchangeably with the term "Closing Date."

Operating Lease
A contract granting the lessee the use of equipment or other fixed assets for a specified time in exchange for payment. Title remains with the contractor. See Lease Purchase.

Payment Bond
A deposit, pledge, or contract of guaranty supplied by a contractor to protect the State against loss due to the contractor's failure to pay subcontractors and material suppliers.

Payment Card
A commercial charge card that is predominately used for transactions that require payment upfront. Agencies may only use commercial charge cards obtained under SPD established contract(s).

Performance Bond
A deposit, pledge, or contract of guaranty supplied by a contractor to protect the State against loss due to the contractor's inability to complete the contract as agreed.

Post-Consumer Materials
Finished products, packages, or materials generated by a business entity or consumer that have served their intended end uses, and that have been recovered or otherwise diverted from the waste stream for the purpose of recycling.

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

Pre-Consumer Materials
Materials or by-products that have not reached a business entity or consumer for an intended end use, including industrial scrap material, and overstock or obsolete inventories from distributors wholesalers, and other companies. The term does not include materials and by-products generated from, and commonly reused within, an original manufacturing process or separate operation within the same or a parent company.

Professional Services
Services directly related to the professional practices specified by the Professional Services Procurement Act, Chapter 2254, Subchapter A, of the Texas Government Code.

Proposal
An offer to contract with the State, submitted in response to an RFP.

Protest Procedures
Procedures for resolving vendor protests relating to purchasing issues.

Public Opening
The public opening of bids, offers, or proposals, in which the names of the respondents to a solicitation are publicly read and recorded. No prices are divulged at an offer or proposal opening as these types of solicitations are subject to negotiation.

Purchase Order
A document issued by a customer to a seller, indicating types, quantities, and agreed prices for products or services the seller will provide to the customer.

Recycled Material Content
The portion of a product made with recycled materials consisting of pre-consumer materials (waste), post-consumer materials (waste), or both.

Recycled Materials
Materials, goods, or products that contain recyclable material, industrial waste, or hazardous waste that may be used in place of raw or virgin materials in manufacturing a new product.

Recycled Product
A product that meets the requirements for recycled material content as prescribed by the rules established by the Texas Commission on Environmental Quality in consultation with CPA.

Remanufactured Product
A product that has been repaired, rebuilt, or otherwise restored to meet or exceed the OEM performance specifications; provided, however, the warranty period for a remanufactured product may differ from the OEM warranty period.

Rent
Payment for the use of property.

Request for Information (RFI)
A general invitation to the vendor community requesting information that may be used in a potential future solicitation.

Request for Offers (RFO)
A written solicitation requesting the submission of offers for AIS which include hardware, software and other information technology goods and services.

Request for Proposals (RFP)
A written solicitation requesting the submission of proposals.

Request for Qualifications (RFQ)
A written solicitation requesting the submission of qualifications or specialized services. Typically used for the procurement of professional services.

Responsive
The bid, offer, or proposal complies with all material aspects of the solicitation document, including submission of all required documents.

Respondent
An individual or entity that submits an offer or proposal. The term includes anyone acting on behalf of the individual or entity that submits an offer or proposal, such as an agent, employee, and representative. See Bidder.

Responsible
For purposes of the reciprocal preference law, a governmental entity may not award a governmental contract to a nonresident bidder unless the nonresident bidder underbids the lowest bid submitted by a responsible resident bidder by the amount authorized by statute.

Salvage Value
The estimated value of a property when the user completes its use of the property.

Sealed Bids or Proposals
A response which is kept secure and unopened until after the due date and time specified in the solicitation.

Service
The furnishing of skilled or unskilled labor or professional work.

Set Aside Contract
Term used to refer to the State Use Program and the Texas Correctional Industries (TCI) purchasing program.

Solicitation
A document such as an IFB, RFO, RFP or RFQ requesting responses from vendors to provide specified goods and services. The term also refers to the process of obtaining responses from vendors to provide specified goods and services.

Standard
The established and fixed measure used in assessing quality or performance.

Standing Order
A purchase order to a contractor for a specified time period during which a specific quantity of product will be delivered on specified delivery dates. See Blanket Order.

State
The State of Texas.

Statute
A law enacted by the state or federal government.

Successor-in-Interest
Any business entity that acquires or otherwise obtains the controlling ownership of a business entity.

Surplus
Federal and State surplus property programs administered by TFC. Each program has its own laws, rules, and procedures.

Term Contract
A contract established by SPD for the purchase or lease of goods and services used in large quantities by several agencies.

Texas Bidder
For the preference to resolve tie bids, "Texas bidder" means a business (1) incorporated in Texas, (2) that has its principal place of business in Texas, or (3) that has an established physical presence in Texas. See Texas Resident Bidder.

Texas Resident Bidder
For purposes of reciprocal preference law, "resident bidder" refers to a person whose principal place of business is in Texas, including a contractor whose ultimate parent company or majority owner has its principal place of business in Texas. See Texas Bidder.

Texas SmartBuy
The State's central e-procurement system for non-IT goods and services.

Texas Specification
A specification adopted by SPD and used whenever possible in the purchase of the item involved. Established standard of minimum quality for products or services purchased in volume by the State.

Uniform Grant Management Standards (UGMS)
Uniform grant and contract administration procedures, developed under the authority of Chapter 783 of the Texas Government Code, to promote the efficient use of public funds in local government and in programs requiring cooperation among local, state and federal agencies.

Unit Price
The price for a good or service in accordance with the unit of measure provided in the solicitation.

Vendor
A potential provider of goods or services to the State.

APPENDIX 2

Acronyms and Abbreviations

AIS	Automated Information System
ARO	After Receipt of Order
BAFO	Best and Final Offer
BI	Bodily Injury (insurance)
BLS	Bureau of Labor Statistics (federal agency)
BOM	Bill of Materials
CAO	Contract Administration Office
CAPPS	Centralized Accounting and Payroll/ Personnel System
CAT	Contract Advisory Team
CCTS	Capitol Complex Telephone System
CFR	Code of Federal Regulations
CMBL	Centralized Master Bidders List
CNA	Central Nonprofit Administration
COI	Conflict of Interest or Certificate of Insurance
CO-OP	Cooperative Purchasing Program
COTS	Commercial Off the Shelf
CPA	Comptroller of Public Accounts
CPI	Consumer Price Index
CPO	Chief Procurement Officer
CRP	Community Rehabilitation Program
CTCD	Certified Texas Contract Developer
CTCM	Certified Texas Contract Manager
DBITS	Deliverable Based Information Technology Services
DIR	Department of Information Resources
DPS	Department of Public Safety

DSC	Data Center Services (DIR)
EIR	Electronic Information Resources
ESBD	Electronic State Business Daily
FOB	Free On Board
FOIA	Freedom of Information Act (federal)
FSPP	Federal Surplus Property Program
GCI	General Contract Information (Texas SmartBuy Contracts)
GSA	General Services Administration (federal agency)
HSP	HUB Subcontracting Plan
HUB	Historically Underutilized Business
IAC	Interagency Cooperation Agreement
ICT	Information Communication Technology
IFB	Invitation for Bids
IT	Information Technology
ITV	Interagency Transaction Voucher
LAR	Legislative Appropriations Request
LBB	Legislative Budget Board
MIRP	Major Information Resources Project
MOLA	Master Operating Lease Agreement
MOU	Memorandum of Understanding
NASPO	National Association of State Procurement Officials
NDA	Non-Disclosure Agreement
NIGP	National Institute of Governmental Purchasing
NOA	Notice of Award

OAG	Office of the Attorney General
OCC	Outside Counsel Contract
OEM	Original Equipment Manufacturer
OMB	Office of Management and Budget (federal)
OMR	Open Market Requisition (Request)
OVFM	Office of Vehicle Fleet Management
PAR	Progress Assessment Report (HSP)
PCC	Purchase Category Code
PD	Property Damage (insurance)
PI	Personal Injury (insurance)
PIN	Payee Identification Number
PM	Project Manager
PO	Purchase Order
POCN	Purchase Order Change Notice
PPI	Producer Price Index
PR	Price Request
QAT	Quality Assurance Team
QAP	Quality Assessment Plan
REQ	Requisition
RFA	Request for Applications
RFI	Request for Information
RFO	Request for Offers
RFP	Request for Proposals
RFQ	Request for Qualifications
RTI	Recurring Transaction Index
RtR	Request to Retain (OAG Outside Counsel Contracts)
SAM	System for Award Management (federal)
SAO	State Auditor's Office

SOW	Scope of Work or Statement of Work
SPD	Statewide Procurement Division
STMP	State Travel Management Program
T&Cs	Terms and Conditions
T&M	Time and Materials
TAC	Texas Administrative Code
TCI	Texas Correctional Industries
TCO	Total Cost of Ownership
TDCJ	Texas Department of Criminal Justice
TEC	Texas Ethics Commission
TEX-AN	Texas Agency Network (DIR)
TFC	Texas Facilities Commission
TIBH	TIBH Industries (State Use Program)
TIN	Texas Identification Number
TPIA	Texas Public Information Act
TWC	Texas Workforce Commission
TXFS	Texas Fleet System
TXMAS	Texas Multiple Award Schedule
UCC	Uniform Commercial Code (federal)
UGMS	Uniform Grants Management Standards
UOM	Unit of Measurement
USAS	Uniform Statewide Accounting System
USC	United States Code
USPS	United States Postal Service
VIN	Vendor Identification Number
VPTS	Vendor Performance Tracking System
VPR	Vendor Performance Report

APPENDIX 3

Selected Statutory State Employment Restrictions and Required Disclosures

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Restrictions During State Employment

Dealings with Public Servants

Employees of agencies who perform purchasing functions under SPD's delegated authority shall adhere to the same ethical standards required of CPA employees, and shall avoid all conflicts of interest in their purchasing activities.[1] The Deputy Comptroller and an employee who exercises discretion in connection with a contract, payment, claim, or other pecuniary transaction under SPD's purchasing 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.[2] For purposes of this statute, the terms "value," "reward," and "compensation" include anything with a monetary value of $5 or more.[3] This prohibition includes the spouse and dependent children of the Deputy Comptroller or agency employee.[4]

Prohibited Financial Interest in Certain Private Vendor Contracts

A state agency[5] may not enter into a contract with a private vendor for the purchase of goods or services solicited through a PO if the amount of the PO exceeds $25,000 and any of the following agency officers or employees have a financial interest in the vendor:

- a member of a state agency's governing body,
- the governing official, executive director, general counsel, chief procurement officer, or procurement director; or
- a family member related to one of the persons described in items (1) or (2) within the second degree of kinship by affinity or consanguinity.[6]

An agency employee or official has a financial interest in a vendor if the employee or official

- owns or controls, directly or indirectly, an ownership interest of at least 1 percent in the person, including the right to share in profits, proceeds, or capital gains or
- could reasonably foresee that a contract with the person could result in a financial benefit to the employee or official.[7]

Contracting with Current Executive Head of State Agency

A state agency may not enter into a contract with the executive head of the state agency or with a person who employs a current executive head of a state agency, unless the governing body

- votes in an open meeting to approve the contract, and
- notifies the Legislative Budget Board, not later than the fifth day before the date of the vote, of the terms of the proposed contract.[8]

Contracts by State Officers with Governmental Entities

A state officer[9] may not solicit or accept from a governmental entity a commission fee, bonus, retainer, or rebate that is compensation for the officer's personal solicitation for the award of a contract for services or sale of goods to a government entity.[10] This prohibition does not apply to a court appointment or a contract that is awarded to the state officer by competitive bid as provided by law and that is not otherwise prohibited by law.[11]

Certain Leases Prohibited

A member of the Legislature, an executive or judicial officer elected in a statewide election, or a business entity in which the legislator or officer has a substantial interest may not lease any office space or other real property to the State, a state agency, the Legislature or legislative agency, the Supreme Court of Texas, the Court of Criminal Appeals, or a state judicial agency.[12] However, a member of the Legislature or a business entity in which the legislator has a substantial interest may donate the use of office space that the member or entity owns and that is located in the member's district to the house of the Legislature in which the member serves to be

1 34 TEX. ADMIN. CODE § 20.157.
2 TEX. GOV'T CODE § 2155.003.
3 1 TEX. ADMIN. CODE § 45.3(b)(3).
4 1 TEX. ADMIN. CODE § 45.3(b)(1).
5 "State agency" includes the Texas Department of Transportation and an institution of higher education acquiring goods or services under Section 51.9335 or 73.115, Education Code; however, the prohibition discussed does not apply to the Employees Retirement System of Texas or to the Teacher Retirement System of Texas, except for a contract with a nongovernmental entity for claims administration of a group health benefit plan. TEX. GOV'T CODE § 2261.251. Additionally, Texas Education Code § 51.923 governs the conflicts of interest of the members of the governing board of an institution of higher education. TEX. GOV'T CODE § 2261.252(f).
6 TEX. GOV'T CODE §§ 2261.252(b); 2261.252(e).
7 TEX. GOV'T CODE § 2261.252(c); 34 TEX. ADMIN. CODE § 20.158(c). A financial interest does not include a retirement plan, a blind trust, insurance coverage, or an ownership interest of less than one percent in a corporation. TEX. GOV'T CODE § 2261.252(d).
8 TEX. GOV'T CODE § 669.003.
9 A "state officer" is defined as an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency. TEX. GOV'T CODE § 572.002(12).
10 TEX. GOV'T CODE § 572.056(a).
11 TEX. GOV'T CODE § 572.057(b).
12 TEX. GOV'T CODE § 572.057(a).

used for the member's official business.[13] A lease made in violation of this prohibition is void.[14]

Elected or Appointed Officer's Private Interest in Measure or Decision

An elected or appointed officer,[15] who is a member of a board or commission having policy direction over a state agency and who has a personal or private interest in a measure, proposal, or decision pending before the board or commission, shall publicly disclose the fact to the board or commission in an open meeting and may not vote or otherwise participate in the decision.[16] An individual who violates this prohibition may be removed from office.[17]

Prohibition of Economic Benefit Related to Publications and Other Printed Matter

In accordance with Article XVI, Section 21, of the Texas Constitution, 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 matter issued by a department or agency of the executive branch.[18] A person who violates this prohibition shall be dismissed from state employment.[19]

Legislator's Interest in Contracts

A member of the Legislature is prohibited from having an interest in a contract with the State or county if the contract was authorized by any law passed during the term for which the legislator was elected.[20]

Post-Employment Restrictions

Certain Employment for Former State Officer or Employee Restricted

A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the contract was signed or the procurement was terminated or withdrawn.[21]

Contracting with Former Executive Head of State Agency

A state agency may not enter into a contract with a person who at any time during the four years before the date of the contract was the executive head of the state agency, or with a person who employs a former executive head of a state agency, unless the governing body (1) votes, in an open meeting, to approve the contract, and (2) notifies the Legislative Budget Board, not later than the fifth day before the date of the vote, of the terms of the proposed contract.[22]

Contracting with Certain Former Agency Employees

A state agency[23] may not enter into an employment contract, a professional services contract under Chapter 2254 of the Texas Government Code, or a consulting services contract under Chapter 2254 of the Texas Government Code with a former or retired employee of the agency before the first anniversary of the last date on which the individual was employed by the agency, if appropriated money will be used to make payments under the contract.[24] This restriction does not prohibit an agency from entering into a professional services contract with a corporation, firm, or other business entity that employs a former or retired employee of the agency within one year of the employee's leaving the agency, provided that the former or retired employee does not perform services on projects for the corporation, firm, or other business entity that the employee worked on while employed by the agency.[25]

Representation by Former Officer or Employee of Regulatory Agency Restricted

There are two general "revolving door" provisions in Section 572.054 of the Texas Government Code. For purposes of Section 572.054 of the Texas Government Code, CPA, the Secretary of State, and DIR are included within the definition of "regulatory agency."[26] Employees of certain agencies may be governed by post-employment provisions stricter than those in Section 572.054 of the Texas Government Code.

13 TEX. GOV'T CODE §572.057(d).
14 TEX. GOV'T CODE § 572.057(b).
15 TEX. GOV'T CODE § 572.002(1), (4) (defining appointed officer and elected officer, respectively).
16 TEX. GOV'T CODE § 572.058(a).
17 TEX. GOV'T CODE § 572.058(b).
18 TEX. GOV'T CODE § 2052.302.
19 TEX. GOV'T CODE § 2052.302.
20 TEX. CONST. art. III, § 18.
21 TEX. GOV'T CODE § 572.069.
22 TEX. GOV'T CODE § 669.003.
23 For purposes of this section, "state agency" includes a "public senior college or university," as that term is defined by Section 61.003 of the Education Code. TEX. GOV'T CODE § 2252.901(d).
24 TEX. GOV'T CODE § 2252.901(a).
25 TEX. GOV'T CODE § 2252.901(a).
26 TEX. GOV'T CODE §§ 572.002(8), Tex. Gov't Code 572.054(g), (g-1).

Former Board Members and Executive Directors. A former member of the governing body or a former executive head of a regulatory agency may not make any communication to or appearance before an officer or employee of the agency in which the member or executive head served before the second anniversary of the date the member or executive head ceased to be a member of the governing body or the executive head of the agency if the communication or appearance is made (1) with the intent to influence and (2) on behalf of any person in connection with any matter on which the person seeks official action.[27]

Former State Officers and Employees. A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, and is compensated at or above a certain salary level, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility.[28] This restriction does not apply to a rulemaking proceeding that was concluded before the officer's or employee's service or employment ceased.[29]

A former state officer or employee covered by this provision is prohibited from ever representing any person or receiving any compensation for services rendered on behalf of any person regarding a particular matter in which the individual "participated" while serving with the agency. A "particular matter" means a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding.[30] "Participated" means to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.[31] The determination of whether an individual participated in a matter is not limited to those of personal involvement. Participation can mean having supervisory authority over others who have personal involvement with a particular matter, even if such authority was never exercised.[32]

Required Disclosure Statements

Non-Disclosure and Conflict of Interest Certification for Contract Developers and Purchasers

Employees of agencies performing purchasing functions under SPD's delegated authority are required to adhere to the same ethical standards required of CPA employees.[33] Contract Developers and purchasers certify their compliance with the conflict of interest prohibition described in Section 2155.003 of the Texas Government Code by completing the Non-Disclosure and Conflict of Interest Certification for Contract Developers and Purchasers located in Appendix 4. Contract Developers and Purchasers must sign the certification prior to engaging in any purchasing activity. In addition, state employees have a responsibility to promptly disclose any actual or potential conflict of interest that occurs at any time during the procurement process. It is best practice for the Non-Disclosure and Conflict of Interest Certification for Contract Developers and Purchasers to be signed on a regular basis. The timing of when the certification must be signed on a periodic basis (*e.g.,* every fiscal year, calendar year, employment date anniversary) may vary according to each agency's policy.

Conflict of Interest Disclosure Statement for Procurement and Contract Management Employees

Each state agency employee or official who is involved in procurement or in contract management for a state agency shall 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.[34] This disclosure requirement applies only to a contract for the purchase of goods or services solicited through a purchase order if the amount of the purchase order exceeds $25,000.[35] For contracts subject to the disclosure requirement, a state agency employee or official is required to disclose any potential conflict of interest specified by state law or agency policy that is known by the employee or official at any time during

- the procurement process, from the initial request for bids for the purchase of goods or services from a private vendor until the completed final delivery of the goods or services or
- the term of a contract with a private vendor.[36]

27 TEX. GOV'T CODE § 572.054(a).
28 TEX. GOV'T CODE § 572.054(b)-(c).
29 TEX. GOV'T CODE § 572.054(d).
30 TEX. GOV'T CODE § 572.054(h)(2).
31 TEX. GOV'T CODE § 572.054(h)(1).
32 Tex. Ethics Comm. Op. No. 285 (1995).

33 1 TEX. ADMIN. CODE § 20.157.
34 TEX. GOV'T CODE § 2261.252(a).
35 TEX. GOV'T CODE § 2261.252(e).
36 TEX. GOV'T CODE § 2261.252(a-1).

State Auditor's Office Disclosure Statement for Purchasing Personnel

Before a state agency[37] may award a major contract, defined as a contract with a value of at least $1 million,[38] for the purchase of goods or services to a business entity, each of the agency's purchasing personnel[39] working on the contract must submit a completed disclosure statement to the administrative head of the state agency.[40] The purchasing personnel must disclose, on the form prescribed by the State Auditor's Office, any relationship about which the purchasing personnel is aware with an employee, a partner, a major stockholder, a paid consultant with a contract with the business entity the value of which exceeds $25,000, or other owner of the business entity that is within the degree of kinship described by Section 573.002 of the Texas Government Code.[41] The SAO Disclosure Statement for Purchasing Personnel is located on the SAO website.[42]

Disclosure of Interested Parties – Texas Ethics Commission Form 1295

A governmental entity[43] or state agency[44] may not enter into a contract with a business entity[45] that requires an action or vote by the governing body of the entity or agency before the contract may be signed or has a value of at least $1 million unless the business entity submits a disclosure of interested parties statement to the governmental entity or state agency.[46] A contract does not require an action or vote by the governing body of a governmental entity or state agency if

- the governing body has legal authority to delegate to its staff the authority to execute the contract,
- the governing body has delegated to its staff the authority to execute the contract, and
- the governing body does not participate in the selection of the business entity with which the contract is entered into.[47]

A disclosure of interested parties statement is not required for the following contracts if entered into or amended on or after January 1, 2018:

- sponsored research contract of an institution of higher education;
- an interagency contract of a state agency or an institution of higher education;
- a contract related to health and human services if
  1. the value of the contract cannot be determined at the time the contract is executed and
  2. any qualified vendor is eligible for the contract;
- a contract with a publicly traded business entity, including a wholly owned subsidiary of the business entity;
- a contract with an electric utility, as that term is defined by Section 31.002 of the Utilities Code; or
- a contract with a gas utility, as that term is defined by Section 121.001 of the Utilities Code.[48]

For purposes of this disclosure requirement, an "interested party" means a person who has a controlling interest in a business entity with whom a governmental entity or state agency contracts or who actively participates in facilitating the contract or negotiating the terms of the contract, including a broker, intermediary, adviser, or attorney for the business entity.[49]

For contracts subject to this disclosure requirement, the business entity must submit the disclosure of interested parties on the form prescribed by the Texas Ethics Commission to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency.[50] The Form 1295 Certificate of Interested Parties is located on the Texas Ethics Commission website.[51] Not later than the 30th day after the date the governmental entity or state agency receives a disclosure of interested parties from the business entity, the governmental entity or state agency must log into the Texas Ethics Commission website to acknowledge receipt of the applicable business entity's disclosure statement.[52]

37 For purposes of this statute "state agency" includes an institution of higher education as defined by Section 61.003 of the Education Code and contracts of the Texas Department of Transportation that relate to highway construction or highway engineering. TEX. GOV'T CODE § 2262.004(d).

38 TEX. GOV'T CODE § 2262.001(4).

39 The term "purchasing personnel" means an employee of a state agency who makes decisions on behalf of the state agency or recommendations regarding (1) contract terms or conditions on a major contract, (2) who is to be awarded a major contract, (3) preparation of a solicitation for a major contract, or (4) evaluation of a bid or proposal. TEX. GOV'T CODE § 2262.004(a)(2).

40 TEX. GOV'T CODE § 2262.004(b).

41 TEX. GOV'T CODE § 2262.004(b).

42 The SAO website is located at www.sao.texas.gov.

43 The term "governmental entity" means a municipality, county, public school district, or special-purpose district or authority. TEX. GOV'T CODE § 2252.908(a)(2).

44 The term "state agency" means a board, commission, office, department, or other agency in the executive, judicial, or legislative branch of state government including an institution of higher education as defined by Section 61.003, Education Code. TEX. GOV'T CODE § 2252.908(a)(4).

45 The term "business entity" means any entity recognized by law through which business is conducted, including a sole proprietorship, partnership, or corporation. TEX. GOV'T CODE § 2252.908(a)(1).

46 TEX. GOV'T CODE § 2252.908(d).

47 1 TEX. ADMIN. CODE § 46.1(c).

48 TEX. GOV'T CODE § 2252.908(c).

49 TEX. GOV'T CODE § 2252.908(a)(3).

50 TEX. GOV'T CODE § 2252.908(d)-(e).

51 The Texas Ethics Commission website is located at www.ethics.state.tx.us.

52 TEX. GOV'T CODE § 2252.908(f).

Disclosure of Financial Interest in Consulting Services Contract

An officer or employee of a state agency shall report to the chief executive of the agency, not later than the 10th day after the date on which a private consultant submits an offer to provide consulting services to the agency, any financial interest that

- the officer or employee has in the private consultant who submitted the offer or
- an individual who is related to the officer or employee within the second degree by consanguinity or affinity, as determined under Chapter 573 of the Texas Government Code, has in the private consultant who submitted the offer.[53]

This reporting requirement applies to all consulting services contracts and renewals, amendments, and extensions of consulting services contracts.[54]

Disclosure of Consulting Services Contract with a Former State Employee

An individual who offers to provide consulting services to a state agency and who has been employed by that agency or by another agency at any time during the two years preceding the making of the offer shall disclose in the offer

- the nature of the previous employment with the agency or the other agency,
- the date the employment was terminated, and
- the annual rate of compensation for the employment at the time of its termination.[55]

A state agency that accepts an offer from a former state employee within the restricted time period shall include a statement about the individual's previous employment and the nature of the employment with notice of award for a major consulting services contract published in the *Texas Register* not later than the 20th day after the contract award.[56]

Disclosure by Outside Financial Advisor or Service Provider

Not later than April 15th of each year, a financial advisor or service provider described by Section 2263.004 of the Texas Government Code shall disclose certain relationships and direct or indirect pecuniary interests in writing, on a prescribed form, to the administrative head of the applicable state governmental entity and to the state auditor. The financial advisor or service provider shall disclose a relationship without regard to whether the relationship is a direct, indirect, personal, private, commercial, or business relationship.[57] The financial advisor or service provider shall promptly file a new or amended statement with the administrative head of the applicable state governmental entity and with the state auditor whenever there is new information to report.[58]

53 TEX. GOV'T CODE § 2254.032(a).
54 TEX. GOV'T CODE § 2254.032(b).
55 TEX. GOV'T CODE § 2254.033(a).
56 TEX. GOV'T CODE § 2254.033(b).
57 TEX. GOV'T CODE § 2263.005(b).
58 TEX. GOV'T CODE § 2263.005(e).

APPENDIX 4

Non-Disclosure and Conflict of Interest Certification for Contract Developers and Purchasers

[COMPTROLLER STATEWIDE PROCUREMENT EMPLOYEE] NON-DISCLOSURE AND CONFLICT OF INTEREST CERTIFICATION

Fiscal Year [2018] Certification

A special responsibility is imposed on all people who are entrusted with the disposition of the state's funds. The fiduciary nature of the purchasing function, particularly when expending public funds, makes it critical that all persons involved in the process remain independent, free of obligation or suspicion, and free from the perception of impropriety. Premature or unauthorized disclosure of information regarding a proposed solicitation irreparably harms the State's interests and may constitute a violation of Section 39.02 of the Texas Penal Code, the antitrust laws of the United States and the State of Texas, and/or the Texas Public Information Act (chapter 552, Texas Government Code). Credibility and public confidence are vital throughout the purchasing and contracting system. The appearance of impropriety can be as harmful as the conduct itself. It is with this in mind that the following certification is set forth.

I,_____, the undersigned hereby certify that I understand and agree to be bound by the commitments contained herein.

I participate in procurement processes for the [Agency Name].

I agree that I will not participate in any procurement process if I have, or if I am aware that any member of my immediate family has, an actual or potential financial interest, including employment or prospective employment, in a contract that may result from the procurement. The term "immediate family," as used in this Certification means: One's parents, wife or husband, children, brothers, and sisters, whether residing together or not.

I agree that I will not participate in any procurement process if I have, or if I am aware that any member of my immediate family has, an actual, potential, or perceived financial interest, including, but not limited to, employment or prospective employment, in a business or organization that may be a respondent (a respondent may be called a proposer, an offeror, a bidder or other like term) or a subcontractor to a respondent.

If, during any procurement process, I become aware of any actual, potential, or perceived conflict, I will immediately notify my Manager and the assigned legal counsel.

I agree that I will not solicit or accept anything of value from an actual or potential respondent. Should I receive a gift, whether solicited or unsolicited, from an actual or potential respondent or a current, potential, or previous vendor, I agree to follow the [Agency Name] policies regarding disposal of the gift.

When participating in procurement processes, I will act on my own accord and not act under duress. I will not participate in a procurement process if I am currently employed by, or if I am receiving any compensation from, or if I will be the recipient of any present or future economic opportunity, employment, gift, loan, gratuity, special discount, trip, favor, or service in return for favorable consideration of a respondent(s) during a procurement process. I will have no preconceived position on the relative merits of any of the responses, nor will I have established a personal preference or position on the worth or standing of any respondents participating in any procurement. Further, I will, to the utmost of my ability, ensure that the solicitation and the specifications provide all potential respondents an equal and fair opportunity to submit a proposal for evaluation, taking care to ensure that specifications and evaluations are not intended to favor any particular respondent, performing 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 agree not to disclose or otherwise divulge any information pertaining to a procurement process, including the contents, status, or ranking of any response, to anyone other than approved evaluators, purchasers, and management concerned with the procurement until the process is completed. The process is considered complete after award of the contract and resolution of any protests and litigation relating to the procurement. I understand the terms "disclose or otherwise divulge" to include but are not limited to, reproduction of any part or portion of any response, or removal of same from designated areas without prior authorization from the assigned legal counsel. I agree to perform any and all duties relating to the award process in an unbiased manner, to the best of my ability, and with the best interest of the State of Texas paramount in all decisions. A vendor or other member of the public who requests information relating to the solicitation process should be instructed to submit the request in writing, as an open records request, to the [Agency Name] Open Records division.

I will immediately inform both my management and the legal counsel assigned to my division if, at any time during the solicitation process, any of these statements are no longer true and correct.

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 my management and/or assigned legal counsel. **I have not made any changes or deletions on this form without informing my Manager and assigned legal counsel.**

Should I violate any of the conditions of this agreement, I understand that I may be subject to the agency's disciplinary policies as well as possible actions relating to any professional certifications or licenses that I may hold.

_____ _____

(Signature) (Date)

APPENDIX 5

SPD Programs and Online Systems

Programs

Statewide Procurement Policy and Outreach

The Statewide Procurement Policy and Outreach program consists of the Outreach team, the Training and Policy Development team, and the Procurement Oversight & Delegation team. This program conducts policy research, performs solicitation reviews, and approves delegation of purchasing authority for services. The Outreach team provides customer support for procurement inquiries including, but not limited to, questions regarding the Texas SmartBuy support and memberships, the Centralized Master Bidder's List, and Vendor Performance reporting. To contact the Outreach team, please call 512-463-3034, option #1, or email spd.outreach@cpa.texas.gov.

The Training and Policy Development team develops and administers the contract development and contract management training for certification of public procurement professionals. The team also provides continuing education courses required for maintenance of certifications. To contact the Training and Policy Development team, please call (512) 463-5355, or email ctp@cpa.texas.gov.

Statewide Contract Development

The Statewide Contract Development team develops statewide contracts for use by state agencies, institutions of higher education, and Texas SmartBuy Members for a broad range of goods and services. The Statewide Contract Development team is responsible for issuing and overseeing solicitations that will establish Term Contracts and contracts for non-delegated goods and services through competitive solicitation processes. In addition, TXMAS contracts are developed by the Statewide Contract Development team from contracts awarded by the federal government or another governmental entity of another state. To contact the Statewide Contract Development team, please call (512) 463-7985, or email open.market@cpa.texas.gov.

Statewide Contract Management Office

The Statewide Contract Management Office assists state agencies, institutions of higher education, Texas SmartBuy Members, contractors, and internal customers with day-to-day contract management, contract administration, reporting requirements, and vendor performance issues related to statewide contracts. To contact the SPD Contract Management Office, please call (512) 463-3034, or email spd.cmo@cpa.texas.gov.

Historically Underutilized Business Program

The Statewide Historically Underutilized Business (HUB) Program promotes full and equal business opportunities in an effort to remedy disparity in state procurement and contracting. The Statewide HUB Program collaborates with various minority and women business trade organizations and development centers to circulate information pertaining to the initiatives of the Statewide HUB Program. To contact the Statewide HUB Program, please call (512) 463-3377, or email StatewideHUBProgram@cpa.texas.gov.

Office of Vehicle Fleet Management

The Office of Vehicle Fleet Management (OVFM) is charged with the establishment and management of the state vehicle reporting system, a computerized database known as the Texas Fleet System (TXFS), to assist state agencies and institutions of higher education with the management of their fleet vehicles. The OVFM is also charged with the creation, publication and distribution of the biennial State of the Fleet Report. To contact the OVFM, please call (512) 936-8458, or email ovfm@cpa.texas.gov.

State Travel Management Program

The State Travel Management Program (STMP) provides contract travel services to state agencies, institutions of higher education, and travel-eligible Texas SmartBuy members including local governments, public school districts, charter schools and community colleges. These contracts help the State manage travel expenditures, monitor travel activity, and provide discounted travel services resulting in a more efficient use of taxpayer dollars. To contact the STMP, please call (512) 463-3435, or email STMP@cpa.texas.gov.

Statewide Mail Operations

Statewide Mail Operations provides state agencies and institutions of higher education a variety of mail operations services including delivery, collection and metering of United States Postal Service (USPS) domestic and international mail as well as delivery and collection of state warrants. The interagency mail service transports more than one million pieces of mail between state agencies annually, eliminating the need to pay postage for items delivered between state agency locations using this service. To contact Statewide Mail Operations, please call (512) 463-9520 or (512) 463-3440, or email spd.mailroom@cpa.texas.gov.

Online Systems

Electronic State Business Daily

The Electronic State Business Daily (ESBD) is an online application. The application is used for posting solicitations for the purpose of informing vendors of procurement opportunities and providing public notice of contract awards. Information on access to and use of the ESBD is found in the ESBD Guide. To contact the SPD Outreach team regarding issues or questions related to the ESBD, please call (512) 463-3034, or email esbdsupport@cpa.texas.gov.

Centralized Master Bidder's List

The Centralized Master Bidder's List (CMBL) is an online directory that provides public procurement professionals the ability to foster competition between vendors. The CMBL provides the ability to develop a mailing list of vendors, which may be tailored based on the products or services provided by the vendors and the specific district(s) the vendors serve. For assistance in registration or general questions regarding the CMBL, please contact the CMBL Help Desk at (512) 463-3459, or email e.cmbl@cpa.texas.gov.

Texas SmartBuy Online Ordering System

Texas SmartBuy is the State's central eProcurement system for non-IT goods and services. State agencies and other Texas SmartBuy members can search SPD contracts and place purchase orders through Texas SmartBuy. Local governments that wish to purchase from SPD contracts must first join the Texas SmartBuy Membership program. Information regarding Texas SmartBuy is located in the Texas SmartBuy Public User Guide. To contact the SPD Outreach team regarding questions related to Texas SmartBuy, please call (512) 936-2764, or email txsmartbuy@cpa.texas.gov.

Procurement Oversight & Delegation Portal

The Procurement Oversight & Delegation web portal is used by state agencies to submit

1. requests for SPD delegation authority for service contracts with an anticipated value of more than $100,000,
2. solicitations that have an anticipated value of $5 million or greater for CAT review, and
3. solicitations for major information resources projects that require QAT review.

To contact the Procurement Oversight & Delegation team, please call (512) 463-2410, or email spd.oversight@cpa.texas.gov.

Vendor Performance Tracking System

The Vendor Performance Tracking System (VPTS) provides the state procurement community with a comprehensive online tool for evaluating vendor performance to reduce risk in the contract award process. For information on vendor performance reporting, please see the VPTS User Guide. To contact the SPD Outreach team regarding questions related to the VPTS, please call (512) 463-3913, or email vendor.performance@cpa.texas.gov.

APPENDIX 6

Sample Acquisition Plan

ACQUISITION PLAN

Agency Name

[Solicitation Name]

Document Version: Revision Date:

Requested Contract Start Date:
Projected Award and Start Date:
Projected Contract Completion Date:
Projected Contract Closeout Date:

Contract Developer	
Name	Title/Division
Signature	Date
Executive Sponsor (if designated)	
Name	Title/Division
Signature	Date
Contract Manager	
Name	Title/Division
Signature	Date
End-User Division Director/Manager	
Name	Title/Division
Signature	Date
Project Manager	
Name	Title/Division
Signature	Date
Budget & Internal Accounting	
Name	Title
Signature	Date

(This is agency specific based on who the agency wants approving the Acquisition Plan)

Section 1. Solicitation Overview

1.1 Needs Assessment

(Describe the business reason(s) for initiating the solicitation, specifically stating the business problem.)

1.2 Justification of Solicitation Procurement Method

(Describe the reason for choosing IFB/RFP/RFO/RFQ/RFA.)

1.3 Contract Goals and Objectives

(Describe the business goals and objectives of the contract.)

1.4 Solicitation/Contract Scope of Work

(Describe the contract scope. The scope defines contract limits and identifies the products and/or services delivered under the contract. The scope establishes the boundaries of the contract and should describe products and/or services that are outside of the contract scope.)

Contract Includes:

Contract Excludes:

1.5 Critical Success Factors

(Describe the factors or characteristics that are deemed critical to the success of the contract, such that, in their absence the contract will fail.)

Critical Success Factors:

1.6 Assumptions

Assumptions:

1.7 Constraints

Constraints:

1.8 Potential Risks

(Identify potential risks related to the procurement/contract. Consider all major contract risks, including information security risks.)

Risk	Risk Details

1.9 Insurance and Bonds

(Check the box if proof of insurance or bond is to be provided, and then designate minimum amount of coverage.)

Required	Type of Insurance and/or Bond(s) To Be Provided	Minimum Amount of Coverage
☐	Commercial General Liability	
☐	EO/Professional Liability	
☐	Workers Comp/Employer Liability	
☐	Umbrella/Excess Insurance	
☐	Auto Insurance Liability	
☐	Crime/Employee Dishonesty	
☐	Cyber Liability	
☐	Performance Bond	
☐	Other Insurance/Bond	

Section 2. Internal Calendar of Events

(Examples of activities for an internal calendar of events are listed in the table below. The activities in the Internal Calendar of Events should be tailored to the specific procurement.)

Internal Calendar of Events		
Activity	**Planned Start Date**	**Estimated Completion**
Budget (approval/questions)		
Kick Off Meeting (Contract Developer, Contract Manager, End User)		
Draft Solicitation		
Agency Approvals for Solicitation Issuance		
CAT Review ≥ $5M SPD Delegation Review: Services > $100K SPD Delegation Review: Goods > $50K		
Solicitation Issued		
Pre-Bid/Offer/Proposal Conference		
Due Date for Written Questions		
Date of Issuance of Agency's Written Answers		
Due Date for Responses		
Internal Post Award Meeting		
Vendor Selection Evaluation Committee (RFP, RFO, RFQ) or Bid Tabulation (IFB)		
Negotiation (if permitted) and Contract Formation		
Contract Award		
Transition Meeting Between Contract Developer and Contract Manager		
Post Award Meeting with Contractor		
Project Schedule		
Contract End Date		

Section 3. Contract Organization Structure

3.1 Contract Administration Team

(Identify Contract Developer, Contract Manager, end-user, project manager, legal counsel, and any other person representing the agency contract team structure.)

Role	Resource Name
Contract Developer	
Contract Manager	
End-user	
Project Manager	
Legal Counsel	

3.2 Roles and Responsibilities Detail

(Examples of responsibilities for each role are listed in the table below. The responsibilities for each role should be tailored to the specific procurement.)

Role	Responsibility
Contract Developer	Perform the following activities, prior to contract execution: • receive and process requisitions, • assess need, • develop and review specifications, • develop and review scopes of work, • identify and select procurement method, • identify and prepare evaluation criteria, • prepare and advertise solicitation, • provide guidance to evaluation committee, • negotiate terms and conditions, and • prepare and complete contract award documents.

Role	Responsibility
Contract Manager	Participate with the procurement team in solicitation development and the review of contract documents. Serve as the primary point of contact for agency communication with the contractor regarding all matters pertaining to the contract. Manage any state property used in contract performance, *e.g.,* computers, telephones, identification badges. Implement a quality control and contract monitoring process. Monitor the contractor's progress and performance to ensure products and services procured conform to the contract requirements and keep timely records of findings. Consult with agency legal counsel in a timely manner to address any legal concerns and/or issues. Manage, approve, and document any changes to the contract through the amendment process authorized by the terms of the contract. Inspect and approve the products and/or services by submitting a written document accepting the deliverables or obtain documentation from end users responsible for receipt that inspection and approval have been completed. Verify accuracy of invoices and authorizing payments consistent with the contract terms. Monitor the contract budget to ensure sufficient funds are available throughout the terms of the contract. Identify and resolve disputes with the contractor in a timely manner. Exercise state remedies, as appropriate, when a contractor's performance is deficient. Maintain appropriate records in accordance with records retention policy. Confirm all products and/or services have been delivered and delivery is completed prior to the expiration date of the contract. Perform contract closeout processes by ensuring the contract file contains all necessary contract documentation, formal acceptance documented, vendor performance reported to VPTS, and document lessons learned.
End-user	Gather requirements and provide end-user support working closely with the Contract Developer and Contract Manager, as appropriate. Provide feedback to Contract Developer and Contract Manager and other procurement team members on process change suggestions.

Role	Responsibility
Project Manager	Manages the project following project management methodology as prescribed by the agency Project Management Office. Leads the planning and development of all project deliverables; actively monitors progress and quality of project tasks and deliverables. Identifies and resolves project problems and conflicts, escalating to the Contract Manager when necessary. Communicates project status, issues and risks to chain of command and the Contract Manager and recommends corrective action when necessary. Manages and coordinates project activities of all project team members.
Legal Counsel	Provide legal advice on solicitations, including an appropriate procurement method, and contract terms and conditions. Draft or assist Contract Developer in drafting the solicitation. Prepare other contract instruments to support or comprise part of a contract (*e.g.*, solicitation templates, other specialized t&cs). Negotiate terms and conditions and contract language, as needed. Draft and review contracts including the following: • Leases, • Licenses, • Loan agreements, • Grants, • Interagency agreements (IACs and MOUs), • Interlocal agreements, • Non-disclosure agreements (NDAs), • Consulting services agreements, • Legal services agreements (*e.g.*, outside counsel contracts, expert witness agreements), and • Professional services agreements.

Section 4. Specification Requirements

Deliverables

(Ask the end user what is being purchased, and break requirements up into functional categories in order to explore granular detail of each requirement. Add topics and rows as appropriate.)

(Topic #1)

1.0
1.1
1.2
1.3

(Topic #2)

2.0
2.1
2.2
2.3

(Topic #3)

3.0
3.1
3.2
3.3

Section 5. Special Terms and Conditions

(Define any special terms and conditions to be included in the contract that will influence the risk factor.)

Section 6. Payment Structure

(Describe the payment conditions (terms and schedule) that will fulfill the contract.)

6.1 Payment Terms

(Payment considerations include whether the pricing terms align with applicable industry standards and whether consideration for all possible costs associated with the purchase been taken into account.)

6.2 Payment Schedule

(The payment schedule specifies the period allowed an agency to pay the contractor, i.e., monthly payment schedule, or other similar provisions.)

Section 7. Documenting Files

(Provide the documenting techniques that will be used for the contract.)

Section 8. Change Control

(Describe the process to be used to modify the contract.)

Section 9. Contract Close-out

(List all contract close-out activities. To ensure a contract is completed every duty should be marked when complete.)

- ☐ 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 materials have been returned.
- ☐ All property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract.
- ☐ Final acceptance from the Project Manager has been received.
- ☐ Final payment has been made to the contractor.
- ☐ Contractor's performance reported to the Vendor Performance Tracking System (VPTS).

APPENDIX 7

Procurement Value Threshold Chart

To download full document, visit:

https://comptroller.texas.gov/purchasing/docs/procurement-requirements.pdf

PROCUREMENT REQUIREMENTS - VALUE THRESHOLDS | **CONTRACT CATEGORIES** Look for all categories in which your contract may fall | **ALL CONTRACT TYPES** | **IT SERVICES / COMMODITIES** | **NON-IT SERVICES / COMMODITIES** | **CONSTRUCTION, PROFESSIONAL SERVICES, AND CONSULTING SERVICES** | **CONSULTING SERVICES** | **TXMAS PURCHASES** | **SOLE SOURCE AND EMERGENCY PROCUREMENTS** | **MIRP CONTRACT AMENDMENT (IT)** | **HHSC CONTRACTS FOR ATTORNEY GENERAL REVIEW**

Advertising Requirements

$0

$1,000

- **ALL CONTRACT TYPES** | *GO TO - DIR*
  Solicitation requirements are waived for IT commodity procurements with a value of $1,000 or more but not more than $5M. An exemption is required to purchase IT commodities outside DIR contracts.[3]

$2,500

$5,000

$14,000

$15,000

- **CONSULTING SERVICES** | *GO TO - Texas Register*
  Consulting services solicitations valued at more than $15,000 must be posted to the Texas Register. Must comply with Texas Register posting requirements (minimum 30 days).[1]

$25,000

- **ALL CONTRACT TYPES** | *GO TO - ESBD (SPD)*
  Solicitations valued at more than $25,000 must be posted to the ESBD. For questions about minimum posting requirements, please contact the SPD.[2]

$50,000

$100,000

$1M

$5M

$10M

$250M

Delegation Requirements

- **IT COMMODITIES** | *GO TO - SPD*
  An open market requisition must be submitted to SPD to obtain delegation of purchasing authority for non-IT goods with a value of $50,000 or more.[3]
- **NON-IT SERVICES** | *GO TO - CATRAD (SPD)*
  Solicitations for non-IT services with a value of more than $100,000 must be submitted to the CATRAD program in SPD for review and delegation of purchasing authority if the agency does not otherwise have a statutory exemption from SPD's purchasing authority.[14]

Competitive Bidding Requirements

- **NON-IT SERVICES/COMMODITIES** | *GO TO - SPD Spot Purchase*
  Competitive bidding is not required for the purchase of non-IT goods or services valued at $5,000 or less.
- **NON-IT SERVICES/COMMODITIES** | *GOTO - SPD*
  Agencies must utilize the SPD approved Print Shop to competitively procure printing services estimated at $2,500 or more.[4]
- **NON-IT SERVICES/COMMODITIES** | *GO TO - CMBL/HUB (SPD)*
  Three informal bids from vendors on the CMBL must be obtained for purchases of commodities or non-IT services with a value of more than $5,000 but not more than $25,000.[5]
- **TXMAS PURCHASES** | *GO TO - TXMAS (SPD)*
  For TXMAS purchases in excess of $50,000 a request for pricing should be submitted to at least three vendors from a relevant category on the TXMAS Contract Schedule.[10]
- **IT COMMODITIES** | *GO TO - DIR*
  Agencies must submit a request for pricing to at least 3 vendors on a relevant category on DIR's cooperative contracts list or TXMAS list (depending on which the agency chooses) for the purchase of IT commodities with a value of more than $50,000 but not more than $1M.[13]
- **ALL SERVICES** | *GO TO - HUB (SPD)*
  For any solicitation with a value of $100,000 or more, agencies must consider whether there are probable subcontracting opportunities and if so, require a HUB subcontracting plan for vendor responses.[15]
- **IT COMMODITIES** | *GO TO - DIR*
  Agencies must submit a request for pricing to at least 6 vendors in a relevant category on DIR's cooperative contracts list or TXMAS list (depending on which the agency chooses) for the purchase of IT commodities with a value of more than $1M but not more than $5M.[13]
- **IT COMMODITIES** | *GO TO - SPD RFO Method*
  Agencies may not use DIR's cooperative contracts list or TXMAS list for the purchase of IT commodities with a value of more than $5M.[3]
- **MIRP CONTRACT AMENDMENT (IT)** | *GO TO - QAT*
  Any contract related to a Major Information Resources Project with a value of more than $10M must be submitted, signed only by the vendor, to the QAT for approval prior to final execution of contract.[24]
- **HHSC CONTRACTS FOR ATTORNEY GENERAL REVIEW**
  Any contract with a value of $250 million or more related to the provision of medical or health care services, coverage, or benefits must be reviewed by the OAG. Notification to the OAG is required when the agency begins the planning phase of the contract.[28]

Ethics & Oversight Review/Approval

- **IT SERVICES** | *GO TO - DIR*
  Statements of work for IT services valued at more than $50,000 must be submitted to DIR for approval and signature.[11]
- **IT SERVICES - MAJOR INFORMATION RESOURCE PROJECTS & ASSOCIATED CONTRACTS & AMENDMENTS** | *GO TO - QAT*
  IT projects a value of more than $1M may meet the criteria of a Major Information Resource Project, which must be submitted to the QAT for approval. Multiple contracts may or may not be associated with one project.[18]
  IT contract amendments associated with a MIRP must be submitted to QAT for approval if the amendment increases the value of the contract by 25% or more or increases the cost of an existing element in the initial contract by 10% or greater.[21]
- **ALL CONTRACT TYPES** | *GO TO - SAO*
  Agency purchasing personnel associated with a contract with a value of more than $1M must sign a SAO Nepotism Disclosure form prior to contract award.[7]
- **ALL CONTRACT TYPES** | *GO TO - Texas Ethics Commission*
  Agency purchasing personnel associated with a contract valued at $1M or more (by a vendor) until that vendor has filed a Form 1295 with the Texas Ethics Commission.[17]
- **ALL CONTRACT TYPES*** | *GO TO - CAT*
  Solicitations for services with an anticipated value of $5M or more must be submitted to the CAT-RAD program in SPD. *Very limited exceptions to this requirement exist. When in doubt, please contact the CAT-RAD program in SPD.

Sole Source and Emergency Procurements

- **CONSTRUCTION, PROFESSIONAL SERVICES, AND CONSULTING SERVICES** | *GO TO - LBB*
  No later than 10 days after entering into one of these contracts, valued at more than $14,000, the contract information, along with the contract itself and associated solicitation documents unless otherwise exempted, must be posted to the LBB website.[1]
- **ALL CONTRACT TYPES** | *GO TO - LBB*
  No later than 30 days of contract award, information on any contract, along with the contract itself and associated solicitation documents unless otherwise exempted, that exceeds $50,000 must be posted to the LBB website.[1]
- **ALL CONTRACT TYPES** | *GO TO - Agency Website*
  For agencies (other than higher ed) that receive appropriations of at least $175M, a listing and description of all vendor contracts with a value more than $100,000 must be posted on the agency's website.[1]
- **IT COMMODITIES** | *GO TO - LBB*
  No later than 10 days after entering into a contract for IT commodities or services with a value of more than $100,000, the contract information, along with the contract itself and associated solicitation documents unless otherwise exempted, must be posted to the LBB website.[17]
- **SOLE SOURCE AND EMERGENCY PROCUREMENTS**
  Prior to the date on which first payment will be made but no later than 30 days of contract award or, for an emergency purchase, within 48 hours of making a payment, information on any emergency or sole source contract that exceeds $1M must be posted to the LBB website, along with the contract itself, attestation letter and solicitation documents.[2]

Posting Requirements (Post-Execution of Contract)

- **ALL CONTRACT TYPES** | *GO TO - Agency Website*
  No later than 30 days after entering into a contract with a private vendor for the purchase of goods and services, the contract and solicitation must be posted to the agency's website if it is not already posted to the LBB under another requirement.[1]
- **ALL CONTRACT TYPES** | *GO TO - LBB*
  No later than 30 days of contract award, information on any contract, along with the contract itself and associated solicitation documents unless otherwise exempted, that exceeds $50,000 must be posted to the LBB website.[1]
- **ALL CONTRACT TYPES** | *GO TO - LBB*
  Prior to the date on which first payment will be made but no later than 30 days of contract award or, for an emergency purchase, within 48 hours of making a payment, information on any contract that exceeds $10M must be posted to the LBB website, along with the contract itself, attestation letter and solicitation documents.[27]

Foot notes on reverse side

Glenn Hegar | Texas Comptroller of Public Accounts

APPENDIX 8

Sample Procurement File Checklist

SOLICITATION NO. _____	☐ Contract Developer (CTCD) ☐ Purchaser (non-CTCD) _____

SOLICITATION DOCUMENTATION	N/A	Included
Draft/Initial solicitation documentation – All Parts/Attachments/Exhibits		☐
Stakeholder Meeting Documentation (*e.g.,* Needs Assessment, Cost Estimate, Acquisition Plan)	☐	☐
Requisition	☐	☐
HUB Coordinator Review of Subcontracting Opportunities	☐	☐
Proprietary Purchase Justification	☐	☐
Emergency Justification	☐	☐
External Approvals Obtained (including evidence of agency request and receipt of approval) ☐CAT approval for contract ≥ $5M, ☐QAT approval of MIRP contract > $1M ☐SPD Review/Delegation Letter, ☐DIR approval of SOW PR with value > $50,000, ☐DIR Exemption from use of DIR Cooperative Contracts for IT commodity items, ☐DIR/LBB approval not to use DCS services, ☐Governor Finding of Fact, ☐SAO delegation to obtain audit services, ☐OAG approval to retain outside counsel services, ☐Other: _____	☐	☐
If CAT approval received, either (1) comply with recommendations or (2) submit written explanation regarding why the recommendation is not applicable to the procurement.	☐	☐
Final Solicitation (including all parts/attachments/exhibits)	☐	☐
Final Bidder List (dated CMBL Listing – Extracted from CMBL using NIGP Class/Item Codes and, if applicable, agency head or designee approval of supplements to Bidder List)	☐	☐
Internal Approval to Issue Solicitation	☐	☐
ESBD Posting (including dated ESBD printout of posting and/or ESBD Generated E-mail Notification of Confirmation of Posting)	☐	☐
Solicitation Announcement issued to all vendors on Final Bid List. (Email printout)	☐	☐
Texas Register Publication (including dated Texas Register printout and/or Texas Register Email Notification of Confirmation of Publication).	☐	☐
Solicitation Issuance via email (*e.g.,* informal bidding) (including evidence of issuance to Bidder List)	☐	☐
Pre-Proposal Conference Agenda and Sign-in Sheet (including dated ESBD printout of posting and/or ESBD Generated E-mail Notification of Confirmation of Posting) ☐Voluntary, ☐Mandatory	☐	☐
Copies of Questions from Potential Respondents (including proof of timely receipt)	☐	☐
Question and Answer Document Issued (including evidence of issuance *e.g.,* ESBD printout of posting and/or ESBD Generated E-mail Notification of Confirmation of ESBD Posting)	☐	☐
Solicitation Addenda Issued (all parts/attachments/exhibits including evidence of issuance *e.g.,* ESBD printout of each posting and/or each ESBD Generated E-mail Notification of Confirmation of Posting) Addenda: ☐1, ☐2, ☐3, ☐4, ☐5	☐	☐
Scoring Matrix finalized		☐
Evaluation Committee Members selected	☐	☐

EVALUATION DOCUMENTATION	N/A	Included
Copies of Responses (including proof of timely receipt)		☐
Administrative Review Documentation for each Response (*i.e.,* responsiveness screening tracking sheet for each response)		☐
HUB Coordinator Review of HSP for each Response (including evidence of approval/disapproval)	☐	☐
Vendor Performance Report or screen shot showing "no results found" for each Respondent		☐
Signed Non-Disclosure and Conflict of Interest Statement from each Evaluation Committee Member and, if applicable, Technical Advisor	☐	☐
Evaluation Committee Meeting Documentation (including agenda, guidelines)	☐	☐
Copy of Clarification Questions Issued to Respondent(s) (including evidence of issuance)	☐	☐
Copy of Answers Received from Respondent(s) to Agency's Clarification Questions (including evidence of receipt)	☐	☐
Copy of Oral Presentation Agenda and Sign-in Sheet	☐	☐
Copy of each Presenter's Oral Presentation Documents	☐	☐
All Completed Evaluation Committee Member Score Sheets (score sheets from all scoring committee members for all scoring rounds) Scoring Round: ☐1, ☐2, ☐3	☐	☐
Bid Tabulation or Master Evaluation Score Sheet (completed)		☐
Quality control review performed on Bid Tabulation or Master Evaluation Score Sheet		☐
Internal Approval for ☐Tentative Contract Award, ☐Cancellation of Solicitation		☐
CONTRACT AWARD DOCUMENTATION	**N/A**	**Included**
Updated/Revised Solicitation Documents following negotiations ☐BAFO, ☐HSP, ☐Insurance, ☐Other: _____	☐	☐
External Approvals Obtained (including evidence of agency request and receipt of approval) ☐QAT (MIRP contract > $10M), ☐DIR (SOW > $50,000), ☐OAG approval of outside counsel services contract; ☐Other: _____	☐	☐
Agency Verification of Best Value Standards (refer to 34 TAC § 20.217(a))		☐
Required Agency Approval and Signature of Contract > $1M (refer to TEX GOV'T CODE § 2261.254(c)-(d))	☐	☐
Required Agency Verification of Compliance of Procurement with State Law and Agency Policy and Notification of Potential Issues for Contract > $5M (refer to TEX GOV'T CODE § 2261.255)	☐	☐
Signed Conflict of Interest Disclosure Statement for Procurement and Contract Management Employees for PO > $25,000 (TEX GOV'T CODE § 2261.252(a))	☐	☐
Signed SAO Nepotism Disclosure Form for Agency Personnel for Contract ≥ $1M	☐	☐
Vendor signed Texas Ethics Commission Form 1295 for Contract ≥ $1M	☐	☐
CPA Debarred Vendor List Check		☐
SAM Check of Vendor		☐
Iran, Sudan & Foreign Terrorist Organization Check of the TTSTC Divestment Statutes Lists		☐
Boycott Israel Check of the TTSTC Divestment Statutes Lists		☐
Warrant Hold Status Check		☐
Franchise Tax Status Check		☐
Signed Contract	☐	☐
Purchase Order		☐
Notice of Award (including evidence of issuance) ☐ESBD, ☐Texas Register, ☐Email Notification to Bidder List (*e.g.,* informal bidding) ☐QAT (MIRP contract > $10M), ☐LBB contract reporting, ☐Other: _____	☐	☐
Notice of Cancellation of Solicitation (including evidence of issuance) ☐ESBD, ☐Texas Register, ☐Email Notification to Bidder List (*e.g.,* informal bidding) ☐QAT, ☐Other: _____	☐	☐

APPENDIX 9

Proprietary Purchase Justification Template

PROPRIETARY PURCHASE JUSTIFICATION

(TEX. GOV'T CODE § 2155.067)

Texas Comptroller of Public Accounts
Attn: Statewide Procurement Division
P.O. Box 13186
Austin, Texas 78711-3186

Re: Proprietary Purchase Justification for **insert:** NIGP commodity code/general item description

The Propriety Purchase Justification must include the following information in order to document best value to the State:

(1) describe the product or service the agency proposes to purchase, and provide a statement regarding the agency's business need and planned use;

(2) explain why the agency specifications for the product or service are written as they are, and why those specifications are necessary to accomplish the agency's goal for the procurement;

(3) state the reason that no other competing products or services will satisfy the need of the agency and provide examples of the technical, practical, or operational risks that would occur if competing products or services are selected; and

(4) specify whether the purchase is sole source or competitive.

NOTE: The signature of the Executive Head or Presiding Officer of a state agency (or designee) is required. If anyone other than the Executive Director or Presiding Officer of the agency will sign the submission, the agency must have the appropriate signed delegation available, and must promptly provide that delegation letter upon request to SPD.

APPENDIX 10

Federal and State Surplus Property Programs Procedures

Acquisition and Disposal of Surplus Property

Before making a procurement of any kind, an agency should ensure that it cannot first fulfill the business need by using the State and Federal Surplus Property Programs. The Texas Facilities Commission (TFC) is charged with administering the State and Federal Surplus Property Programs. TFC's Surplus Property Program has three locations in Texas – Austin, Fort Worth, and San Antonio. TFC's State surplus property is located at its Austin location, whereas the Federal property is located at the Fort Worth and San Antonio warehouses.

Both the state and federal programs serve the purpose of transferring surplus government property to state agencies. However, the federal and state programs differ in their relationship with state agencies. The State Surplus Property Program offers state agencies assistance with the acquisition and disposal of state agency surplus property, while the Federal Surplus Property Program offers state agencies the opportunity to acquire federal agency surplus property. State agencies must use TFC for the disposal of surplus and salvage state agency property unless exempted.[1] Participation in the Federal Program is encouraged to ensure best value to the state, but is not specifically mandated by law. For more information, please visit http://tfc.state.tx.us/surplus.

The best way to avoid wasteful spending is to transfer surplus or unwanted property to another organization. Acquisitions from the surplus property program are exempt from competitive bidding requirements.[2] If an item is available in Surplus Property, then it may be possible to fulfill the need of the end user without the need to purchase an item from a third party. During the property disposal process, state agency purchasers, asset managers, and contract managers should be aware of potential waste, fraud and theft. Due to improper disposal, an agency could miss out on significant revenue from the sale of surplus and salvage property. The following section will cover the acquisition process and also some key factors in disposal process.

State Surplus Property Program

There are two methods to acquire State Surplus Property – via transfer directly from the surplus agency, or from public sales at the Austin storefront. State agencies are highly encouraged to take advantage of the Transfer Process (method #1), particularly for vehicles and other high dollar items.

(1) Transfer from State Agency

- State agencies are required to post all surplus and salvage property on TFC's website[3] for 10 business days. During the posting period, state property is available for transfer to state agencies, political subdivisions, and TFC-approved assistance organizations.[4]
- Using this method, the requesting agency picks up the property from the surplus agency. TFC does not need to approve interagency transfers; however, TFC must approve the price for all transfers to political subdivisions.
- Keep in mind that property is available for a limited amount of time. Requests for property must be received within the 10 business day posting period to take advantage of this method.
- Examples of items commonly available for transfer include office furniture and equipment, vehicles, heavy equipment, trailers, and computer equipment.

(2) From the TFC Storefront (Public Sales)

- After the transfer period ends, the property is then offered for sale to the public through the TFC Storefront in Austin, or through online auction. The price will be closer to fair market value, therefore state agencies are encouraged to utilize the transfer method described above in the interest of conserving state resources.

1 TEX. GOV'T CODE § 2175.
2 TEX. GOV'T CODE § 771.003.
3 http://tfc.state.tx.us/divisions/supportserv/prog/statesurplus/political-subdivisions-and-non-profits/property-available-for-transfer.html.
4 TEX. GOV'T CODE § 2175.001.

- The property available at TFC's State Surplus Storefront comes from two sources: State agencies and the Transportation Security Administration (TSA). The TSA turns over abandoned and willfully surrendered property collected at Texas airports to TFC, and in turn, TFC sells it to the public from their storefront in east Austin. The airport property, however, is not available for transfer, only for sale.
  - The general public, including state agencies may purchase items from the Austin Storefront. TFC's Austin Storefront offers a variety of items, including cars, trucks, SUVs, office equipment, supplies, and furniture.
  - State agency property (priced at $200 or less) is available to state agencies for transfer at no cost. This does not apply to TSA property, or property for personal use.
  - Online auctions are conducted as-needed for specialty items and property located outside of the Austin area. TFC does not recommend agencies use this method to purchase property.

How to Dispose of State Surplus and Salvage Property

TFC is responsible for overseeing the advertisement and disposal of all state agency surplus and salvage personal property (regardless of initial or current value), including:

- Scrap metal, recycling (except paper),
- Vehicles, including wrecked/salvage,
- Modular furniture (cubicles),
- Office furniture and equipment,
- Computer peripherals and other electronics, and
- Computers.

This policy applies to capitalized, controlled, and non-capitalized assets. If an agency thinks an item may not have significant value, it does not exempt the agency from statutory requirement to go through TFC.[5] Unless a state agency has specific legal authority or written delegated authority from TFC, then the agency may not dispose of surplus or salvage property without

- advertising it for transfer, and
- contacting TFC to determine the final disposal or sale method. TFC monitors state property disposal records and may report violations to the Legislative Budget Board.

To initiate the disposal process, state agencies are required to post all surplus and salvage property on TFC's website[6] for 10 business days (also called the "advertisement period"). During the advertisement period, state property is available for transfer to state agencies, political subdivisions, and TFC-approved assistance organizations.[7] Requests from state agencies have priority over all other organizations; however, if no state agency requests the property, the first organization requesting the property and agreeing to the price is entitled to it.

For transfers to political subdivisions and TFC-approved assistance organizations during the 10 business day-advertisement period:

- TFC, in conjunction with the owning agency, determines the price, if any, for each item;
- agencies are responsible for verifying an assistance organization's eligibility by obtaining a copy of the organizations TFC-issued approval letter which includes a list of property that the organization has been approved to request; and
- for transfers to political subdivisions and assistance organizations, a TFC Certificate of Acquisition form must also be completed, signed, and forwarded to TFC.

If the property has not been transferred during the advertisement period, an agency may contact TFC for final disposal instructions once the item falls off TFC's advertisement website. At this point, there are three options:

- Sell from TFC warehouse;
- Auction in place; or

[5] TEX. GOV'T CODE § 2175, SubCh. F.
[6] http://tfc.state.tx.us/divisions/supportserv/prog/statesurplus/political-subdivisions-and-non-profits/property-available-for-transfer.html.
[7] TEX. GOV'T CODE § 2175.001.

- TFC-authorized donation in lieu of abandonment.

If TFC cannot otherwise sell or dispose of the property, or has determined that the property has no resale value, then the property may be destroyed as worthless salvage.

Contact TFC's State Surplus Property Program to dispose of property:

- For items to be dropped off at Austin Warehouse, complete a TFC Bill of Lading, and submit to storefront.surplus@tfc.state.tx.us.
- NOTE: San Antonio and Fort Worth Warehouses will not accept State property.
- For items to be auctioned in place, complete a TFC Auction Request Form, and submit to auctions@tfc.state.tx.us.
- State agencies and political subdivisions (*i.e.,* cities, counties, school districts, and state institutions of higher education) that are interested in sending data processing equipment to a TCI computer recovery facility can contact the nearest computer recovery facility. TFC will accept peripherals (monitors, mice, keyboards, printers), but cannot accept CPUs, tablets or laptops.

For more information, including all State Agency Forms, please visit the TFC website: http://tfc.state.tx.us/SSP. The State Surplus Property Program can be reached at (512) 463-1990 or storefront.surplus@tfc.state.tx.us.

Federal Surplus Property Program

The Federal Surplus Property Program offers state agencies the opportunity to obtain surplus federal government property at pennies on the dollar (when comparing TFC's fees to the original value of the property). TFC has a standing inventory of thousands of items at its San Antonio and Fort Worth Warehouses. If an agency cannot find what it needs in TFC's inventory, then TFC's Federal Program will accept a request, and notify the agency if/when that item is available. Purchasing from this program is exempt from the typical requirements to obtain bids and post solicitations.[8]

TFC's Federal Surplus Property Program manages the disposition of surplus property donated to the state by federal programs. TFC's Federal Surplus Property Program requests, warehouses, and transfers surplus federal government equipment to eligible organizations in Texas. TFC certifies organizations as eligible under federal management regulations to receive and use the property. All state agencies are eligible, however, agencies must have an active account to be able to obtain property. Private citizens and the general public may not participate in this program.

The program is not funded by the Legislature, but is supported by the revenues generated from handling fees. This means that the cost of maintaining the staff and facilities are passed on to the program participants in the form of the handling fee. Handling fees will vary according to condition of the item and demand, but are usually significantly lower than the cost of comparable items on the open market. The difference in value is considered a "donation" from the federal government; hence, participants in the program are referred to as "donee." As a recipient of surplus property under the Federal Surplus Property Program, the agency is considered a sub-recipient of federal financial assistance. The fair market value of property received must be reported as part of the Schedule of Expenditures of Federal Awards in an agency's Annual Financial Report. Property received through this program are subject to federal handling and use restrictions including the requirement that the recipient organization keep and use the property for a certain amount of time (usually 12-18 months) before disposing of it. Payment for handling fees may be made by an Interagency Transfer Voucher (ITV).

For questions about the Federal Surplus Property Program, please contact TFC at 512-463-2688 or federal.surplus@tfc.state.tx.us.

TFCs Federal Surplus Warehouses are located in San Antonio and Fort Worth. For complete details, including a link to complete inventory, warehouse contact information, and forms, please visit: http://tfc.state.tx.us/FSP.

[8] TEX. GOV'T CODE § 771.003.

APPENDIX 11

Sample State of Texas Disaster Declaration

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, GREG ABBOTT, Governor of the State of Texas, do hereby certify that Tropical Depression Harvey poses a threat of imminent disaster, including severe flooding, storm surge and damaging winds, in the counties of Aransas, Austin, Bee, Calhoun, Chambers, Colorado, Brazoria, DeWitt, Fayette, Fort Bend, Galveston, Goliad, Gonzales, Harris, Jackson, Jefferson, Jim Wells, Karnes, Kleberg, Lavaca, Liberty, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Waller, Wharton, and Wilson, beginning August 23, 2017.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in the previously listed counties based on the existence of such threat.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 23rd day of August, 2017.

GREG ABBOTT
Governor

ATTESTED BY:

ROLANDO B. PABLOS
Secretary of State

FILED IN THE OFFICE OF THE SECRETARY OF STATE
4pm O'CLOCK
AUG 23 2017

APPENDIX 12

Sample Evaluation Criteria and Scoring Strategies

Example 1: Weighted Scores, Scoring Scale, and Price Formula

RFP Solicitation	
Evaluation Criteria	**Weight**
Respondent's Past Performance, Qualifications, and Experience	20%
Respondent's Proposed Plan for Providing Services	40%
Price	40%
Total:	**100%**

Possible Scoring Strategy			
PRICE EVALUATION CRITERION	**Use a mathematical formula to determine the weighted price score.**		
Price of Lowest Response **Price of Response Being Evaluated x Maximum No. of Available Points* = Weighted Price Score**** *Number of Points Assigned corresponds to the numerical percentage assigned to the criterion. **Do not round.			
NON-PRICE EVALUATION CRITERIA	**Evaluators assign a raw score for each criterion using a 100 point scoring scale. The cumulative score is determined by converting the raw score for each criterion into a weighted score using the using the applicable weighted percentage.**		
DESCRIPTION OF CRITERIA	**RAW SCORE (0-100 PTS)**	**WEIGHT**	**WEIGHTED SCORE**
Respondent's Past Performance, Qualifications, and Experience		20%	
Respondent's Proposed Plan for Providing Services		40%	
Total Weighted Points:			

SCORING SCALE – Past Performance, Qualifications, and Experience		
Score	**Rating**	**Definition**
90-100	**Excellent**	Respondent demonstrates a broad range of relevant experience and completed projects within the last three (3) years of similar scale and complexity with at least one (1) completed contract of larger scale and complexity.
80-89	**Good**	Respondent demonstrates a broad range of relevant experience and completed projects of similar scale and complexity within the last 3 years.
70-79	**Satisfactory**	Respondent demonstrates relevant experience and completed projects of similar scale and complexity within the last 3 years.
50-69	**Marginal**	Respondent demonstrates marginal experience and completed projects of similar or smaller scale and complexity within the last 3 years.

1-49	**Unsatisfactory**	Respondent demonstrates limited experience. Bidder has either not completed any relevant projects within the last 3 years or completed projects were of smaller scale and complexity.
0	**Unacceptable**	Response does not address requirement.
SCORING SCALE – Proposed Plan for Providing Services		
Score	**Rating**	**Definition**
90-100	**Excellent**	Response demonstrates excellent understanding of the requirements. Response clearly details how provided services will significantly exceed all specified requirements.
80-89	**Good**	Response clearly demonstrates an understanding of the requirements. Response exceeds, to varying degrees, one or more specified requirements.
70-79	**Satisfactory**	Response demonstrates an understanding of the requirements. Response satisfies the identified requirements in an adequate manner.
50-69	**Marginal**	Response demonstrates only a limited understanding of the requirements. Response has deficiencies, to varying degrees, of one or more specified requirements.
1-49	**Unsatisfactory**	Response does not demonstrate an understanding of the requirements. Response contains significant deviations from one or more key requirements.
0	**Unacceptable**	Response does not address the requirements or response does not meet the minimum requirements.

Example Score Sheet

Evaluation Criteria	Weight	Bidder 1		Bidder 2	
		Raw Data	*Weighted Score*	Raw Data	*Weighted Score*
Respondent's Past Performance, Qualifications, and Experience	20%	80	*16*	100	*20*
Respondent's Proposed Plan for Providing Services	40%	80	*32*	50	*20*
Price	40%	$75	*26*	$50	*40*
Total:	**100%**		*74*		*80*

Example 2: Subcriteria, Maximum Available Points Allocation, Reasonableness of Price

RFO Solicitation	
Evaluation Criteria	**Weight**
Respondent's Past Performance, Qualifications, and Experience	35%
Respondent's Proposed Plan for Providing Services	35%
Reasonableness of Price	30%
Total:	**100%**

Possible Scoring Strategy				
Evaluation Criteria		**Points are assigned to each criterion equal to the weight percentage advertised in the solicitation. Evaluators assign a score within maximum range of points allocated for the criterion.**		
Description of Criteria		**Weight**	**Maximum Possible Points**	**Assigned Points**
Respondent's Past Performance, Qualifications, and Experience		35	35	
Subcriteria	1. Respondent's Past Performance	*(10)*	*(10)*	
	2. Respondent's Overall Experience & Qualifications	*(10)*	*(10)*	
	3. Qualifications & Experience of Respondent's Proposed Personnel	*(15)*	*(15)*	
Respondent's Proposed Plan for Providing Services		35	35	
Reasonableness of Price		30	30	
Total:		**100**	**100**	

Example Score Sheet					
Evaluation Criteria		**Weight**	**Maximum Possible Points**	**Assigned Points**	
				Respondent 1	**Respondent 2**
Respondent's Past Performance, Qualifications, and Experience		35	35	29	29
Subcriteria	1. Respondent's Past Performance	*(10)*	*(10)*	*8*	*8*
	2. Respondent's Overall Experience & Qualifications	*(10)*	*(10)*	*9*	*8*
	3. Qualifications & Experience of Respondent's Proposed Personnel	*(15)*	*(15)*	*12*	*13*
Respondent's Proposed Plan for Providing Services		35	35	32	30
Reasonableness of Price		30	30	20	27
Total:		**100**	**100**	**81**	**86**

APPENDIX 13

Solicitation Announcement Example

SOLICITATION ANNOUNCEMENT

TO: Interested Parties

FROM: Contract Developer Name, Agency Name

RE: Title of Solicitation and Solicitation No.

DATE:

This is an official notification that [Agency Name], an agency of the State of Texas, has issued a Request for Proposals No. ____ ("RFP") for [Title of Solicitation]. Please promptly review the RFP posted on the *Electronic State Business Daily* ("ESBD") for general information regarding the solicitation and key deadlines applicable to respondents and responses.

To reduce costs, [Agency Name] will mail a hard copy of the solicitation only to those requesting a copy. To request a copy, an *authorized representative* must complete, sign below, and return via email to:

Contract Developer Name

Re: RFP No. _____

Email: _____

Telephone requests will not be accepted. [Agency Name] will not mail copies to parties that do not complete, sign, and return this form as instructed in this notice. [Agency Name] is not responsible for solicitations lost in the mail or delivered after the closing date and time for submission. This notice does not obligate [Agency Name] to award any contracts as a result of the solicitation.

☒ I understand that the complete solicitation is available electronically on the following website: http://www.txsmartbuy.com/sp.

☒ I request that [Agency Name] mail a copy of RFP No. _____, as follows:

Name of Individual or Entity	
Address (include city, state, zip)	
Point of Contact:	
Telephone Number:	
Email Address:	

APPENDIX 14

Pre-Bid/Offer/Proposal Conference Guidelines

Solicitation Content. If a pre-bid/offer/proposal is conducted by the agency, the solicitation must include the following:

- Date and time of the conference. The date must allow sufficient time for respondents to receive and review the solicitation prior to the conference. Typically, this is at least 10 days after the solicitation is published.
- Exact physical location (address and room number) of the conference.
- If attendance at the conference is mandatory, then the following statement must be included in the solicitation: "Failure to attend the pre-bid/offer/proposal conference will result in disqualification of the response."
- Agency point of contact information for scheduling site visit appointments, if applicable.

Pre-Conference Activities. Prior to the conference, the Contract Developer typically

- finalizes the conference agenda;
- prepares the conference sign-in sheet; and
- schedules a meeting with the agency staff that will attend the conference so the team may review, at a high level, the published solicitation documents, the conference agenda, and the conference protocol.

Conference Activities. A typical agenda for a pre-bid/offer/proposal conference is as follows:

- **Opening** – The Contract Developer provides opening remarks which include the Solicitation Title and Number and the purpose for the conference. The Contract Developer's administrative announcements may also include the following:
  - Provide notification if the conference is being recorded.
  - Advise attendees to turn cell phone alerts off or to vibrate.
  - Remind attendees to sign the sign-in sheet at commencement of the conference, especially if conference is mandatory.
  - Inform attendees that answers will be given to questions raised at the conference whenever possible; however, any answer that changes or affects the solicitation will be reviewed and published in an addendum. Vendors may not rely on verbal answers that differ from solicitation requirements.
- **Introduction** – Contract Developer introduces agency representatives and explains their roles in the procurement. Depending on number of vendors attending the conference, the Contract Developer may ask that attendees introduce themselves and identify the company they are representing. If the conference is mandatory, the Contract Developer will collect sign-in sheets prior to the solicitation overview/review phase of the conference and, if applicable, site visit.
- **Solicitation Overview/Review** – The solicitation 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. Site inspections may be conducted prior to or after the solicitation review, depending on the circumstances, but prior to close of the conference. If site inspections are conducted, all attendees should return to conference room and be permitted to ask any questions that relate to the site inspection. The Contract Developer will take notes of any addendum items and significant discussions.
- **Closing Summary** – The Contract Developer confirms the changes, if any, that are being considered by the agency and summarizes any unanswered questions to be addressed by the agency at a later date. Attendees should be reminded that no verbal changes to the solicitation are binding on the agency; all changes to the solicitation must be in the form of a written addendum to the solicitation.

Post-Conference Activities. After the conference, the Contract Developer typically performs the following tasks:

- Prior to the end of the conference, if practical, make copies of the sign-in sheet for the attendees;
- Determine whether the response due date should be extended based on questions raised during the conference;
- Prepare the question and answer document and, if applicable, the solicitation addendum with input from the program staff; and
- Maintain any conference minutes (may or may not be transcribed) or notes in the procurement file.

APPENDIX 15

Sample Q&A

Title of Solicitation

Solicitation Number

Official Responses to Questions From Potential Respondents

[Date posted/issued]

1. **Is this a follow-on contract? Is there an incumbent company providing these services? If so, could you tell us their name?**

   Response: An incumbent company is not currently providing the requested services.

2. **I was wondering if a pre-bid meeting has been arranged for this opportunity? If so, could you give me some details on it, so we could try and attend.**

   Response: A pre-proposal conference will not be held for this RFP. Refer to the Anticipated Schedule of Events on page 1 of the RFP.

3. **The numbering of requirements on page 25 goes from D.4.5.3 to D.4.5.5. Is it the State's intent to skip D.4.5.4 or is there a requirement missing?**

   Response: There was a formatting error on page 25 of the RFP; no requirements are missing.

4. **What is the name of the current vendor?**

   Response: Refer to the response to Question No. 1.

5. **Is there a page limit for the vendor's offer?**

   Response: No; there is not a designated maximum page limit for a proposal submitted in response to this RFP. However, Section III, Part 3.1 (Introduction) of the RFP states that conciseness and clarity of content in proposals are required; vague and general proposals may be considered non-responsive, and may result in disqualification.

6. **My company, [Company Name], is a Texas HUB certified vendor. Do I have to submit the HSP?**

   Response: Yes.

7. **Will the State consider an extension of the due date to provide greater participation by more vendors?**

   Response: Refer to Addendum No. 1.

APPENDIX 16

Sample Solicitation Addendum

Title of Solicitation
Solicitation Number
Addendum No. 1
[Date posted/issued]

The solicitation is amended as follows:

1. Section I, Item Number 7 (Deadline for Offers) is deleted and replaced with the following:

   7. Deadline for Offers: In Issuing Office No Later Than: Month/Day/Year; 2:00 p.m., Central Time.

2. Section II, Part D (Key Personnel) is amended by adding the following as new Paragraph 5.

   (5) Successful Respondent, at the request of the Agency Project Manager, shall cooperate in all reasonable respects with contractors retained by Agency in connection with the Services, and any other Agency-designated entities which are associated with the Services provided under the contract.

3. The last sentence in the first paragraph of Part P (Timeline) of Section II is deleted in its entirety.

Acknowledgement of Receipt of Addendum No. 1:

Respondent/Entity Name: _____

Signature of Authorized Representative: _____

Printed Name, Title: _____

Date: _____

Respondent should sign and return this acknowledgement with its response or otherwise acknowledge Addendum Number 1 in its response.

APPENDIX 17

Sample Administrative Review Checklist

Administrative Review Checklist	Respondent Name	Respondent Name	Respondent Name	Respondent Name	Respondent Name	Respondent Name
Response Received by Deadline	Y	Y	Y	Y	Y	N
Required Original and No. of Hard Copies Provided	Y	Y	Y	Y	Y	N/A*
Execution of Offer Signed	Y	Y	Y	Y	N	N/A*
HSP Completed and Signed	Y	Y	Y	Y	N	N/A*
HSP approved by HUB Coordinator	Y	Y	Y	Y	N	N/A*
Response Valid for 90 Days	Y	Y	Y	Y	Y	N/A*
Respondent Questionnaire (description of offered goods/services, etc.) Completed	Y	Y	Y	Y	Y	N/A*
Three References Provided	Y	Y	Y	Y	Y	N/A*
Mandatory Price Sheet Completed	Y	Y	Y	Y	N	N/A*
Conflict of Interest Form Completed and Signed	Y	Y	Y	Y	N	N/A*
Conflict of Interest Noted	N	N	N	N	unkn	N/A*
Nondisclosure Agreement Signed	Y	Y	Y	Y	N	N/A*
Response Responsive to Solicitation	Y	Y	Y	Y	N	N

* Late response is not opened. Respondent will be notified that the response was rejected because it was not timely received.

APPENDIX 18

Evaluation Committee Guidelines

Note: This procedure is provided as a general guideline for agencies to use and may be customized to meet individual agency needs.

- [ ] The Contract Developer collects a signed Evaluation Committee Member Non-Disclosure and Conflict of Interest Disclosure Statement from each committee member. The Contract Developer will check each statement to ensure that it is signed and has not been modified. For any committee member not in attendance at the scheduled meeting, responses will not be provided until the Non-Disclosure and Conflict of Interest Disclosure Statement is signed and participation in an evaluation committee briefing has occurred.

- [ ] The Contract Developer will hand out evaluation packages to each committee member. Each package should include:

  - [ ] Copy of the Non-Disclosure and Conflict of Interest Disclosure Statement. Committee members should each have a copy of the Non-Disclosure and Conflict of Interest Disclosure Statement as a reminder of their responsibilities.

  - [ ] Copy of the Evaluation Committee Briefing document (see attached).

  - [ ] Complete copy of the solicitation and any addenda and Q&A documents. (Members should already be familiar with these documents prior to the meeting).

  - [ ] Copy of each responsive response received.

  - [ ] Evaluation Committee Member Scoring Matrix. (If hard copy, provide appropriate number of copies for the number of responses received).

- [ ] The Contract Developer will go over the briefing document (see attached) with the committee.

- [ ] The Contract Developer will explain the scoring process and walk through the evaluation scoring matrix to ensure each scoring committee member understands how the matrix works and how the responses will be evaluated.

- [ ] Generally, the Contract Developer remains during the meeting to answer any questions which may arise and to ensure proper procedures are followed. The preferred practice is for the evaluation committee to conduct their evaluations at the same time in the same room. Sometimes, due to time constraints, remote location of committee members, or other circumstances, it is not possible for all members to be together for the evaluation. If the evaluation committee conducts their evaluation from their respective workspaces, the Contract Developer will provide a deadline for when the evaluation scoring matrices are to be completed.

- [ ] After the evaluation is completed, the evaluation scoring matrices are submitted to the Contract Developer and maintained in the procurement file.

Evaluation Committee Briefing

Committee Members

- Committee members must be independent and objective, without any conflict of interest.
- Each committee member's participation should not create even the appearance of impropriety.
- Each committee member must comply with the agency and State's conflict of interest disclosure policies.
- Each committee member must sign the *Evaluation Committee Member Non-Disclosure and Conflict of Interest Disclosure Statement*.
- Each committee member must be knowledgeable about the matter under evaluation and add value to the process.
- All committee members must attend every evaluation meeting, each oral presentation, and all site visits to respondent premises.

Evaluation/Scoring

- Each scoring committee member will independently and impartially score each response using only the evaluation factors and weights identified in the solicitation.
- Scores are not divulged between committee members. Members may ask questions if they are unable to find information, do not understand information in a response, or require the technical assistance of other members.
- Evaluations by the committee are based solely on the written responses, oral presentations or other factors as instructed by the Contract Developer and assigned attorney for that particular solicitation and consistent with the solicitation.
- Committee members may not conduct their own independent research on respondents (such as online research) and may not consider any independent research or other extraneous information in their scoring.
- With approval of the Contract Developer or assigned attorney as applicable, the chair may appoint one or more committee members to assist with specific administrative tasks (such as checking references) which are allowable under the solicitation.
- The committee may determine that clarification of the response is necessary prior to scoring. The Contract Developer or the assigned attorney, as appropriate, will submit written clarification questions to the respondents.
- Each committee member will record the scores for each response on the scoring matrix provided by the chair.
- Some solicitations may involve multiple scoring rounds to narrow the competitive field. The Contract Developer will brief the committee if the particular solicitation involves that possibility.
- The committee may determine that requests for oral presentations by all or only the top rated respondents are desirable and consistent with the particular solicitation. The Contract Developer or the assigned attorney, as appropriate, will notify the respondents about oral presentations.
- The chair will tally the individual committee member's evaluation scores and provide the committee with a master score sheet showing the total scores.
- Each committee member will review the master score sheet to verify the accuracy of the scoring.
- Committee members will not lobby each other to change scores; however, the chair may discuss the portions of the responses from which the scores were derived to ensure that each member understood that portion of the solicitation and the response.
- The Contract Developer with assistance from the assigned attorney, if needed, will verify that the appropriate method of scoring was used by each committee member.
- The chair will prepare, sign and date the evaluation committee's master score sheet.
- The chair will prepare the appropriate internal approval memo (*e.g.,* recommendation of tentative contract award memo, recommendation to narrow the competitive field memo, recommendation to cancel procurement).

Confidentiality

- All evaluations and responses are highly confidential and may not be disclosed. The responses must be safeguarded by the committee members.
- Evaluations, including comments made on score sheets, are subject to the Texas Public Information Act. Written comments on score sheets are not discouraged. Evaluation committee members' written comments may aid the reviewer in circumstances where the score is unusually low or high. Evaluation committee member comments are also helpful in the event of a debriefing as they may assist a respondent in identifying strengths and weaknesses of the response.
- Committee members may not communicate with respondents or anyone else outside the committee regarding the responses received or the evaluation process without prior approval of the Contract Developer or the assigned attorney, as appropriate. Examples of permitted communications are those facilitated by the Contract Developer such as consultations with technical advisors assigned to the committee and attendance at an oral presentation.

Evaluation Committee Member
Non-Disclosure and Conflict of Interest Disclosure Statement

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 am acting at the request of the [Agency Name] as a participant in the [Name of Procurement].

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 in connection with any responses or involved respondent in return for favorable consideration. I have no preconceived position on the relative merits of any of the submitted responses nor have I established a personal preference or position on the worth or standing of any respondent participating in this action.

I agree not to disclose or otherwise divulge any information pertaining to the contents, status, or ranking of any submitted responses to anyone other than the evaluation committee chair or other evaluation committee members. I understand the terms "disclose or otherwise divulge" to include, but are not limited to, reproduction of any part or portion of any responses, or removal of same from designated areas without prior authorization from the Contract Developer. I agree to consult with the assigned Contract Developer or legal counsel, as appropriate, if I have any questions regarding the guidance provided to the evaluation committee. I agree to perform any and all evaluations of said submitted responses in an unbiased manner, to the best of my ability, and with the best interest of the State of Texas paramount in all decisions.

_____

Signature

_____

Printed Name

_____

Date

Evaluation Committee
Master Score Sheet
for
[Title and No. of Solicitation]

	Criteria	Weight *(Maximum Points Permitted)*	Committee Score			
			Respondent Name	Respondent Name	Respondent Name	Respondent Name
1.	List criterion from solicitation					
2.	List criterion from solicitation					
3.	List criterion from solicitation					
4.	List criterion from solicitation					
5.	List criterion from solicitation					
	Total	**[100 points]**				

Signature of Evaluation Committee Chair: _____

Printed Name of Evaluation Committee Chair: _____

Date: _____

APPENDIX 19

Sample Evaluation Committee Member Scoring Matrix

Evaluator No. _____

Date: _____

	Criteria	Weight *(Maximum Points Permitted)*	Score			
			Respondent Name	Respondent Name	Respondent Name	Respondent Name
1.	List criterion from solicitation					
2.	List criterion from solicitation					
3.	List criterion from solicitation					
4.	List criterion from solicitation					
5.	List criterion from solicitation					
Total		**[100 points]**				

APPENDIX 20

Sample Reference Check Form

Telephone Interview Reference Check
For
[Title of Solicitation]

Respondent Name:	
Company to be contacted as a Reference:	
Name and Title of Designated Reference:	
Contact Number for Designated Reference:	
Point of Contact Information for Individual Responding to Reference Check if Different than Point of Contact Designated in the Response:	

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?

Questions:

1. Has the vendor provided [description of products/services] to your organization in the past 3 years? Yes ☐ No ☐

2. How long has the vendor provided [description of products/services] to your organization?

   _____

3. What is the approximate annual value of the vendor's contract?

   _____

4. Did the vendor stay within budget? Yes ☐ No ☐

5. On a rating scale of 0 to 3 – where (0) Unsatisfactory, (1) Marginally Satisfactory, (2) Satisfactory, (3) Exceeds Expectations, and (N/A) Not Applicable – please provide answers to the following questions:
   a. How satisfied was your organization with the timeliness of the vendor's delivery of products or performance of services under the contract?

      0 ☐, 1 ☐, 2 ☐, 3 ☐, N/A ☐, Declined to Respond ☐

   b. How satisfied was your organization with the skill, knowledge, cooperativeness, and professional manner of the personnel assigned by the vendor?

      0 ☐, 1 ☐, 2 ☐, 3 ☐, N/A ☐, Declined to Respond ☐

c. How satisfied was your organization with the vendor's ability to resolve problems?

0 ☐, 1 ☐, 2 ☐, 3 ☐, N/A ☐, Declined to Respond ☐

d. How satisfied was your organization with the vendor's customer service?

0 ☐, 1 ☐, 2 ☐, 3 ☐, N/A ☐, Declined to Respond ☐

e. Overall, how satisfied was your organization with the vendor's performance?

0 ☐, 1 ☐, 2 ☐, 3 ☐, N/A ☐, Declined to Respond ☐

6. Do you have any comments? Yes ☐ No ☐

_____

_____

_____

_____

_____

Reference Check Conducted By:

Printed Name:	
Date & Time:	
Signature:	

Reference check activities were unsuccessful for the following reason(s):

☐ Designated point of contact declined to answer any questions.

☐ Designated point of contact information provided in response was incorrect.

☐ Designated point of contact was determined to be "unavailable" after _____ unsuccessful attempts on the following dates and times: _____

☐ Other: _____

_____

APPENDIX 21

List of Preferences

PREFERENCE FOR PRODUCTS OF PERSONS WITH MENTAL RETARDATION OR PHYSICAL DISABILITIES.
TEXAS GOVERNMENT CODE § 2155.441.

(a) The products of workshops, organizations, or corporations whose primary purpose is training and employing individuals having mental retardation or a physical disability shall be given preference if they meet state specifications regarding quantity, quality, delivery, life cycle costs, and price.

(b) The workshops, organizations, or corporations shall test the products to the extent necessary to ensure quality in accordance with Section 2155.069 and may enter into contracts with a private or public entity to assist with testing.

(c) The commission is not required to purchase products under this section that do not meet formal state specifications developed by the commission or meet commercial specifications approved by the commission.

PREFERENCE FOR ENERGY EFFICIENT PRODUCTS.
TEXAS GOVERNMENT CODE § 2155.442.

The commission shall give preference to energy efficient products in purchases made under this subtitle if:

(1) the products meet state specifications regarding quantity and quality; and

(2) the cost of the product is equal to or less than the cost of other similar products that are not energy efficient.

PREFERENCE FOR RUBBERIZED ASPHALT PAVING.
TEXAS GOVERNMENT CODE § 2155.443.

The commission may give preference to rubberized asphalt paving made from scrap tires by a facility in this state in purchases of rubberized asphalt paving material if the cost as determined by a life-cycle cost benefit analysis does not exceed by more than 15 percent the bid cost of alternative paving materials.

PREFERENCE TO TEXAS AND UNITED STATES PRODUCTS AND TEXAS SERVICES.
TEXAS GOVERNMENT CODE § 2155.444.

(a) The commission and all state agencies making purchases of goods, including agricultural products, shall give preference to those produced or grown in this state or offered by Texas bidders as follows:

(1) goods produced or offered by a Texas bidder that is owned by a service-disabled veteran who is a Texas resident shall be given a first preference and goods produced in this state or offered by other Texas bidders shall be given second preference, if the cost to the state and quality are equal; and

(2) agricultural products grown in this state shall be given first preference and agricultural products offered by Texas bidders shall be given second preference, if the cost to the state and quality are equal.

(b) If goods, including agricultural products, produced or grown in this state or offered by Texas bidders are not equal in cost and quality to other products, then goods, including agricultural products, produced or grown in other states of the United States shall be given preference over foreign products if the cost to the state and quality are equal.

(c) In this section:

(1) "Agricultural products" includes textiles and other similar products.

(1-a) "Service-disabled veteran" means a person who is a veteran as defined by 38 U.S.C. Section 101(2) and who has a service-connected disability as defined by 38 U.S.C. Section 101(16).

(2) "Texas bidder" means a business:

(A) incorporated in this state;

(B) that has its principal place of business in this state; or

(C) that has an established physical presence in this state.

(d) The commission and all state agencies making purchase of vegetation for landscaping purposes, including plants, shall give preference to Texas vegetation native to the region if the cost to the state is not greater and the quality is not inferior.

(c) The commission and all state agencies procuring services shall give first preference to services offered by a Texas bidder that is owned by a service-disabled veteran who is a Texas resident and shall give second preference to services offered by other Texas bidders if:

(1) the services meet state requirements regarding the service to be performed and expected quality; and

(2) the cost of the service does not exceed the cost of other similar services of similar expected quality that are offered by a bidder that is not entitled to a preference under this subsection.

(f) The comptroller and each state agency conducting an advertising campaign that involves the creation or production of a commercial shall give preference to a commercial production company and advertising agency located in this state if:

(1) the services meet state requirements regarding the service to be performed and regarding expected quality; and

(2) the cost of the service does not exceed the cost of other similar services of similar expected quality that are offered by a bidder that is not entitled to a preference under this subsection.

(g) For purposes of Subsection (f), "commercial production company" means a corporation, limited liability company, partnership, or other private entity that includes as one of its purposes the production of one or more television, film, radio, or other media-related commercials.

(h) The Music, Film, Television, and Multimedia Office within the office of the governor has exclusive rulemaking authority for purposes of:

(1) determining whether an advertising campaign is subject to the requirements of this section;

(2) establishing a bid process for purposes of the services described by Subsection (f); and

(3) establishing criteria to determine whether a commercial production company or advertising agency is located in this state for the purposes of this section.

PREFERENCE UNDER SERVICE CONTRACTS.
TEXAS GOVERNMENT CODE § 2155.4441.

A state agency that contracts for services shall require the contractor, in performing the contract, to purchase products and materials produced in this state when they are available at a price and time comparable to products and materials produced outside this state.

PREFERENCE FOR RECYCLED, REMANUFACTURED, OR ENVIRONMENTALLY SENSITIVE PRODUCTS.
TEXAS GOVERNMENT CODE § 2155.445.

(a) The commission and state agencies shall give preference to recycled, remanufactured, or environmentally sensitive products, as those terms are defined by rule of the commission, in purchases made under this subtitle if:

(1) the product meets state specifications regarding quantity and quality; and

(2) the average price of the product is not more than 10 percent greater than the price of comparable nonrecycled products.

(b) The commission regularly shall review and revise its procurement procedures and specifications for the purchase of goods to:

(1) eliminate procedures and specifications that explicitly discriminate against recycled, remanufactured, or environmentally sensitive products, as those terms are defined by rule of the commission; and

(2) encourage the use of recycled, remanufactured, or environmentally sensitive products.

(c) In developing new procedures and specifications, the commission shall encourage the use of recycled products and products that may be recycled or reused or that are remanufactured or environmentally sensitive.

(d) In addition to the products covered by the definition adopted by rule under this section, in this section "recycled product" includes recycled steel products. The preference for recycled steel products under this section applies also to products purchased in connection with projects described by Section 2166.003.

PURCHASE OF RECYCLED OIL.
TEXAS GOVERNMENT CODE § 2155.447.

The commission, all state agencies, and all state agency employees who purchase motor oil and other automotive lubricants for state-owned vehicles shall give preference to motor oils and lubricants that contain at least 25 percent recycled oil if the cost to the state and the quality are comparable to those of new oil and lubricants.

PREFERENCE TO PRODUCTS AND SERVICES FROM ECONOMICALLY DEPRESSED OR BLIGHTED AREA.
TEXAS GOVERNMENT CODE § 2155.449.

(a) In this section, "economically depressed or blighted area" means an area that:

(1) is an economically depressed or blighted area as defined by Section 2306.004; or

(2) meets the definition of a historically underutilized business zone as defined by 15 U.S.C. Section 632(p).

(b) The commission and all state agencies procuring goods or services shall give preference to goods or services produced in an economically depressed or blighted area if:

(1) the goods or services meet state specifications regarding quantity and quality; and

(2) the cost of the good or service does not exceed the cost of other similar products or services that are not produced in an economically depressed or blighted area.

PREFERENCE FOR PRODUCTS OF FACILITIES ON FORMERLY CONTAMINATED PROPERTY.
TEXAS GOVERNMENT CODE § 2155.450.

The commission and state agencies shall give preference to goods produced at a facility located on property for which the owner has received a certificate of completion under Section 361.609, Health and Safety Code, if the goods meet state specifications regarding quantity, quality, delivery, life cycle costs, and price.

VENDORS THAT MEET OR EXCEED AIR QUALITY STANDARDS.
TEXAS GOVERNMENT CODE § 2155.451.

(a) This section applies only to a contract to be performed, wholly or partly, in a nonattainment area or in an affected county, as those terms are defined by Section 386.001, Health and Safety Code.

(b) The commission and state agencies procuring goods or services may:

(1) give preference to goods or services of a vendor that demonstrates that the vendor meets or exceeds any state or federal environmental standards, including voluntary standards, relating to air quality; or

(2) require that a vendor demonstrate that the vendor meets or exceeds any state or federal environmental standards, including voluntary standards, relating to air quality.

(c) The preference may be given only if the cost to the state for the goods or services would not exceed 105 percent of the cost of the goods or services provided by a vendor who does not meet the standards.

PREFERENCE FOR CONTRACTORS PROVIDING FOODS OF HIGHER NUTRITIONAL VALUE.
TEXAS GOVERNMENT CODE § 2155.452.

(a) The commission and state agencies making purchases of food for consumption in a public cafeteria may give preference to contractors who provide foods of higher nutritional value and who do not provide foods containing trans fatty acids for consumption in the cafeteria.

(b) In complying with this section, the commission and state agencies shall review the Department of Agriculture's nutrition standards.

APPENDIX 22

Texas Required Contract Clauses

In accordance with Section 2262.051(d)(1) of the Texas Government Code, this document identifies the model contract clauses for the essential provisions that an agency must include in a contract to protect the interests of the State. Except as otherwise specifically noted as an "EXCEPTION" in this document, the Texas Required Contract Clauses are required to be included in both solicitations and contracts.

The wording of the Texas Required Contract Clauses must substantially conform to the Standard Text or Alternate Text. For instance, it is an acceptable practice to remove the reference to the solicitation for the clause appearing in a contract. Also, the following terms may be revised by the agency as appropriate for conformity with the applicable solicitation and contract documents: **Agency**, **Respondent**, **Response**, and **Solicitation**. Examples of conforming terms include, but are not limited to, the following:

- "**Agency**" to agency name, Customer, or Client
- "**Respondent**" to Bidder, Proposer, Applicant, Contractor, or Vendor
- "**Response**" to Bid, Proposal, Offer, or Application
- "**Solicitation**" to Invitation for Bids, Request for Proposals, Request for Offers, Request for Applications, Pricing Request, or Request for Qualifications

General guidance is provided along with examples of supplemental text that routinely accompany the required clause. Any additional text included by the agency must not conflict with or weaken a Texas Required Contract Clause. It is recommended that public procurement professionals seek assistance from agency legal counsel prior to modifying the Standard Text or Alternate Text as slight variations may result in the agency's non-compliance with applicable statutes and rules.

Note: The Essential Provisions which must be included in every contract are comprised of (1) the terms necessary for the formation of a legally binding contract and (2) the Texas Required Contract Terms. For a discussion of the terms necessary for the formation of a legally binding contract, refer to the *Texas Procurement and Contract Management Guide*.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Antitrust Affirmation	The undersigned affirms under penalty of perjury of the laws of the State of Texas that (1) in connection with this **Response**, neither I nor any representative of the **Respondent** have violated any provision of the Texas Free Enterprise and Antitrust Act, Tex. Bus. & Comm. Code Chapter 15; (2) in connection with this **Response**, neither I nor any representative of the **Respondent** have violated any federal antitrust law; and (3) neither I nor any representative of the **Respondent** have directly or indirectly communicated any of the contents of this **Response** to a competitor of the **Respondent** or any other company, corporation, firm, partnership or individual engaged in the same line of business as the **Respondent**.	**Respondent** represents and warrants that, in accordance with Section 2155.005 of the Texas Government Code, neither **Respondent** nor the firm, corporation, partnership, or institution represented by **Respondent**, or anyone acting for such a firm, corporation or institution has (1) violated any provision of the Texas Free Enterprise and Antitrust Act of 1983, Chapter 15 of the Texas Business and Commerce Code, or the federal antitrust laws, or (2) communicated directly or indirectly the contents of this **Response** to any competitor or any other person engaged in the same line of business as **Respondent**.	TEX GOVT CODE § 2155.005	As directed by Section 2155.005(b) of the Texas Government Code, the OAG prepared the Antitrust Certification which is published at www.oag.texas.gov. The OAG is charged with investigating and prosecuting violations of the Texas Free Enterprise & Antitrust Act and the federal antitrust statutes which prohibit anti-competitive conduct. Supplemental text to the required clause may include the following: **Respondent** assigns to the **Agency** all of **Respondent**'s rights, title and interest in and to all claims and causes of action **Respondent** may have under the antitrust laws of Texas or the United States for overcharges associated with this **Solicitation** or any resulting contract.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Buy Texas Affirmation	In accordance with Section 2155.4441 of the Texas Government Code, **Respondent** agrees that during the performance of a contract for services it shall purchase products and materials produced in Texas when they are available at a price and time comparable to products and materials produced outside this state.	**Respondent** agrees to comply with Section 2155.4441 of the Texas Government Code, relating to use of service contracts and the purchase of products and materials produced in the State of Texas. Or **Respondent** agrees to comply with Section 2155.4441 of the Texas Government Code, requiring the purchase of products and materials produced in the State of Texas in performing service contracts.	TEX GOVT CODE § 2155.4441	EXCEPTION: On a case-by-case basis, and with the advice of legal counsel, the preface "to the extent applicable" may be added to the clause in contracts when circumstances indicate that Section 2155.4441 of the Texas Government Code does not apply to the transaction; for example, to contracts that are solely for goods.
Child Support Obligation Affirmation	Under Section 231.006 of the Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.	Under Section 231.006(d) of the Texas Family Code, regarding child support, **Respondent** certifies that the individual or business entity named in this **Response** is not ineligible to receive the specified payment and acknowledges that the contract may be terminated and payment may be withheld if this certification is inaccurate. Furthermore, any **Respondent** subject to Section 231.006 of the Texas Family Code, must include in the **Response** the names and social security numbers of each person with at least 25% ownership of the business entity submitting the **Response**. Or Under Section 231.006 of the Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate. A bid or an application for a contract, grant, or loan paid from state funds must include the name and social security number of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting the bid or application.	TEX FAM CODE §§ 231.006, 231.302	Section 231.006(d) of the Texas Family Code mandates the use of statutorily specified text. Section 231.006(a) of the Texas Family Code provides that a child support obligor who is more than 30 days delinquent in paying child support and a business entity in which the obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least 25 percent is not eligible to: (1) receive payments from state funds under a contract to provide property, materials, or services; or (2) receive a state-funded grant or loan. In situations where Responses are submitted to the agency via unencrypted email, Responses should only contain the last four digits of the SSN in order to comply with the sensitive personal information acquisition requirements of Section 2054.1125 of the Texas Government Code. In the event a Respondent is subject to Section 231.006 of the Texas Family Code, the agency, in accordance with its information security protocol, should request the Respondent to submit the complete social security number via separate, secure transmission prior to conducting the evaluation. Supplemental text to the required clause may include the following: **FEDERAL PRIVACY ACT NOTICE**: This notice is given pursuant to the Federal Privacy Act. Disclosure of your Social Security Number (SSN) is required under Section 231.006(c) and Section 231.302(c)(2) of the Texas Family Code. The Social Security number will be used to identify persons that may owe child support and will be kept confidential to the fullest extent allowed under Section 231.302(e) of the Texas Family Code.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Computer Equipment Recycling Program	**Respondent** certifies its compliance with Subchapter Y, Chapter 361 of the Texas Health and Safety Code and the Texas Commission on Environmental Quality rules in 30 TAC Chapter 328.	If **Respondent** is submitting a **Response** for the purchase or lease of computer equipment, then **Respondent** certifies that it is in compliance with Subchapter Y, Chapter 361 of the Texas Health and Safety Code related to the Computer Equipment Recycling Program and the Texas Commission on Environmental Quality rules in 30 TAC Chapter 328.	TEX HEALTH & SAFETY CODE § 361.965(c) 1 TAC §217.10 30 TAC §§328.131-155	EXCEPTION: Clause only applies to solicitations and contracts for the purchase or lease of computer equipment, which is defined in Section 361.962(2) of the Texas Health and Safety Code as "a desktop or notebook computer and includes a computer monitor or other display device that does not contain a tuner." Section 361.965(c) of the Texas Health and Safety Code states the following: (c) A state agency that purchases or leases computer equipment shall require each prospective bidder to certify the bidder's compliance with this subchapter. Failure to provide that certification renders the prospective bidder ineligible to participate in the bidding.
Dealings with Public Servants Affirmation	**Respondent** has not given, offered to give, nor 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**.	Pursuant to Section 2155.003 of the Texas Government Code, **Respondent** represents and warrants that it has not given, offered to give, nor 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 contract.	TEX GOVT CODE §§ 572.051(a)(1), 2155.003 34 TAC § 20.157	Employees of agencies that perform purchasing functions under the delegated authority of SPD shall adhere to the same ethical standards as CPA employees, and shall avoid all conflicts of interest in their purchasing activities. The Texas Ethics Commission administers and enforces Section 2155.003 of the Texas Government Code and has adopted rules at 1 TAC §§ 45.1, 45.3, 45.7.
Debts and Delinquencies Affirmation	**Respondent** agrees that any payments due under the contract shall be applied towards any debt or delinquency that is owed to the State of Texas.	**Respondent** agrees that any payments due under the contract shall be directly applied towards eliminating any debt or delinquency it has to the State of Texas including, but not limited to, delinquent taxes, delinquent student loan payments, and delinquent child support. Or **Respondent** acknowledges and agrees that, to the extent **Respondent** owes any debt including, but not limited to, delinquent taxes, delinquent student loans, and child support owed to the State of Texas, any payments or other amounts **Respondent** is otherwise owed under the contract may be applied toward any debt **Respondent** owes the State of Texas until the debt is paid in full. These provisions are effective at any time **Respondent** owes any such debt or delinquency.	TEX GOVT CODE § 2252.903	

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Disaster Recovery Plan	In accordance with 13 TAC § 6.94(a)(9), **Respondent** shall provide to **Agency** the descriptions of its business continuity and disaster recovery plans.	Upon request of **Agency**, **Respondent** shall provide the descriptions of its business continuity and disaster recovery plans. Or Upon request of **Agency**, **Respondent** shall provide copies of its most recent business continuity and disaster recovery plans.	TEX GOVT CODE § 441.190 13 TAC § 6.94(a)(9)	EXCEPTION: Clause is recommended for all contracts but is an Essential Clause for solicitations and contracts with vendors that have custody of vital state records. 13 TAC § 6.94(a)(9) states that each state agency must require all third-party custodians of records to provide the state agency with descriptions of their business continuity and/or disaster recovery plans as regards to the protection of the state agency's vital state records. The term "vital state record" is defined in Section 441.180(13) of the Texas Government Code to mean any state record necessary to: (A) the resumption or continuation of state agency operations in an emergency or disaster; (B) the re-creation of the legal and financial status of the agency; or (C) the protection and fulfillment of obligations to the people of the state. Supplemental text to the required clause may provide additional details regarding the required business continuity and disaster recovery plans (*e.g.*, title and date of plan).
Disclosure of Prior State Employment	In accordance with Section 2254.033 of the Texas Government Code, relating to consulting services, **Respondent** certifies that it does not employ an individual who has been employed by **Agency** or another agency at any time during the two years preceding the submission of the **Response** or, in the alternative, **Respondent** has disclosed in its **Response** the following: (i) the nature of the previous employment with **Agency** or the other agency; (ii) the date the employment was terminated; and (iii) the annual rate of compensation for the employment at the time of its termination.		TEX GOVT CODE § 2254.033	EXCEPTION: Clause only applies to solicitations and contracts for consulting services under Chapter 2254 of the Texas Government Code. Section 2254.034 of the Texas Government Code states the following: (a) A contract entered into in violation of Sections 2254.029 through 2254.031 is void. (b) A contract entered into with a private consultant who did not comply with Section 2254.033 is void. (c) If a contract is void under this section: (1) the comptroller may not draw a warrant or transmit money to satisfy an obligation under the contract; and (2) a state agency may not make any payment under the contract with state or federal money or money held in or outside the state treasury. (d) This section applies to all consulting services contracts, including renewals, amendments, and extensions of consulting services contracts.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Dispute Resolution (General)	The dispute resolution process provided for in Chapter 2260 of the Texas Government Code must be used to attempt to resolve any dispute arising under the contract.	Disputes arising under the contract shall be resolved in accordance with the dispute resolution process provided in Chapter 2260 of the Texas Government Code. Or The dispute resolution process provided for in Chapter 2260 of the Texas Government Code must be used to attempt to resolve any dispute arising under the contract. If the Contractor's claim for breach of Contract cannot be resolved informally with the **Agency**, the claim shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, the Contractor shall submit written notice, as required by Chapter 2260, to the individual identified in the Contract for receipt of notices. Any informal resolution efforts shall in no way modify the requirements or toll the timing of the formal written notice of a claim for breach of contract required under §2260.051 of the Texas Government Code. Compliance by the Contractor 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 Contractor's sole and exclusive process for seeking a remedy for an alleged breach of Contract by the **Agency** if the parties are unable to resolve their disputes as described above. Notwithstanding any other provision of the Contract to the contrary, unless otherwise requested or approved in writing by the **Agency**, the Contractor shall continue performance and shall not be excused from performance during the period any breach of contract claim or while the dispute is pending. However, the Contractor may suspend performance during the pendency of such claim or dispute if the Contractor 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.	TEX GOVT CODE § 2260.004	EXCEPTION: See "Dispute Resolution (Engineering, Architectural, or Construction Services)" Section 2260.004 of the Texas Government Code states the following: (a) Each unit of state government that enters into a contract to which this chapter applies shall include as a term of the contract a provision stating that the dispute resolution process used by the unit of state government under this chapter must be used to attempt to resolve a dispute arising under the contract. (b) The attorney general shall provide assistance to a unit of state government in developing the contract provision required by this section. Supplemental text to the required clause may include specific details of the agency's dispute resolution process adopted by rule.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Dispute Resolution (Engineering, Architectural, or Construction Services)	Subject to Texas Government Code, Section 2260.002, the dispute resolution process provided for in Chapter 2260 of the Texas Government Code and set forth below in subsections (a)-(d) shall be used by the parties to attempt to resolve all disputes arising under this contract. In accordance with the Texas Civil Practice and Remedies Code, Section 114.005, the parties agree claims encompassed by Texas Government Code, Section 2260.002(3) and Texas Civil Practice and Remedies Code Section 114.002 shall be governed by the dispute resolution process set forth below in subsections (a)-(d). (a) Notwithstanding Texas Government Code, Chapter 2260.002(3) and Chapter 114.012 and any other statute or applicable law, if the **Respondent**'s claim for breach of contract cannot be resolved by the parties in the ordinary course of business, **Respondent** may make a claim against **Agency** for breach of contract and the **Agency** may assert a counterclaim against the **Respondent** as is contemplated by Texas Government Code, Chapter 2260, Subchapter B. In such event, **Respondent** must provide written notice to **Agency** of a claim for breach of the contract not later than the 180th day after the date of the event giving rise to the claim. The notice must state with particularity: (1) the nature of the alleged breach; (2) the amount the **Respondent** seeks as damages; and (3) the legal theory of recovery. (b) The chief administrative officer, or if designated in the contract, another officer of the **Agency**, shall examine the claim and any counterclaim and negotiate with the **Respondent** in an effort to resolve them. The negotiation must begin no later than the 120th day after the date the claim is received, as is contemplated by Texas Government Code, Chapter 2260, Section 2260.052. (c) If the negotiation under paragraph (b) above results in the resolution of some disputed issues by agreement or in a settlement, the parties shall reduce the agreement or settlement to writing and each party shall sign the agreement or settlement. A partial settlement or resolution of a claim does not waive a party's rights under this contract as to the parts of the claim that are not resolved.		TEX. CIV. PRAC. & REM. CODE CH 144	EXCEPTION: Clause only applies to solicitations and contracts for engineering, architectural, or construction services. Under Chapter 114 of the Texas Civil Practices and Remedies Code, a claim for breach of a contract for engineering, architectural, or construction services or for materials related to those services, in which the amount of controversy is not less than $250,000 can be brought directly in district court without exhausting the administrative requirements of Chapter 2260 of the Texas Government Code. Consult with legal counsel regarding applicability of this clause.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Dispute Resolution (Engineering, Architectural, or Construction Services)	(d) If a claim is not entirely resolved under paragraph (b) above, on or before the 270th day after the date the claim is filed with **Agency**, unless the parties agree in writing to an extension of time, the parties may agree to mediate a claim made under this dispute resolution procedure. This dispute resolution procedure is the **Respondent**'s sole and exclusive process for seeking a remedy for an alleged breach of contract by the **Agency** if the parties are unable to resolve their disputes as described in this section. (e) Nothing in the contract shall be construed as a waiver of the state's or the **Agency**'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. **Agency** does not waive any privileges, rights, defenses, or immunities available to **Agency** by entering into this contract or by its conduct, or by the conduct of any representative of **Agency**, prior to or subsequent to entering into this contract. (f) Compliance with the dispute resolution process provided for in Texas Government Code, Chapter 2260, subchapter B and incorporated by reference in subsection (a)-(d) above is a condition precedent to the **Respondent**: (1) filing suit pursuant to Chapter 114 of the Civil Practices and Remedies Code; or (2) initiating a contested case hearing pursuant to Subchapter C of Chapter 2260 of the Texas Government Code.			

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Entities that Boycott Israel	**Respondent** represents and warrants that, pursuant to Section 2270.002 of the Texas Government Code, **Respondent** does not boycott Israel and will not boycott Israel during the term of the contract.	In accordance with Section 2270.002 of the Texas Government Code, **Respondent** hereby represents and warrants that it does not, and shall not for the duration of the contract, boycott Israel as the term is defined by 808.001(1) of the Texas Government Code.	TEX GOVT CODE § 2270.002	Section 2270.002 of the Texas Government Code states the following: A governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract.
E-Verify Program	**Respondent** certifies that for contracts for services, **Respondent** shall utilize the U.S. Department of Homeland Security's E-Verify system during the term of the contract to determine the eligibility of: 1. all persons employed by **Respondent** to perform duties within Texas; and 2. all persons, including subcontractors, assigned by **Respondent** to perform work pursuant the contract within the United States of America.	**Respondent** certifies that it utilizes and will continue to utilize the U.S. Department of Homeland Security's E-Verify system to determine the eligibility of: 1. all persons employed to perform duties within Texas during the term of the contract; and 2. all persons, including subcontractors, assigned by **Respondent** to perform work pursuant to the contract within the United States of America.	Executive Order No. RP-80 Tex. Att'y Gen. Op. No. KP-70 (2016)	EXCEPTION: Clause only applies to solicitations and contracts for services from agencies that are under the direction of the Governor. EXCEPTION: On a case-by-case basis, and in consultation with legal counsel, the preface "to the extent not prohibited by federal law or regulation" may be added to the clause in contracts when circumstances indicate that strict compliance with the required clause is inconsistent with current federal law or regulation. Supplemental text to the required clause may include the following: If it is determined that **Respondent** has violated the certifications set forth in this Section, then (1) **Respondent** shall be in breach of contract, (2) **Agency** shall have the option to terminate the contract for cause without prior notice, and (3) in addition to any other rights or remedies available to **Agency** under the contract, **Respondent** shall be responsible for all costs incurred by **Agency** to obtain substitute services to replace the terminated contract.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Excess Obligations Prohibited	The contract is subject to termination or cancellation, without penalty to **Agency**, either in whole or in part, subject to the availability of state funds.	Any contract resulting from this **Solicitation** is contingent upon the continued availability of lawful appropriations by the Texas Legislature. Or **Respondent** understands that all obligations of **Agency** under the contract are subject to the availability of state funds. If such funds are not appropriated or become unavailable, the contract may be terminated by **Agency**. Or The contract shall not be construed as creating a debt on behalf of **Agency** in violation of Article III, Section 49a of the Texas Constitution. **Respondent** understands that all obligations of **Agency** under the contract are subject to the availability of state funds. Or The contract is subject to termination or cancellation, without penalty to **Agency**, either in whole or in part, subject to the availability of state funds. **Agency** is a state agency whose authority and appropriations are subject to actions of the Texas Legislature. If **Agency** becomes subject to a legislative change, revocation of statutory authority, or lack of appropriated funds that would render either **Agency**'s or **Respondent**'s delivery or performance under the contract impossible or unnecessary, the contract will be terminated or cancelled and be deemed null and void. In the event of a termination or cancellation under this Section, **Agency** will not be liable to **Respondent** for any damages, that are caused or associated with such termination, or cancellation, and **Agency** will not be required to give prior notice.	TEX CONST Art III § 49a TEX CONST Art VIII § 6 General Appropriations Act, Art IX, § 6.03 (2017-2018 Biennium)	EXCEPTION: Clause is recommended for every contract but constitutes an Essential Clause for any contract with a term that crosses the biennium. The Texas Constitution and the General Appropriations Act prohibit an agency from incurring obligations in excess of amounts lawfully appropriated by the Texas Legislature over the course of a biennium. Therefore, any installment purchase, lease, or any other type of purchase which incurs an obligation beyond the current appropriations is strictly prohibited, unless such obligation is expressly conditioned upon continued legislative appropriation. For information regarding the one exception to the prohibition against incurring excess obligations, refer to the "Termination for Non-Appropriations, Excess Obligations Prohibited" Section of the Guide. Penalty for Requisitioning Officer or Employee. If General Appropriations Act, Article IX, Section 6.03 (2017-2018 Biennium) is violated, the State Auditor shall certify the fact of the violation and the amount of the over-obligation to CPA, and CPA shall deduct an amount equivalent to the over-obligation from the salary or other compensation due to the responsible disbursing or requisitioning officer or employee, and apply the amount to the payment obligation. Supplemental text to the required clause may include the following to clarify the effect of the termination in advance payment situations such as software procurements: Termination under this Section shall not affect **Agency**'s right to use previously paid licensed software through the term of each such license, or any maintenance or support paid prior to such termination.
Excluded Parties	**Respondent** certifies that it is not listed on the federal government's terrorism watch list as described in Executive Order 13224.	**Respondent** certifies that it is not listed in the prohibited vendors list authorized by Executive Order No. 13224, *"Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism"*, published by the United States Department of the Treasury, Office of Foreign Assets Control.	Executive Order No. 13224	EXCEPTION: Clause applies as long as Executive Order No. 13224 is in effect. Executive Order 13224 (Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), was issued by President George W. Bush on September 23, 2001, as a response to the attacks on September 11, 2001.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Executive Head of a State Agency Affirmation	Under Section 669.003 of the Texas Government Code, **Respondent** certifies that it does not employ, or has disclosed its employment of, any former executive head of the **Agency**. **Respondent** must provide the following information in the **Response**. Name of Former Executive: _____ Name of State Agency: _____ Date of Separation from State agency: _____ Position with **Respondent**: _____ Date of Employment with **Respondent**: _____	In accordance with Section 669.003 of the Texas Government Code, relating to contracting with the executive head of a state agency, **Respondent** certifies that it is not (1) the executive head of the **Agency**, (2) a person who at any time during the four years before the date of the contract was the executive head of the **Agency**, or (3) a person who employs a current or former executive head of the **Agency**. Or Under Section 669.003 of the Texas Government Code, relating to contracting with an executive head of a state agency, **Respondent** represents that no person who served as an executive of **Agency**, in the past four (4) years, was involved with or has any interest in the contract. If **Respondent** employs or has used the services of a former executive of **Agency**, then **Respondent** shall provide the following information in the **Response**: name of the former executive, the name of the state agency, the date of separation from the state agency, the position held with **Respondent**, and the date of employment with **Respondent**.	TEX GOVT CODE § 669.003	Section 669.003 of the Texas Government Code states the following: A state agency may not enter into a contract with the executive head of the state agency, with a person who at any time during the four years before the date of the contract was the executive head of the state agency, or with a person who employs a current or former executive head of a state agency affected by this section, unless the governing body: (1) votes, in an open meeting, to approve the contract; and (2) notifies the Legislative Budget Board, not later than the fifth day before the date of the vote, of the terms of the proposed contract.
False Statements	**Respondent** represents and warrants that all statements and information prepared and submitted in this document are current, complete, true, and accurate. Submitting a **Response** with a false statement or material misrepresentations made during the performance of a contract is a material breach of contract and may void the submitted **Response** and any resulting contract.	If **Respondent** signs the **Response** with a false statement or it is subsequently determined that **Respondent** has violated any of the representations, warranties, guarantees, certifications, or affirmations included in the **Response**, **Respondent** will be in default under the contract and **Agency** may terminate or void the contract. Or The undersigned certifies that the information contained in this **Response** is accurate and complete. Or *Other text that specifies that the Response was reviewed for accuracy and completeness by Respondent prior to submission to the Agency.*	TEX GOVT CODE § 2155.077(a)(2)	EXCEPTION: Clause is recommended for every contract but constitutes an Essential Clause for solicitations. Under SPD's debarment rules at 34 TAC § 20.585, the director of SPD may debar a contractor for a period of no more than five years upon a finding that the contractor committed fraud in the procurement or performance of the contract, including the submission of falsified documents by the contractor or any person under the direction or control of the contractor.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Financial Participation Prohibited Affirmation	Under Section 2155.004(b) of the Texas Government Code, **Respondent** certifies that the individual or business entity named in this **Response** or contract is not ineligible to receive the specified contract and acknowledges that the contract may be terminated and payment withheld if this certification is inaccurate.	Pursuant to Section 2155.004(a) of the Texas Government Code, **Respondent** certifies that neither **Respondent** nor any person or entity represented by **Respondent** has received compensation from **Agency** to participate in the preparation of the specifications or solicitation on which this **Response** or contract is based. Under Section 2155.004(b) of the Texas Government Code, **Respondent** certifies that the individual or business entity named in this **Response** or contract is not ineligible to receive the specified contract and acknowledges that the contract may be terminated and payment withheld if this certification is inaccurate.	TEX GOVT CODE § 2155.004	Section 2155.004(b) of the Texas Government Code mandates the use of statutorily specified text. Supplemental text to the required clause may include the following: This Section does not prohibit a **Respondent** or contract participant from providing free technical assistance.
Foreign Terrorist Organizations	**Respondent** represents and warrants that it is not engaged in business with Iran, Sudan, or a foreign terrorist organization, as prohibited by Section 2252.152 of the Texas Government Code.	Section 2252.152 of the Texas Government Code prohibits **Agency** from awarding a contract to any person who does business with Iran, Sudan, or a foreign terrorist organization as defined in Section 2252.151 of the Texas Government Code. **Respondent** certifies that it not ineligible to receive the contract. Or In accordance with Texas Government Code, Chapter 2252, Subchapter F, **Respondent** hereby represents and warrants that it is not a company identified on the lists prepared and maintained under Texas Government Code §§ 806.051 (companies with business operations in Sudan), 807.051 (companies with business operations in Iran), or 2252.153 (companies known to have contracts with or provide supplies or services to a foreign terrorist organization). Notwithstanding the foregoing, a company that the United States government affirmatively declares to be excluded from its federal sanctions regime relating to Sudan, Iran, or to a foreign terrorist organization, is not subject to contract prohibition under this clause. A company claiming such exemption must submit the official copy of the declaration.	TEX GOVT CODE § 2252.152	Section 2252.152 (Contracts With Companies Engaged In Business With Iran, Sudan, Or Foreign Terrorist Organization Prohibited) of the Texas Government Code states the following: A governmental entity may not enter into a governmental contract with a company that is identified on a list prepared and maintained under Section 806.051, 807.051, or 2252.153. In accordance with Section 2252.153 of the Texas Government Code, CPA has posted on its website a list of companies known to have contracts with or provide supplies or services to a foreign terrorist organization.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Former Agency Employees	**Respondent** represents and warrants that none of its employees including, but not limited to, those authorized to provide services under the contract, were former employees of the **Agency** during the twelve (12) month period immediately prior to the date of execution of the contract.	In accordance with Section 2252.901 of the Texas Government Code, **Respondent** represents and warrants that none of its employees including, but not limited to, those authorized to provide services under the contract, were former employees of the **Agency** during the twelve (12) month period immediately prior to the date of execution of the contract. Or *For professional services procurements* In accordance with Section 2252.901 of the Texas Government Code, **Respondent** represents and warrants that for professional services contracts as described by Chapter 2254 of the Texas Government Code, if a former employee of the **Agency** was employed by **Respondent** within one year of the employee's leaving the **Agency**, then such employee will not perform services on projects with **Respondent** that the employee worked on while employed by the **Agency**.	TEX GOVT CODE § 2252.901	EXCEPTION: Clause only applies to solicitations and contracts that are employment contracts or professional services and consulting services contracts under Chapter 2254 of the Texas Government Code, if appropriated money will be used to make payments under the contract. Section 2252.901(a) of the Texas Government Code provides a narrow exception to the prohibition with regards to the professional services contracts. Section 2252.901(a) of the Texas Government Code states the following: A state agency may not enter into an employment contract, a professional services contract under Chapter 2254, or a consulting services contract under Chapter 2254 with a former or retired employee of the agency before the first anniversary of the last date on which the individual was employed by the agency, if appropriated money will be used to make payments under the contract. This section does not prohibit an agency from entering into a professional services contract with a corporation, firm, or other business entity that employs a former or retired employee of the agency within one year of the employee's leaving the agency, provided that the former or retired employee does not perform services on projects for the corporation, firm, or other business entity that the employee worked on while employed by the agency.
Governing Law and Venue	The contract shall be governed by and construed in accordance with the laws of the State of Texas, without regard to the conflicts of law provisions. The venue of any suit arising under the contract is fixed in any court of competent jurisdiction of Travis County, Texas, unless the specific venue is otherwise identified in a statute which directly names or otherwise identifies its applicability to the contracting **Agency**.		TEX GOVT CODE § 2155.077	

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Indemnification (General)	**RESPONDENT** SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND **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 **RESPONDENT** 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 **RESPONDENT** WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND **RESPONDENT** MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE TEXAS ATTORNEY GENERAL. **RESPONDENT** AND **AGENCY** AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.		TEX CONST Art VIII § 6 TEX GOVT CODE § 2254.0031	EXCEPTION: *See* "Indemnification (Engineering or Architectural Services)" NOTE: Depending on the transaction, the parties may also negotiate an additional indemnification clause to specifically address intellectual property. *See* "Indemnification (IP)." Vendor created liability under a contract may pose a financial risk to the State in violation of the prohibition against Excess Obligations. Legal counsel should be sought prior to the agency agreeing to a mutual indemnification or indemnification of another entity as such an obligation may constitute a "debt" in violation of law. *See* Tex. Att'y Gen. Op. No. MW-475 (1982). A statute may expressly authorize the state's indemnification of another entity. *See* TEX GOV'T CODE § 808.003. Supplemental text to the required clause may include the following: THIS PARAGRAPH IS NOT INTENDED TO AND SHALL NOT BE CONSTRUED TO REQUIRE **RESPONDENT** TO INDEMNIFY OR HOLD HARMLESS THE STATE OR **AGENCY** FOR ANY CLAIMS OR LIABILITIES RESULTING FROM THE NEGLIGENT ACTS OR OMISSIONS OF **AGENCY** OR ITS EMPLOYEES. For the avoidance of doubt, **Agency** shall not indemnify **Respondent** or any other entity under the contract.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Indemnification (Engineering or Architectural Services)	**RESPONDENT** SHALL INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND **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 DAMAGES, COSTS, ATTORNEY FEES, AND EXPENSES TO THE EXTENT CAUSED BY, ARISING OUT OF, OR RESULTING FROM ANY ACTS OF NEGLIGENCE, INTENTIONAL TORTS, WILLFUL MISCONDUCT, PERSONAL INJURY OR DAMAGE TO PROPERTY, AND/OR OTHERWISE RELATED TO **RESPONDENT**'S PERFORMANCE, AND/OR FAILURES TO PAY A SUBCONTRACTOR OR SUPPLIER BY THE **RESPONDENT** OR ITS AGENTS, EMPLOYEES, SUBCONTRACTORS, ORDER FULFILLERS, CONSULTANTS UNDER CONTRACT TO **RESPONDENT**, OR ANY OTHER ENTITY OVER WHICH THE CONTRACTOR EXERCISES CONTROL, OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THE CONTRACT. THE DEFENSE SHALL BE COORDINATED BY **RESPONDENT** WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND **RESPONDENT** MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE TEXAS ATTORNEY GENERAL. **RESPONDENT** AND **AGENCY** AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM		TEX GOVT CODE § 2254.0031 TEX LOCAL GOVT CODE § 271.904(a)-(e) and (g).	EXCEPTION: Clause only applies to solicitations and contracts involving architectural or engineering services. Section 2254.0031 of the Texas Government Code states the following: (a) A state governmental entity may require a contractor selected under this subchapter to indemnify or hold harmless the state from claims and liabilities resulting from the negligent acts or omissions of the contractor or persons employed by the contractor. A state governmental entity may not require a contractor to indemnify, hold harmless, or defend the state for claims or liabilities resulting from the negligent acts or omissions of the state governmental entity or its employees. (b) Notwithstanding any other provision of law, Sections 271.904(a)-(e) and (g), Local Government Code, apply to a contract for architectural or engineering services between an architect or engineer selected under this subchapter and a state agency as defined by Section 2052.101. Sections (a)-(e) and (g) of the Texas Local Government Code states, among other things, that indemnifications provisions in contracts for architectural or engineering services are void and unenforceable unless limited to specific acts provided for within the statute.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Indemnification (IP)	**RESPONDENT** SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS AGENCY AND THE STATE OF TEXAS FROM AND AGAINST ANY AND ALL CLAIMS, VIOLATIONS, MISAPPROPRIATIONS OR INFRINGEMENT OF ANY PATENT, TRADEMARK, COPYRIGHT, TRADE SECRET OR OTHER INTELLECTUAL PROPERTY RIGHTS AND/OR OTHER INTANGIBLE PROPERTY, PUBLICITY OR PRIVACY RIGHTS, AND/OR IN CONNECTION WITH OR ARISING FROM: (1) THE PERFORMANCE OR ACTIONS OF **RESPONDENT** PURSUANT TO THIS CONTRACT; (2) ANY DELIVERABLE, WORK PRODUCT, CONFIGURED SERVICE OR OTHER SERVICE PROVIDED HEREUNDER; AND/OR (3) **AGENCY**'S AND/OR **RESPONDENT**'S USE OF OR ACQUISITION OF ANY REQUESTED SERVICES OR OTHER ITEMS PROVIDED TO **AGENCY** BY **RESPONDENT** OR OTHERWISE TO WHICH **AGENCY** HAS ACCESS AS A RESULT OF **RESPONDENT**'S PERFORMANCE UNDER THE CONTRACT. **RESPONDENT** AND **AGENCY** AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. **RESPONDENT** SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE, INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY **RESPONDENT** WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL(OAG) WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND **RESPONDENT** MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM OAG. IN ADDITION, **RESPONDENT** WILL REIMBURSE **AGENCY** AND THE STATE OF TEXAS FOR ANY CLAIMS, DAMAGES, COSTS, EXPENSES OR OTHER AMOUNTS, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES AND COURT COSTS, ARISING FROM ANY SUCH CLAIM. IF **AGENCY** DETERMINES THAT A CONFLICT EXISTS BETWEEN ITS INTERESTS AND THOSE OF **RESPONDENT** OR IF **AGENCY** IS REQUIRED BY APPLICABLE LAW TO SELECT SEPARATE COUNSEL, **AGENCY** WILL BE PERMITTED TO SELECT SEPARATE COUNSEL AND **RESPONDENT** WILL PAY ALL REASONABLE COSTS OF **AGENCY**'S COUNSEL.		TEX CONST Art VIII § 6	EXCEPTION: Clause only applies to solicitations and contracts involving intellectual property matters. The IP Indemnification clause is used in addition to a general indemnification clause. Legal counsel should be consulted regarding use of an IP Indemnification clause.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
No Conflicts of Interest	**Respondent** represents and warrants that the provision of goods and services or other performance under the contract will not constitute an actual or potential conflict of interest or reasonably create an appearance of impropriety.	**Respondent** has disclosed in writing to **Agency** all existing or potential conflicts of interest relative to the performance of the contract.	TEX GOVT CODE §§ 2252.908, 2254.032, 2261.252(b)	Guidance relating to a former state employee's provision of subcontracting services is discussed in Ethics Advisory Opinion No. 545 (2017). Information obtained from the following sources may indicate an actual or potential conflict of interest: • Certificate of Interested Parties required by Section 2252.908 of the Texas Government Code. • Employee disclosure statement required by Section 2254.032 of the Texas Government Code. • Employee disclosure statement required by Section 2261.252 of the Texas Government Code. • Purchasing personnel disclosure statement required by 2262.004 of the Texas Government Code. Supplemental text to the required clause may include the following: If circumstances change during the course of the contract, **Respondent** shall promptly notify **Agency**.
Prior Disaster Relief Contract Violation	Under Sections 2155.006 and 2261.053 of the Texas Government Code, the **Respondent** certifies that the individual or business entity named in this **Response** 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.	Sections 2155.006 and 2261.053 of the Texas Government Code, prohibit state agencies from accepting a **Response** or awarding a contract that includes proposed financial participation by a 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 of the Texas Government Code, occurring after September 24, 2005. Under Sections 2155.006 and 2261.053 of the Texas Government Code, **Respondent** certifies that the individual or business entity named in this **Response** 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.	TEX GOVT CODE §§ 2155.006, 2261.053	Sections 2155.006 and 2261.053 of the Texas Government Code mandate the use of statutorily specified text.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Public Information Act	Information, documentation, and other material in connection with this **Solicitation** or any resulting contract may be subject to public disclosure pursuant to Chapter 552 of the Texas Government Code (the "Public Information Act"). In accordance with Section 2252.907 of the Texas Government Code, **Respondent** is required to make any information created or exchanged with the State pursuant to the 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.	**Respondent** understands that **Agency** will comply with the Texas Public Information Act (Chapter 552 of the Texas Government Code) as interpreted by judicial rulings and opinions of the Attorney General of the State of Texas. Information, documentation, and other material in connection with this **Solicitation** or any resulting contract may be subject to public disclosure pursuant to the Texas Public Information Act. In accordance with Section 2252.907 of the Texas Government Code, **Respondent** is required to make any information created or exchanged with the State pursuant to the 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.	TEX GOVT CODE Chapter 552 TEX GOVT CODE § 2252.907	Supplemental text to the required clause may include the following: Specific formats acceptable to the **Agency** include Word, Excel, and pdf. Supplemental text to the required clause may include details of the agency's protocol for labeling confidential information and procedures for receipt and handling of public information requests.
Signature Authority	By submitting the **Response**, **Respondent** represents and warrants that the individual submitting this document and the documents made part of this **Response** is authorized to sign such documents on behalf of the **Respondent** and to bind the **Respondent** under any contract that may result from the submission of this **Response**.	The undersigned certifies that I am duly authorized to submit this **Response** and execute a contract on my own behalf or on behalf of the **Respondent** listed below. Or *Other text that specifies that the Respondent signatory is authorized to act on behalf of the Respondent in submitting the Response or executing the contract.*	TEX GOVT CODE § 2155.0012	This clause ensures only individuals that are legally empowered to contractually bind the Respondent execute the contract and related documents on behalf of the Respondent.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Standard of Care for Architectural and Engineering Contractors	Pursuant to Section 2254.0031 of the Texas Government Code, which incorporates by reference Section 271.904(d) of the Texas Local Government Code, **Respondent** shall perform services (1) with professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license, and (2) as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer or architect.		TEX GOVT CODE § 2254.0031 TEX LOCAL GOVT CODE § 271.904(a)-(e) and (g)	EXCEPTION: Clause only applies to solicitations and contracts involving architectural or engineering services. Section 2254.0031 of the Texas Government Code incorporates Sections 271.904(a)-(e) and (g) of the Texas Local Government Code for all contracts for architectural/ engineering services. Section 271.904(d) of the Texas Local Government Code states the following: A contract for engineering or architectural services to which a governmental agency is a party must require a licensed engineer or registered architect to perform services: (1) with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license; and (2) as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer or architect. Section 271.904(e) of the Texas Local Government Code states that a provision establishing a different standard of care than a standard described by Subsection (d) is void and unenforceable.
State Auditor's Right to Audit	The state auditor may conduct an audit or investigation of any entity receiving funds from the state directly under the contract or indirectly through a subcontract under the contract. The acceptance of funds directly under the contract or indirectly through a subcontract under the 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, 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.	Pursuant to Section 2262.154 of the Texas Government Code, the state auditor may conduct an audit or investigation of any entity receiving funds from the state directly under any contract or indirectly through a subcontract under the contract. The acceptance of funds by the **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, 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** shall ensure that this paragraph concerning the authority to audit funds received indirectly by subcontractors through the contract and the requirement to cooperate is included in any subcontract it awards.	TEX GOVT CODE § 2262.154	Supplemental text to the required clause may include the following: The contract may be amended unilaterally by **Agency** to comply with any rules and procedures of the state auditor in the implementation and enforcement of Section 2262.154 of the Texas Government Code.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Suspension and Debarment	**Respondent** certifies that it and its principals are not suspended or debarred from doing business with the state or federal government as listed on the *State of Texas Debarred Vendor List* maintained by the Texas Comptroller of Public Accounts and the *System for Award Management (SAM)* maintained by the General Services Administration.	**Respondent** certifies that the offering 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. Entities ineligible for federal procurement are listed at http://www.sam.gov. Or **Respondent** certifies that neither it nor its principals are debarred, suspended, proposed for debarment, declared ineligible, or otherwise excluded from participation in the contract by any state or federal agency.	TEX GOVT CODE § 2155.077	
Technology Access Clause	**Respondent** expressly acknowledges that state funds may not be expended in connection with the purchase of an automated information system unless that system meets certain statutory requirements relating to accessibility by persons with visual impairment. Accordingly, **Respondent** represents and warrants to **Agency** that the technology provided to **Agency** for purchase is capable, either by virtue of features included within the technology or because it is readily adaptable by use with other technology, of: • providing equivalent access for effective use by both visual and non-visual means; • presenting information, including prompts used for interactive communications, in formats intended for non-visual use; and • being integrated into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired. For purposes of this Section, the phrase "equivalent access" means a substantially similar ability to communicate with or make use of the technology, either directly by features incorporated within the technology or by other reasonable means such as assistive devices or services which would constitute reasonable accommodations under the Americans With Disabilities Act or similar state or federal laws. Examples of methods by which equivalent access may be provided include, but are not limited to, keyboard alternatives to mouse commands and other means of navigating graphical displays, and customizable display appearance. In accordance with Section 2157.005 of the Texas Government Code, the Technology Access Clause contract provision remains in effect for any contract entered into before September 1, 2006.		TEX GOVT CODE § 2157.005	EXCEPTION: This clause only applies to contracts for Automated Information Systems entered into before September 1, 2006. In accordance with Section 2157.005 of the Texas Government Code, the Technology Access Clause contract provision remains in effect for any contract entered into before September 1, 2006. This clause would be applicable to current agreements involving long term software licenses (*e.g.*, perpetual term) and equipment leases that were effective prior to September 1, 2006.

Clause	Standard Text	Alternate Text	Legal Authority in Addition to TEX GOVT CODE § 2262.051(d)(1)	Guidance
Television Equipment Recycling Program	**Respondent** certifies its compliance with Subchapter Z, Chapter 361 of the Texas Health and Safety Code, related to the Television Equipment Recycling Program.	If **Respondent** is submitting a **Response** for the purchase or lease of covered television equipment, then **Respondent** certifies that it is compliant with Subchapter Z, Chapter 361 of the Texas Health and Safety Code related to the Television Equipment Recycling Program.	TEX HEALTH & SAFETY CODE § 361.991(c)	EXCEPTION: Clause only applies to solicitations and contracts for the purchase or lease of covered television equipment as defined by Section 361.91(3) of the Texas Health and Safety Code. Section 361.991(c) of the Texas Health and Safety Code states the following: (c) A state agency that purchases or leases covered television equipment shall require a prospective bidder to certify the bidder's compliance with this subchapter before the agency may accept the prospective bidder's bid. Section 361.91(3) of the Texas Health and Safety Code defines "covered television equipment" to mean the following equipment marketed to and intended for consumers: (A) a direct view or projection television with a viewable screen of nine inches or larger whose display technology is based on cathode ray tube, plasma, liquid crystal, digital light processing, liquid crystal on silicon, silicon crystal reflective display, light-emitting diode, or similar technology; or (B) a display device that is peripheral to a computer that contains a television tuner.
Terms and Conditions Attached to Response	Any terms and conditions attached to a **Response** will not be considered unless specifically referred to in the **Response**.		TEX GOVT CODE § 2155.0012	EXCEPTION: Clause does not apply to contracts but is an Essential Clause for solicitations. This clause ensures that Responses received by the agency are complete prior to the closing date of the solicitation.
Texas Bidder Affirmation	**Respondent** certifies that if a Texas address is shown as the address of the **Respondent** on this **Response**, **Respondent** qualifies as a Texas Bidder as defined in Section 2155.444(c) of the Texas Government Code.		TEX GOVT CODE § 2155.444(c)	EXCEPTION: Clause does not apply to contracts but is an Essential Clause for solicitations. As defined by TEX GOVT CODE § 2155.444(c), the term "Texas bidder" means a business: (1) incorporated in this state; (2) that has its principal place of business in this state; or (3) that has an established physical presence in this state.

APPENDIX 23

Recommended Contract Clauses

In accordance with Section 2262.051(d)(1) of the Texas Government Code, this document identifies the recommended provisions that an agency may include in a contract. The Recommended Clauses are terms commonly found in agency solicitations and contracts. For reference, this compendium provides Sample Text for each Recommended Clause.

This compendium does not serve as a substitute for legal counsel. The determination as to the appropriateness of a particular contract term is dependent on the characteristics of the transaction. Accordingly, legal counsel should be consulted to not only ensure that the text of the Recommended Clause is suitable for the applicable transaction but also that the use of the clause is consistent with the agency's internal policies and best practices. While these clauses are recommended clauses, agency legal counsel should carefully review and determine whether to omit them from its procurement templates.

The following terms in the Recommended Clauses should be revised by the agency as appropriate for conformity with the applicable solicitation and contract documents: **Agency**, **Respondent**, **Response**, and **Solicitation**. Examples of conforming terms include, but are not limited to, the following:

- "**Agency**" to agency name, Customer, or Client
- "**Respondent**" to Bidder, Proposer, Applicant, Contractor, or Vendor
- "**Response**" to Bid, Proposal, Offer, or Application
- "**Solicitation**" to Invitation for Bids, Request for Proposals, Request for Offers, Request for Applications, Pricing Request, or Request for Qualifications

Note: This list does not include "sample" text for terms that by their nature are highly negotiable, unique to a particular type of transaction, or descriptive of an individual agency's business practice *e.g.,* confidentiality and data protection safeguards, warranties, software licensing, terms of use, and service levels. Public procurement professionals are advised to seek assistance from their agency legal counsel to ensure that solicitations and contracts include transaction-specific terms that protect the interests of the State.

Recommended Clause	Sample Text (It is expected that the actual wording of a Recommended Clause may vary by agency and legal counsel will be consulted prior to use.)
Agency's Right to Audit	**Respondent** will make available at reasonable times and upon reasonable notice, and for reasonable periods, work papers, reports, books, records, and supporting documents kept current by **Respondent** pertaining to the contract for purposes of inspecting, monitoring, auditing, or evaluating by **Agency** and the State of Texas.
Americans With Disabilities Act	**Respondent** represents and warrants its compliance with the requirements of the Americans With Disabilities Act (ADA) and its implementing regulations, as each may be amended.
Assignment	**Respondent** shall not assign its rights under the contract or delegate the performance of its duties under the contract without prior written approval from the **Agency**. Any attempted assignment in violation of this Section is void and without effect. Or Neither Party may assign the contract or assign, transfer or delegate, in whole or in part, any of its interest in, or rights or obligations under, the contract without the prior written consent of the other Party, and any attempted or purported assignment, transfer or delegation thereof without such consent shall be null and void. Notwithstanding the foregoing, upon prior written notification to the other Party, either Party may assign the contract or assign, transfer or delegate, in whole or in part, any of its interest in, or rights or obligations under, the contract without such prior written consent to: (1) a successor in interest (for **Agency**, another state agency as designated by the Texas Legislature) or (2) a subsidiary, parent company, or other entity in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets.
Binding Effect	The contract shall inure to the benefit of, be binding upon, and be enforceable against, each Party and their respective permitted successors, assigns, transferees and delegates. Or The contract shall be binding upon and shall inure to the benefit of **Agency** and **Respondent** and to their representatives, successors and assigns.

Recommended Clause	Sample Text (It is expected that the actual wording of a Recommended Clause may vary by agency and legal counsel will be consulted prior to use.)
Change in Law and Compliance with Laws	Any alterations, additions, or deletions to the terms of the contract that are required by changes in federal or state law or regulations are automatically incorporated into the contract without written amendment hereto, and shall become effective on the date designated by such law or by regulation. Or **Respondent** shall comply with all laws, regulations, requirements and guidelines applicable to a vendor providing services and products required by the contract to the State of Texas, as these laws, regulations, requirements and guidelines currently exist and as amended throughout the term of the contract. **Agency** reserves the right, in its sole discretion, to unilaterally amend the contract prior to award and throughout the term of the contract to incorporate any modifications necessary for **Agency**'s compliance, as an agency of the State of Texas, with all applicable state and federal laws, regulations, requirements and guidelines.
Contract Term	The initial term of the contract shall be for one (1) year from [Insert Date] to [Insert Date]. **Agency** may, in its sole discretion, exercise the option to extend the contract for up to three (3) additional one (1) year periods. To exercise the option to extend the term, **Agency** will notify **Respondent**; such notice may be by Purchase Order issuance.
Damage to Government Property	**Respondent** shall be liable for all damage to government-owned, leased, or occupied property and equipment caused by the **Respondent** and its employees, agents, subcontractors, and suppliers, including any delivery or cartage company, in connection with any performance pursuant to the contract. **Respondent** shall notify the **Agency** in writing of any such damage within one (1) calendar day. **Respondent** is responsible for the removal of all debris resulting from work performed under the contract. Or In the event of loss, destruction or damage to any **Agency** or State of Texas property by **Respondent** or **Respondent**'s employees, agents, subcontractors, and suppliers, **Respondent** shall be liable to **Agency** and the State of Texas the full cost of repair, reconstruction or replacement of the lost, destroyed or damaged property. **Respondent** will reimburse **Agency** and the State of Texas for such property damage within ten (10) calendar days after **Respondent**'s receipt of **Agency**'s notice of amount due.
Disclosure of Interested Parties	**Respondent** represents and warrants that if selected for award of a contract as a result of the **Solicitation**, **Respondent** will submit to **Agency** a Certificate of Interested Parties prior to contract execution in accordance with Section 2252.908 of the Texas Government Code.
Discounts	If **Respondent** at any time during the term of the contract provides a discount on the final contract costs, **Respondent** will notify **Agency** in writing ten (10) calendar days prior to effective date of discount. **Agency** will generate a Purchase Order Change Notice and send a revised Purchase Order to **Respondent**. Or Notwithstanding any other provision to the contrary, all the benefits, pricing and any hourly rates granted by **Respondent** to **Agency** herein are at least as favorable as the benefits, pricing and hourly rates granted by **Respondent** to any previous client of **Respondent** for services and/or products similar to those provided hereunder. If **Respondent** enters into any subsequent agreement with any other client during the term of this contract which provides for benefits, pricing and/or hourly rates that are more favorable than those contained in this contract, **Respondent** shall notify **Agency** promptly of the existence of such more favorable benefits, pricing and/or hourly rates and **Agency** shall have the right to receive the more favorable contractual terms immediately. If requested in writing by **Agency**, **Respondent** hereby agrees to amend this contract to contain the more favorable benefits, pricing and/or hourly rates.
Drug-Free Workplace	**Respondent** represents and warrants that it shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (41 U.S.C. § 701 *et seq.*) and maintain a drug-free work environment.
Electrical Items	All electrical items must meet all applicable OSHA standards and regulations, and bear the appropriate listing from Underwriters Laboratory (UL), Factory Mutual Resource Corporation (FMRC), or National Electrical Manufacturers Association (NEMA).
Equal Employment Opportunity	**Respondent** represents and warrants its compliance with all applicable duly enacted state and federal laws governing equal employment opportunities.
Federal Occupational Safety and Health Law	**Respondent** represents and warrants that all articles and services shall meet or exceed the safety standards established and promulgated under the Federal Occupational Safety and Health Act of 1970, as amended (29 U.S.C. Chapter 15).
Force Majeure	Neither **Respondent** nor **Agency** shall be liable to the other for any delay in, or failure of performance, of any requirement included in the contract 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.
Immigration	**Respondent** represents and warrants that it shall comply with the requirements of the Immigration and Nationality Act (8 U.S.C.§ 1101 *et seq.*) and all subsequent immigration laws and amendments.

Recommended Clause	Sample Text (It is expected that the actual wording of a Recommended Clause may vary by agency and legal counsel will be consulted prior to use.)
Independent Contractor	**Respondent** acknowledges and agrees that it is furnishing products and services in the capacity of an independent contractor and that **Respondent** and its personnel are not employees of the **Agency** or the State of Texas. Or **Respondent** and **Respondent**'s employees, representatives, agents, subcontractors, suppliers, and third-party service providers shall serve as independent contractors in providing the services under the contract. Neither **Respondent** nor **Agency** is an agent of the other and neither may make any commitments on the other party's behalf. Should **Respondent** subcontract any of the services required in the contract, **Respondent** expressly understands and acknowledges that in entering into such subcontract(s), **Agency** is in no manner liable to any subcontractor(s) of **Respondent**. In no event shall this provision relieve **Respondent** of the responsibility for ensuring that the services performed under all subcontracts are rendered in compliance with the contract. **Respondent** shall have no claim against **Agency** for vacation pay, sick leave, retirement benefits, social security, worker's compensation, health or disability benefits, unemployment insurance benefits, or employee benefits of any kind. The contract shall not create any joint venture, partnership, agency, or employment relationship between **Respondent** and **Agency**.
Legal and Regulatory Actions	**Respondent** represents and warrants that it is not aware of and has received no notice of any court or governmental agency actions, proceedings or investigations, etc., pending or threatened against **Respondent** or any of the individuals or entities included in the **Response** within the five (5) calendar years immediately preceding the submission of the **Response** that would or could impair **Respondent**'s performance under the contract, relate to the solicited or similar goods or services, or otherwise be relevant to **Agency**'s consideration of the **Response**. If **Respondent** is unable to make the preceding representation and warranty, then **Respondent** instead represents and warrants that it has included as a detailed attachment in its **Response** a complete disclosure of any such court or governmental agency actions, proceedings or investigations, etc. that would or could impair **Respondent**'s performance under the contract, relate to the solicited or similar goods or services, or otherwise be relevant to **Agency**'s consideration of the **Response**. In addition, **Respondent** represents and warrants that it shall notify **Agency** in writing within five (5) business days of any changes to the representations or warranties in this clause and understands that failure to so timely update **Agency** shall constitute breach of contract and may result in immediate termination of the contract.
License Grant (Simple)	**Respondent** hereby grants to **Agency** a non-exclusive, perpetual, irrevocable, worldwide, transferable, fully paid, royalty-free, right and license: (a) to reproduce, modify, distribute, store, publicly perform, publicly display, create derivative works of, and otherwise exploit the deliverables, in each case without any restrictions and without accounting to **Respondent**; and (b) to sublicense any or all such rights to third parties.
Limitation on Authority	**Respondent** shall have no authority to act for or on behalf of **Agency** or the State of Texas except as expressly provided for in the contract; no other authority, power or use is granted or implied. **Respondent** may not incur any debt, obligation, expense or liability of any kind on behalf of **Agency** or the State of Texas.
Lobbying Prohibition	**Respondent** represents and warrants that **Agency**'s payments to **Respondent** and **Respondent**'s receipt of appropriated or other funds under the contract are not prohibited by Sections 556.005 or 556.0055 of the Texas Government Code.
Media Releases	**Respondent** shall not use **Agency**'s name, logo, or other likeness in any press release, marketing material, or other announcement without **Agency**'s prior written approval. **Agency** does not endorse any vendor, commodity, or service. **Respondent** is not authorized to make or participate in any media releases or public announcements pertaining to this procurement, the **Response** or the services to which they relate without **Agency**'s prior written consent, and then only in accordance with explicit written instructions from **Agency**.
No Felony Criminal Convictions	**Respondent** represents that neither **Respondent** nor any of its employees, agents, or representatives, including any subcontractors and employees, agents, or representative of such subcontractors, have been convicted of a felony criminal offense or that if such a conviction has occurred **Respondent** has fully advised **Agency** in writing of the facts and circumstances surrounding the convictions.
No Implied Waiver	The failure of a Party to insist at any time upon the strict performance of any covenant or agreement or to exercise any option, right, power, or remedy contained in the contract shall not be construed as a waiver or a relinquishment thereof for the future. Or 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 shall operate 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 successive breach. Or No provision of the contract shall constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to **Agency** as an agency of the State of Texas or otherwise available to **Agency**. The failure to enforce or any delay in the enforcement of any privileges, rights, defenses, remedies, or immunities detailed in the contract or otherwise available to **Agency** by law will not constitute a waiver of said privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel.
No Quantity Guarantees	**Agency** makes no express or implied warranty whatsoever that any minimum compensation or minimum quantity will be guaranteed under the contract. Or The contract is not exclusive to the **Respondent**. **Agency** may obtain products and related services from other sources during the term of the contract. **Agency** makes no express or implied warranties whatsoever that any particular quantity or dollar amount of products and related services will be procured through the contract.

Recommended Clause	Sample Text (It is expected that the actual wording of a Recommended Clause may vary by agency and legal counsel will be consulted prior to use.)
No Third-Party Beneficiaries	The contract is made solely and specifically among and for the benefit of the parties named herein and their respective successors and assigns, and no other person shall have any right, interest, or claims hereunder or be entitled to any benefits pursuant to or on account of the contract as a third-party beneficiary or otherwise. Or Nothing contained in the contract, either expressed or implied, is intended to confer on any person other than the Parties, or their respective permitted successors, assigns, transferees or delegates, any interests, rights, remedies, obligations or liabilities pursuant to, or by reason of, this contract.
Permits, Certifications, and Licenses	**Respondent** represents and warrants that it has determined what licenses, certifications and permits are required under the contract and has acquired all applicable licenses, certifications, and permits.
Prompt Payment	Payment shall be made in accordance with Chapter 2251 of the Texas Government Code, commonly known as the Texas Prompt Payment Act. Chapter 2251 of the Texas Government Code shall govern remittance of payment and remedies for late payment and non-payment. Or All payments to **Respondent** by **Agency**, any payments by **Respondent** to any subcontractor, and any payments by a subcontractor to any other person or entity that provides goods or services under this contract shall be made in compliance with Chapter 2251 of the Texas Government Code and 34 Texas Administrative Code § 20.487.
Property Rights	For purposes of the contract, the term "Work" is defined as all work papers, work products, materials, approaches, designs, specifications, systems, software, programs, source code, documentation methodologies, concepts, intellectual property or other property developed, produced or generated in connection with the services provided under the contract. **Agency** and **Respondent** intend this agreement to be a contract for the services and each considers the Work and any and all documentation or other products and results of the services to be rendered by **Respondent** to be a work made for hire. **Respondent** and **Respondent**'s employees will have no rights in or ownership of the Work and any and all documentation or other products and results of the services or any other property of **Agency**. **Respondent** acknowledges and agrees that the Work (and all rights therein) belongs to and shall be the sole and exclusive property of **Agency**. If for any reason the Work would not be considered a work-for-hire under applicable law, **Respondent** does hereby sell, assign, and transfer to **Agency**, its successors and assigns, the entire right, title and interest in and to the copyright in the Work and any registrations and copyright applications relating thereto and any renewals and extensions thereof, and in and to all works based upon, derived from, or incorporating the Work, and in and to all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present, or future infringement based on the copyrights, and in and to all rights corresponding to the foregoing. **Respondent** agrees to execute all papers and to perform such other property rights, as **Agency** may deem necessary to secure for **Agency** or its designee the rights herein assigned. In the event that **Respondent** has any rights in and to the Work that cannot be assigned to **Agency**, **Respondent** hereby grants to **Agency** an exclusive, worldwide, royalty-free, irrevocable, and perpetual license to directly and indirectly reproduce, distribute, modify, create derivative works of, publicly perform and publicly display, such rights to make, have made, use, sell and offer for sale any products developed by practicing such rights, and to otherwise use such rights, with the right to sublicense such rights through multiple levels of sublicenses. No later than the first calendar day after the termination or expiration of the contract or upon **Agency**'s request, **Respondent** shall deliver to **Agency** all completed, or partially completed, Work and any and all documentation or other products and results of the services. Failure to timely deliver such Work or any and all documentation or other products and results of the services will be considered a material breach of the contract. **Respondent** will 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 **Agency**. Or For purposes of the contract, the term "Work Product" is defined as all work papers, materials, approaches, designs, specifications, systems, software, programs, source code, documentation, methodologies, concepts, intellectual property or other property and/or results of the services that are developed, produced, generated or provided to **Agency** in connection with, or as a result of, the services provided under the contract. **Agency** and **Respondent** intend this agreement to be a contract for the services and each considers and expressly intends and agrees that the Work Product to be rendered by **Respondent** shall be a work-made-for-hire. **Respondent** and **Respondent**'s employees will have no rights in or ownership of the Work Product or any other property of **Agency**. **Respondent** acknowledges and agrees that the Work Product (and all rights therein, including without limitation all intellectual property rights) belongs to and shall be the sole and exclusive property of **Agency**. If for any reason the Work Product would not be considered a work-made-for-hire under applicable law, **Respondent** does hereby irrevocably sell, assign, and transfer to **Agency**, its successors and assigns, the entire right, title and interest in and to the Work Product and any and all intellectual property rights embedded therein or associated therewith, and in and to all works based upon, derived from, or incorporating the Work Product, and in and to all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present, or future infringement based on the copyrights, and in and to all rights corresponding to the foregoing. **Respondent** agrees to execute all papers and to perform such other property rights, as **Agency** may deem necessary to secure for **Agency** or its designee the rights herein assigned. In the event that **Respondent** has any rights in and to the Work Product that cannot be assigned to **Agency**, **Respondent** hereby grants to **Agency** an exclusive, worldwide, royalty-free, irrevocable, and perpetual license to directly and indirectly reproduce, distribute, modify, create derivative works of, publicly perform and publicly display, such rights to make, have made, use, sell and offer for sale any products developed by practicing such rights, and to otherwise use such rights, with the right to sublicense such rights through multiple levels of sublicenses. No later than the first calendar day after the termination or expiration of the contract or upon **Agency**'s request, **Respondent** shall deliver to **Agency** all completed, or partially completed, Work Product and any and all versions thereof. Failure to timely deliver such Work Product will be considered a material breach of the contract. **Respondent** will not make or retain any copies of the Work Product or any and all documentation or other products and results of the services without the prior written consent of **Agency**.

Recommended Clause	Sample Text (It is expected that the actual wording of a Recommended Clause may vary by agency and legal counsel will be consulted prior to use.)
Records Retention	**Respondent** shall maintain and retain all records relating to the performance of the contract including supporting fiscal documents adequate to ensure that claims for contract funds are in accordance with applicable State of Texas requirements. These records will be maintained and retained by **Respondent** for a period of seven (7) years after the contract expiration date or until all audit, claim, and litigation matters are resolved, whichever is later.
Refund	**Respondent** will promptly refund or credit within thirty (30) calendar days any funds erroneously paid by **Agency** which are not expressly authorized under the contract.
Restricted Employment for Certain State Personnel	Pursuant to Section 572.069 of the Texas Government Code, **Respondent** certifies that it has not employed and will not employ a former state officer or employee who participated in a procurement or contract negotiations for **Agency** involving **Respondent** within two (2) years after the date that the contract is signed or the procurement is terminated or withdrawn. This certification only applies to former state officers or employees whose state service or employment ceased on or after September 1, 2015.
Secure Erasure of Hard Disk Capability	All equipment provided to **Agency** by **Respondent** that is equipped with hard disk drives (*i.e.,* computers, telephones, printers, fax machines, scanners, multifunction devices, etc.) shall have the capability to securely erase data written to the hard drive prior to final disposition of such equipment, either at the end of the equipment's useful life or the end of the related services agreement for such equipment, in accordance with 1 TAC § Chapter 202.
Severability	If any provision of the contract is construed to be illegal or invalid, such construction will not affect the legality or validity of any of its other provisions. The illegal or invalid provision will be deemed severable and stricken from the contract as if it had never been incorporated herein, but all other provisions will continue in full force and effect. Or If any provision of the contract is construed to be illegal, invalid or unenforceable, such construction will not affect the legality, validity or enforceability of any of its other provisions. It is the intent and agreement of the parties to this contract that that this contract shall be deemed amended by modifying such provision to the extent necessary to render it valid, legal and enforceable while preserving its intent or, if such modification is not possible, by substituting another provision that is valid, legal and enforceable and that achieves the same objective. All other provisions of this contract will continue in full force and effect.
Sovereign Immunity	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. Or Nothing in the contract shall be construed as a waiver of the **Agency**'s or 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 **Agency** or the State of Texas. The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to **Agency** or the State of Texas under the 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. **Agency** does not waive any privileges, rights, defenses, or immunities available to **Agency** by entering into the contract or by its conduct prior to or subsequent to entering into the contract.
Subcontractors	**Respondent** may not subcontract any or all of the work and/or obligations due under the contract without prior written approval of the **Agency**. Subcontracts, if any, entered into by the **Respondent** shall be in writing and be subject to the requirements of the contract. Should **Respondent** subcontract any of the services required in the contract, **Respondent** expressly understands and acknowledges that in entering into such subcontract(s), **Agency** is in no manner liable to any subcontractor(s) of **Respondent**. In no event shall this provision relieve **Respondent** of the responsibility for ensuring that the services performed under all subcontracts are rendered in compliance with the contract.
Survival	Expiration or termination of the contract for any reason does not release **Respondent** from any liability or obligation set forth in the contract that is expressly stated to survive any such expiration or termination, that by its nature would be intended to be applicable following any such expiration or termination, or that is necessary to fulfill the essential purpose of the contract, including without limitation the provisions regarding warranty, indemnification, confidentiality, and rights and remedies upon termination.
Taxes	Purchases made for State of Texas use are exempt from the State Sales Tax and Federal Excise Tax. **Agency** will furnish Tax Exemption Certificates upon request. **Respondent** represents and warrants that it shall pay all taxes or similar amounts resulting from the contract, including, but not limited to, any federal, State, or local income, sales or excise taxes of **Respondent** or its employees. **Agency** shall not be liable for any taxes resulting from the contract.
Termination for Convenience	**Agency** reserves the right to terminate the contract at any time, in whole or in part, without cost or penalty, by providing thirty (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, **Respondent** must, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination. **Agency** shall be liable for payments limited only to the portion of work **Agency** authorized in writing and which **Respondent** has completed, delivered to **Agency**, and which has been accepted by **Agency**. All such work shall have been completed, in accordance with contract requirements, prior to the effective date of termination. **Agency** shall have no other liability, including no liability for any costs associated with the termination. Or **Agency** may terminate the contract for convenience on thirty (30) calendar days' written notice. There is no buy out or other amounts due if **Agency** terminates early. Upon termination under this provision, **Respondent** shall refund to **Agency** any amounts attributable to the terminated months within thirty (30) days of the termination.

Recommended Clause	Sample Text (It is expected that the actual wording of a Recommended Clause may vary by agency and legal counsel will be consulted prior to use.)
Trademark License	**Agency** hereby grants to **Respondent**, for the term of the contract, a limited non-exclusive, royalty-free, non-assignable, non-transferable license to reproduce **Agency**'s trademarks (as depicted in Exhibit __) on published materials in the United States related to the performance of the contract, provided that such license is expressly conditional upon, and subject to, the following: (1) **Respondent** is in compliance with all provisions of the contract; (2) **Respondent**'s use of the trademarks is strictly in accordance with the quality standards and in conformance with the reproduction requirements set forth in Exhibit __ or as otherwise communicated by **Agency**; (3) **Respondent** takes no action to damage the goodwill associated with the trademarks, and refrains from any attempt to contest, attack, dispute, challenge, cancel and/or oppose **Agency**'s right, title and interest in the trademarks or their validity; (4) **Respondent** makes no attempt to sublicense any rights under this trademark license; and (5) **Respondent** complies with any marking requests **Agency** may make in relation to the trademarks, including without limitation to use the phrase "Registered Trademark", the symbol "™", the registered trademark symbol "®" and/or any equivalent thereof.
Trademark Ownership	**Respondent** hereby acknowledges and agrees that the trademarks remain the exclusive property of **Agency**, that all right, title and interest in and to the trademarks is exclusively held by **Agency**, and all goodwill associated with such trademarks inures solely to **Agency**.
Unfair Business Practices	**Respondent** represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Chapter 17 of the Texas Business and Commerce Code, or allegations of any unfair business practice in any administrative hearing or court suit and that **Respondent** 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 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.
Use of State Property	**Respondent** is prohibited from using State Property for any purpose other than performing Services authorized under the contract. State Property includes, but is not limited to, **Agency**'s office space, identification badges, **Agency** information technology equipment and networks (*e.g.,* laptops, portable printers, cell phones, iPads, external hard drives, data storage devices, any **Agency**-issued software, and the **Agency** Virtual Private Network (VPN client)), and any other resources of **Agency**. **Respondent** shall not remove State Property from the continental United States. In addition, **Respondent** may not use any computing device to access **Agency**'s network or e-mail while outside of the continental United States. **Respondent** shall not perform any maintenance services on State Property unless the contract expressly authorizes such services. During the time that State Property is in the possession of **Respondent**, **Respondent** shall be responsible for (i) all repair and replacement charges incurred by **Agency** that are associated with loss of State Property or damage beyond normal wear and tear and (ii) all charges attributable to **Respondent**'s use of State Property that exceeds the contract scope. **Respondent** shall fully reimburse such charges to **Agency** within ten (10) calendar days of **Respondent**'s receipt of **Agency**'s notice of amount due. Use of State Property for a purpose not authorized by contract shall constitute breach of contract and may result in termination of the contract and the pursuit of other remedies available to **Agency** under contract, at law, or in equity.
Waiver of Consequential Damages	NOTWITHSTANDING ANY OTHER PROVISION TO THE CONTRARY HEREIN, NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OR LOSS OF PROFITS, ANTICIPATED OR OTHERWISE, OR LOSS OF REVENUES IN CONNECTION WITH OR ARISING OUT OF, OR IN CONNECTION WITH, THE SUBJECT MATTER OF THIS CONTRACT.

APPENDIX 24

Sample Quality Assessment Plan (QAP) Tools

Contract Monitoring Schedule

Contract Name/ID:

Date of Original Contract Monitoring Schedule:

Revision No. ____; Date:

Row	Deliverables by Agency	Deliverables by Contractor	Deliverable Due Dates	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)
1		*Status Report (Section 1.7)*	*Weekly*	*Review Report*	*Compare report provided by Contractor against contract requirements for content and timeliness.*	*Contract Manager, Mary Smith*	*Weekly*	*E-mail findings*	*Division Manager, Jane Doe*	*Provide periodic reports to Exec. Management. Provide notice to Contractor of agency approval/ rejection of deliverable. If deliverable not accepted, provide written notice to Contractor documenting noncompliance with contract requirements and monitor the corrective actions taken by Contractor.*
2	*Provide meeting room for contractor provided training sessions (Section 1.15)*		*Once per Fiscal Year*	*Site visit*	*Compare facilities provided by Agency against contract requirements for location and size.*	*Contract Manager, Mary Smith*	*Once for each scheduled training session*	*E-mail findings*	*Division Manager, Jane Doe*	*If Agency obligations are not being fulfilled, escalate matter internally to proactively and promptly correct deficiencies.*
3		*Traffic Signal turns green every 55 seconds (Section 2.1)*	*Ongoing throughout contract term*	*Site visit*	*Visually inspect traffic signal for compliance with performance standard of 8 out of 10 consecutive cycles*	*Contract Manager, Mary Smith*	*Monthly*	*Findings Report*	*Division Manager, Jane Doe*	*Approve/Dispute Invoice depending on findings. If warranted, pursue monetary remedy available under contract.*

Findings Report

Contract Name/ID:
Date of Original Findings Report:

	Deliverable Description and Location of Requirement in Contract	Monitor	Monitoring Methodology and Frequency	Performance Measures	Available Remedies	[Date of Monitoring Activity e.g., *05/18/2018*] Findings	[Date of Monitoring Activity e.g., *06/10/2018*] Findings
1	*Traffic Signal turns green every 55 seconds (Section 2.1)*	*Contract Manager, Mary Smith*	*Site Visit / Monthly*	*8 out of 10 consecutive cycles*	*$5,000 credit on next monthly invoice each time site visit doesn't meet performance standard*	*9 out of 10 tests meet performance standard*	*10 out of 10 tests meet performance standard*
2	*Five (5) miles of pavement laid every 10 days (Section 7.7)*	*Contract Manager, Mary Smith*	*Progress Report/ Quarterly*	*100% on schedule*	*Liquidated damages assessed at $1,000 per day late on completion of laid pavement*	*100% completion*	*N/A*
3							
4							
5							

APPENDIX 25

Sample 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:

- **Introduction**. Introduce all participants and identify agency and contractor key personnel.
- **Scope**. Discuss the scope of the contract (*i.e.,* what the agency is buying). Although this may seem overly simplistic, a thorough discussion by both parties of the agreed contract scope prior to the commencement of services reduces the likelihood of either party having unrealistic expectations during the course of the contract.
- **Terms**. Summarize contract terms and conditions, particularly any transaction-specific contract provisions. This can avoid any misunderstandings later on and allows the both parties to gain a better understanding of the terms prior to beginning work.
- **Requirements**. Discuss the technical and reporting requirements of the contract. The technical requirements may be discussed as part of the Scope. It is vital that the contractor and the agency understand their respective responsibilities under the contract regarding technical requirements. For instance, the contractor must understand the importance of any reports required under the contract and the importance of submitting them in accordance with contract requirements.
- **Administration**. Applicable contract administration procedures, including contract monitoring and progress measurement, should be discussed.
- **Rights**. The rights and obligations of both parties and the contractor performance evaluation procedures should be summarized, including that vendor performance will be reported to the Vendor Performance Tracking System. The agency should explain that the contractor will be evaluated on its performance both during and at the conclusion of the contract and that such information may be considered in the selection of future contracts.
- **Potential Problems**. Potential contract problem areas and possible solutions should be addressed.
- **Payment**. Invoicing requirements and payment procedures should be discussed, especially if the payment will be made according to milestones achieved by the contractor.
- **Authority**. The roles and responsibilities of the parties' contract managers, contract administrators, project managers, key personnel lead(s), 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 should prepare a summary of the meeting for the contract file which details the topics covered. The summary should 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 should be distributed to all conference participants.

APPENDIX 26

Sample Master Contract File Checklist

MASTER CONTRACT FILE CHECKLIST	
☐	A copy of the entire contract, including all amendments and POs
☐	A copy of the Acquisition Plan
☐	A copy of the Quality Assessment Plan *e.g.,* a schedule of compliance review (Contract Monitoring Schedule) and documentation of monitoring activities (Finding Reports)
☐	A reference list or a list of prior contracts with this specific vendor (if they offer valuable historical data)
☐	The records/minutes of all meetings, both internal and external (Including sign-in sheets and/or agendas)
☐	A copy of all reports and written deliverables required by the contract such as sales reports, approval requests, and inspection reports
☐	A copy of all letters of approval pertaining to such matters as materials, the contractor's quality control program, prospective key personnel, and work schedules
☐	A copy of all notices to proceed, to stop work, to correct deficiencies or change orders
☐	A copy of all contractor invoices, information related to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments
☐	A copy of all general correspondence (internal and external) related to the contract
☐	A copy of the Contract Close-Out Checklist

APPENDIX 27

Sample Novation Assignment Agreement

Note: *Contract documents should be reviewed by agency legal counsel prior to use.*

This Assignment Agreement ("***Assignment***") is entered into by and between the [name of agency] ("***Agency***"); _____ [name of current contractor], having offices located _____ ("***Assignor***"); and _____[name of new contractor], having offices located at _____ ("***Assignee***").

WHEREAS, on _____, 2018, Agency and Assignor entered into a _____ ("Contract");

WHEREAS, Assignor wishes to assign all of its rights, duties and obligations under the Contract to Assignee; and

WHEREAS, Agency, subject to the limitations and conditions set forth herein, agrees to this Assignment.

NOW, THEREFORE, the parties hereto agree as follows:

1. Assignor hereby assigns all its rights, title, and interest, and delegates all its obligations responsibilities and duties, in and to the Contract, to Assignee effective immediately.
2. Assignee hereby accepts the assignment of all of Assignor's obligations, responsibilities and duties under the Contract and all of Assignor's rights, title, and interest in and to the Contract to Assignee.
3. Notwithstanding the foregoing, Assignor agrees to defend and indemnify Agency from any and all claims, actions, judgments, liabilities, proceedings, and costs, including reasonable attorneys' fees, resulting from Assignor's performance prior to the assignment of the Contract.
4. Assignee agrees to indemnify Agency from any and all claims, actions, judgments, liabilities, proceedings and costs, including reasonable attorneys' fees and other costs of defense and damages, resulting from Assignee's performance after the assignment of the Contract.
5. [Assignee agrees that _____ shall continue to be the lead effective with this Assignment. Assignee shall notify Agency in writing immediately of any proposed changes in the lead or other key personnel assigned to the Contract. Agency shall retain the right of review and approval of any such proposed changes.] [Assignee shall submit all proposed key personnel under the Contract for Agency review and approval.]
6. Agency, in executing its consent to this Assignment, does not release Assignor from any claims or remedies it may have against Assignor under the Contract.
7. Agency shall not be charged for any costs incurred by either Assignor or Assignee in connection with the transition.
8. Except as otherwise provided herein, all terms and conditions of the Contract, including payment provisions, shall remain in effect and insofar as rights and obligations under the Contract from the date of execution of

this Agreement are concerned, references to Assignor therein shall be deemed replaced with references to Assignee.

9. Assignee has reviewed all representations and certifications in the Contract relating to eligibility for state contract. By signature hereon, Assignee adopts those representations and certifications. Assignee will notify Agency of any representations or certifications in the Contract that are not true or become untrue with respect to Assignee.
10. This Assignment shall be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit brought for any breach of this Assignment is fixed in any court of competent jurisdiction in Travis County, Texas.
11. This Assignment shall become effective as of the date of the signature of Agency after having first been signed by Assignor and Assignee.

IN WITNESS WHEREOF, the parties have signed and executed this Assignment.

Assignor:

[company name]

By:_____

Name: _____

Title: _____

Date: _____

Assignee:

[company name]

By:_____

Name: _____

Title: _____

Date: _____

Agreed and Accepted by:

[name of Agency]

By:_____

Name: _____

Title: _____

Date: _____

APPENDIX 28

Sample Notices of Termination and Cure Notice

Note: *Contract documents should be reviewed by agency legal counsel prior to use.*

NOTICE OF TERMINATION FOR CONVENIENCE

Date

Contractor Name
Contractor Address
Re: Contract Title; Notice of Termination for Convenience

Dear _____:

Pursuant to Section ___ (Termination) of the contract, 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.

By this correspondence, the [Agency Name] expressly does not waive any rights, remedies, privileges or immunities available to it as an agency of the State of Texas or otherwise available to it under the referenced contract and under applicable law.

Sincerely,

Note: *Contract documents should be reviewed by agency legal counsel prior to use.*

NOTICE OF TERMINATION FOR CAUSE

Date

Contractor Name
Contractor Address
RE: Contract Title; Notice of Termination for Cause

Dear _____:

Pursuant to Section _____ (Termination) of the contract, this contract is hereby terminated effective [date] for failure by [Contractor Name] to [describe contractor's non-performance].

[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 Manager [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.

By this correspondence, the [Agency Name] expressly does not waive any rights, remedies, privileges or immunities available to it as an agency of the State of Texas or otherwise available to it under the referenced contract and under applicable law. Among other things, [Agency Name] reserves the right to refer this matter to the Office of the Attorney General of the State of Texas for handling.

Note: *Contract documents should be reviewed by agency legal counsel prior to use.*

NOTICE OF CURE

Date

Contractor Name
Contractor Address
RE: Contract Title; Notice of Cure

Dear _____:

Pursuant to Section ____ (Termination) of the contract, [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 ten (10) business days from the date of this letter, the [Agency Name] may terminate for cause under the terms and conditions of the termination clause of this contract.

Or

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 cause. 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 ten (10) business 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.

APPENDIX 29

Purchase Category Code List

The following Purchase Category Codes (PCC) are for use with purchase Document Type 2. Document Type 2 refers to purchase vouchers that are subject to SPD procurement rules. PCCs are codes used to document the purchase method, commodity type and dollar category of purchases.

Document Type 9 purchases should have a blank PCC field because they are not within SPD purchasing authority, exempt from competitive bidding requirements, or required by statute to be procured through a specific purchasing method. Document Types 2 and 9 are audited after payment.

PCC List:

A - Purchases of items from SPD term contracts using Texas SmartBuy. See 34 Texas Administrative Code § 20.220 – Term Contracts.

B - Purchases made with a State of Texas Retail Fuel Card.

C - Purchases from SPD Managed term contracts using the agency's internal requisition/purchase order forms. See 34 Texas Administrative Code § 20.220 – Term Contracts.

D - Purchases of information technology commodities (products or services) not available through DIR contracts. See 34 Texas Administrative Code § 20.391 – Request for Offer Purchase Method.

E - Purchases of goods and services when the total purchase is estimated to be $0.00 to $5,000.00. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

F - Purchases of goods (not services) in the total estimated amount of $5,000.01 or more but not more than $25,000.00 for the total contract value. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

G - Purchases for non-delegated goods or services from a contract awarded by SPD on behalf of a particular agency. Items are not on SPD term contract. See 34 Texas Administrative Code § 20.184 – Requisitions and Specifications.

H - Purchases in any category, except PCC B, paid for with a payment card.

I - Purchases of commodity items from DIR Contracts. See Texas Government Code § 2157.068 – Purchase of Automated Information Systems (products or services).

K - Purchases of publications directly from the publisher with no dollar limits. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

L - Purchases of perishable goods, *e.g.*, fresh fruit, eggs, ice, etc. with no dollar limits. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

M - Purchases of distributor items, *e.g.*, repair parts for a unit of major equipment that is needed immediately, or maintenance contracts for laboratory/medical equipment with no dollar limits. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

P - Purchases of fuel, oil, and grease - (class 405) with no dollar limits. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

Q - Purchases of services (not goods) in the amounts estimated to be $5,000.01 or more but not more than $25,000.00 for the total contract value. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

S - Purchases of services or goods in an amount estimated to exceed $25,000.00 for the total contract value. See 34 Texas Administrative Code § 20.82 – Delegated Purchases.

T - Emergency purchases of goods and services exceeding $25,000.00. See 34 Texas Administrative Code § 20.210 – Emergency Purchases.

X - Purchases of items from SPD TXMAS Contracts. As of 9-1-2007, PCC X does not include TXMAS Schedule 70 (Information Technology) contracts. See 34 Texas Administrative Code §§ 20.231-.233 – Multiple Award Schedule.

J, N, O, R, U, V, W, Y, Z - Not used.

APPENDIX 30

Post-Payment & Procurement Review Agency Document Checklist

Overview:

- Supporting documentation must be provided for each Purchase Category Code (PCC), including the blank PCC used for Document Type 9 purchases.
- All purchases exceeding $25,000 must be posted on the Electronic State Business Daily (ESBD) for the required minimum time period. Failure to post for the required time will void the contract.
- If "printout" is noted, hard copy or electronic copy documentation must be placed in the procurement file.
- This checklist is a non-exhaustive list of documentation to be included in the procurement file. Refer to the *Texas Procurement and Contract Management Guide* for additional information *e.g.*, requirements pertaining to CAT Reviews, QAT Reviews, State Use Program Exception Reports, SAO Nepotism Disclosure Statement for Purchasing Personnel, TEC Disclosure of Interested Parties Form 1295, Procurement and Contract Management Conflict of Interest Disclosure, LBB reporting, and VPTS reporting.

PCC A **TEXAS SMARTBUY TERM CONTRACT PURCHASE**	☐ Texas SmartBuy Term Contract PO with authorized signature ☐ Invoice must match PO ☐ Waiver from TCI and TIBH included in the documentation indicating that the product or service may be otherwise procured (if applicable) ☐ At the time of PO issuance, file must contain printout of Warrant Hold check for purchases using local funds; printout dated no more than 7 days prior to contract award **NOTE:** TIBH and TCI purchases through Texas SmartBuy require the use of Document Type 9, with a blank PCC field
PCC B **STATE OF TEXAS RETAIL FUEL CARD PURCHASE**	☐ PO with authorized signature and/or Internal Log • NIGP Class-Item Codes Listed ☐ List on the PO the item purchased ☐ All sales receipts or invoices must be included and signed by authorized user ☐ Prior to purchase, file must contain printout of Warrant Hold check for purchases of $500 or more or purchases using local funds; printout dated no more than 7 days prior to contract award **NOTE:** State of Texas Retail Fuel Cards can only be used for fuel, authorized maintenance, and roadside assistance purchases
PCC C **SPD MANAGED TERM CONTRACT PURCHASE**	☐ Internal Agency Purchase Order with authorized signature issued against SPD Managed Term Contract • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Waiver from TCI and TIBH included in the documentation indicating that the product or service may be otherwise procured (if applicable) ☐ At the time of PO issuance, file must contain printout of Warrant Hold check for purchases using local funds; printout dated no more than 7 days prior to contract award **NOTE:** TIBH and TCI purchases through Texas SmartBuy require the use of Document Type 9, with a blank PCC field

PCC D **PURCHASE OF INFORMATION TECHNOLOGY COMMODITIES NOT AVAILABLE THROUGH DIR CONTRACTS**	*If using the 34 Texas Administrative Code § 20.391 (Rule for Request for Offers) procedures:* ☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ DIR exemption must be included in the documentation indicating that the product or service may be otherwise procured; an exemption provided by Legislative Budget Board; or other exemption such as an express statutory exemption may be accepted ☐ If the purchase does not exceed the $5,000 spot purchase limit, documentation must be included in the file ☐ If greater than $5,000 but does not exceed $25,000, file must demonstrate compliance with informal bidding requirements and bid tabulation/committee evaluation is required • CMBL printout of at least three (3) vendors that were solicited, two (2) of which must be certified HUBs (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ If greater than $25,000, file must demonstrate compliance with formal bidding requirements and bid tabulation/committee evaluation is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Waiver from TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award CPA may not authorize the expenditure of appropriated funds until written approval of a Major Information Resource Project (TEX. GOV'T CODE § 2054.003(10)) is obtained from the QAT. GAA Art. IX, Section 9.02(b). *If using an approved alternate method of procurement per 34 Texas Administrative Code § 20.391, report as PCC D but follow relevant procurement procedures. For example, the IFB procedure for IT commodities $5,000.01 to $25,000 would be coded PCC D, but follow the PCC F pattern.*

PCC E **PURCHASE $5,000.00 or Less**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ If the item is on Term Contract, file documentation shows the quantity is less than the minimum order required for Term Contract ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award
PCC F **GOODS PURCHASE $5,000.01 to $25,000.00**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ File must demonstrate compliance with informal bidding requirements and bid tabulation/ committee evaluation is required • CMBL printout of at least three (3) vendors that were solicited, two (2) of which must be certified HUBs (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award

PCC G **SPD-ADMINISTERED AGENCY-SPECIFIC PURCHASE (solicited by SPD)**	☐ Agency-specific procurements issued by SPD *e.g.,* goods exceeding $50,000 and services exceeding $100,000 ☐ Notice of Award issued by SPD with contract documentation ☐ Internal Agency Purchase Order with authorized signature • Delivery terms and/or contract term defined • Reference to SPD contract number on purchase order ☐ Invoice must match SPD PO ☐ At the time of PO issuance, file must contain printout of Warrant Hold check for purchases using local funds; printout dated no more than 7 days prior to contract award
PCC H **PAYMENT CARD PURCHASE**	☐ PO with authorized signature and/or Internal Log • NIGP Class-Item Codes listed ☐ List on the PO the item purchased ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ All sales receipts or invoices must be included and signed by authorized user ☐ Prior to purchase, file must contain printouts of Warrant Hold check for purchases of $500 or more or purchases using local funds; printout dated no more than 7 days prior to contract award **NOTE:** Payment card cannot be used for Term Contracts or Managed Team Contracts. Use PCC B for purchases made with a State of Texas Retail Fuel Card.

PCC I **PURCHASE FROM DIR CONTRACT**	As of 9-1-2007 this Purchase Category Code includes TXMAS Schedule 70 contracts ☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed • State DIR Contract number on PO ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ Waiver from TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ At the time of PO issuance, file must contain printout of Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award <u>Purchases of commodity items on DIR contracts</u>. • If the contract amount is $50,000 or less, the agency may choose any DIR contracted vendor. • If the contract amount is over $50,000.00 but does not exceed $1M, the agency must request bids from three DIR contract vendors offering the items. • If the contract amount is more than $1M but not more than $5M, the agency must request bids from six DIR contract vendors offering the items or all vendors on the schedule if the category has less than six vendors. An agency may not enter into a contract for IT commodity items of more than $5M. TEX. GOV'T CODE § 2157.068 (e-1) – (e-2). <u>Purchases of services requiring a statement of work on DIR contracts greater than $50,000</u>. An agency must consult with DIR before submitting the statement of work to a vendor. A statement of work is not valid and money may not be paid to the vendor unless DIR first signs the statement of work. TEX. GOV'T CODE § 2157.0685. CPA may not authorize the expenditure of appropriated funds until written approval of a Major Information Resource Project (TEX. GOV'T CODE § 2054.003(10)) is obtained from the QAT. GAA Art. IX, Section 9.02(b).

PCC K **DIRECT PUBLICATION PURCHASE**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed • "Direct Publication - Not available from any other source" declaration placed on PO Invoice must match PO ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ If greater than $25,000, file must demonstrate compliance with formal bidding requirements and bid tabulation/committee evaluation is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award.

PCC L PERISHABLE GOODS PURCHASE	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ If greater than $5,000 but does not exceed $25,000, file must demonstrate compliance with informal bidding requirements and bid tabulation/committee evaluation is required • CMBL printout of at least three (3) vendors that were solicited, two (2) of which must be certified HUBs (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ If greater than $25,000, file must demonstrate compliance with formal bidding requirements and bid tabulation/evaluation committee is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award

PCC M **DISTRIBUTOR PURCHASE**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ If greater than $5,000 but does not exceed $25,000, file must demonstrate compliance with informal bidding requirements and bid tabulation/committee evaluation is required • CMBL printout of at least three (3) vendors that were solicited, two (2) of which must be certified HUBs (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ If greater than $25,000, file must demonstrate compliance with formal bidding requirements and bid tabulation/evaluation committee is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award

PCC P **FUEL, OIL, OR GREASE PURCHASE**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ If greater than $5,000 but does not exceed $25,000, file must demonstrate compliance with informal bidding requirements and bid tabulation/committee evaluation is required • CMBL printout of at least three (3) vendors that were solicited, two (2) of which must be certified HUBs (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ If greater than $25,000, file must demonstrate compliance with formal bidding requirements and bid tabulation/evaluation committee is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award

PCC Q **SERVICE PURCHASE $5,000.01 to $25,000.00**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ File must demonstrate compliance with informal bidding requirements and bid tabulation/ committee evaluation is required • CMBL printout of at least three (3) vendors that were solicited, two (2) of which must be certified HUBs (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award

PCC S **GOOD OR SERVICE PURCHASE EXCEEDING $25,000.00**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ SPD Delegation required for purchases of goods over $50,000 ☐ SPD Delegation required for purchases of services over $100,000 ☐ File must demonstrate compliance with formal bidding requirements and bid tabulation/ committee evaluation is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative (if applicable) ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award

PCC T **EMERGENCY PURCHASE OF GOODS AND SERVICES EXCEEDING $25,000.00**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ All Essential Provisions (including Texas Required Contract Clauses) ☐ File must demonstrate compliance with formal bidding requirements and bid tabulation/ committee evaluation is required • CMBL printout of each eligible vendor within the agency's geographic region (CMBL printout must be dated on or before solicitation) • Written approval from agency head or designee authorizing supplementation with non-CMBL vendors ☐ For purchases of $100,000 or more, Historically Underutilized Business Subcontracting Plan must be documented ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000 ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Emergency justification letter signed by the agency's purchasing director or an authorized representative ☐ Proprietary Purchase Justification signed by the Agency Head or designee (if applicable) ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file must contain printouts of vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award
PCC X **SPD TEXAS MULTIPLE AWARD SCHEDULE (TXMAS) PURCHASE**	*As of 9-1-2007 PCC X does not include TXMAS Schedule 70 (Information Technology) contracts* ☐ Texas SmartBuy TXMAS PO with authorized signature ☐ Invoice must match PO ☐ Purchase Order Change Notice (POCN) for extending/renewing a contract (created prior to the expiration of contract) (if applicable) ☐ Waiver from TCI and TIBH included in the file indicating that the product or service may be otherwise procured (if applicable) ☐ Proprietary Purchase Justification signed by Agency Head or designee (if applicable) ☐ Best value statement must be documented on the PO (if applicable) ☐ Electronic State Business Daily (ESBD) award posting printout if purchase is over $25,000 ☐ At the time of PO issuance, file must contain printout of Warrant Hold check for purchases using local funds; printout dated no more than 7 days prior to contract award

EXEMPT PURCHASES **Document Type 9**	☐ PO with authorized signature • Delivery terms and/or contract term defined • NIGP Class-Item Codes listed ☐ Legal citation applicable to the purchase must be listed on the purchase documentation • Example: Texas Government Code Section 2162.105 ☐ Invoice must match PO ☐ Electronic State Business Daily (ESBD) posting (solicitation and notice of award) printout if purchase is over $25,000. ☐ Response documents (signed) for each awarded vendor (if applicable) ☐ At the time of award, file documentation must contain vendor compliance checks: • Debarment check • SAM.gov check; printout dated no more than 7 days prior to contract award • Iran, Sudan & Foreign Terrorist Organization check • Boycott Israel check • Warrant Hold check for purchases by written contract or purchases using local funds; printout dated no more than 7 days prior to contract award **NOTE:** Utility payments made using a payment instrument OTHER THAN a purchase order need not contain a PO number.

APPENDIX 31

Exemptions List (Document Type 9)

Document Type 9 purchases refer to purchases of certain goods and services that are not within SPD purchasing authority, exempt from competitive bidding requirements, or required by statute to be procured through a specific purchasing method. Agency legal counsel should be consulted to determine whether there are agency-specific exemptions which qualify as "Document 9" purchases in addition to the purchases listed below. Document Type 9 purchases should have a blank PCC field.

If not exempt by the General Appropriations Act, Texas Government Code § 2151 et seq., or other statute, the purchase must be competitively bid or the purchase should satisfy the requirements of a proprietary sole source purchase and a proprietary purchase justification should be placed in the procurement file.

NOTE: Document Type 9 purchases are subject to Post-Payment Audit to verify whether the purchases are indeed exempt and that the agency used the correct Document Type and Comptroller Object Codes.

Item or Nature of Service	Texas Government Code Section
Auxiliary enterprises.	2155.141
Goods or services made or provided by blind or visually impaired persons and offered for sale to state agencies.	2155.138
Care/treatment/education services for wards and clients of the state by Texas Juvenile Justice Department.	2155.143
Construction projects by or under the supervision of any public authorities created by the laws of this state; or state-aided local government projects of any character whatsoever.	2166.004
Construction projects undertaken by Texas Department of Criminal Justice.	2166.003(b)
Consulting services or services of a Consultant as defined in Texas Government Code § 2254.021 et seq. Must use 7239, 7240, or 7242 comptroller object codes to process expenditures.	2155.001
Group purchasing program: purchases by state-owned hospital or clinics through a group purchasing program comprised of two or more hospital or clinic facilities.	2155.139(b)
Health care purchases.	2155.144
Health & Human Service agency purchases and all agencies under its statutory umbrella.	2155.144
Items required by statute to be purchased from a particular source.	2155.132(f)(2)
Lease payments for district office space for certain agencies and programs.	2167.002

Item or Nature of Service	Texas Government Code Section
Legislative agency purchases for the following agencies: 101-Senate, 102 House of Representatives, 103-Texas Legislative Council, 104-Legislative Budget Board, 105-Legislative Reference Library, 116-Sunset Advisory Commission, 308-State Auditor, 362-Texas Lottery Commission.	2155.203
Library materials & services within a university or institutions of higher learning, state-owned hospitals or clinics (including Amigos Library services) for certain limited purchases.	2155.139(a)
Organized activities relating to instructional departments of institutions of higher learning & similar activities of other state agencies.	2155.141
Texas Department of Criminal Justice made goods.	2155.065
Professional services & fees: services listed in Texas Government Code § 2254.001 et seq. must use 7253 or 7356 comptroller object codes to process expenditures.	2155.001
Purchases made from gifts or grants, including industrial grants or contracts in support of research or federal grants or contracts in support of research in aid payments (HEAF).	2155.140
Purchases of products and services of workshops, organizations, or corporations whose primary purpose is training and employing mentally retarded or physically handicapped persons (TIBH set-aside contracts) if the agency performs the purchase at the TIBH store personally.	2155.441
Repairs & renovations to buildings excluded by SPD: letter of exclusion from TFC's Facility Construction and Space Management Division should be attached.	2166.003(a)(7)
Repairs & renovations to buildings & projects by agencies listed.	2166.003 2166.004
Residential space for Mental Health and Mental Retardation & Texas Juvenile Justice Department.	2167.001(b)(2) 2167.001(b)(3)
Services of an employee of a state agency.	2155.001
Utilities (services of public utilities): natural gas, electric, water, sewage & garbage services, other services & charges for utility services, and local telephone service. Does not include cell phone or cable services.	2155.001
Vehicle maintenance & repair: any contract for repair of vehicles made by the Office of Vehicle Fleet Management of SPD.	2171.102(c)
Veterans Land Board purchases in connection with improvements, repairs, or maintenance of land or other activities undertaken by Veterans Land Board with respect to land.	2155.149

For more information, visit our website:
comptroller.texas.gov/purchasing/

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