



# THE TEXAS A&M UNIVERSITY SYSTEM

## Contract Management Handbook

(rev. 07/16)

## Table of Contents

[Section 1 – Introduction, P. 4](#)

[Section 2 – Purpose, P.4](#)

[Section 3 – This Handbook, P. 4](#)

[Section 4 – Code of Ethics, P. 5](#)

A. [General, P. 5](#)

B. [State Ethics Policy, P.5](#)

C. [Standards of Conduct, P. 5](#)

D. [Prohibition of Economic Benefit, P.6](#)

E. [The Texas A&M University System Ethics Policy, P. 6](#)

[Section 5 – Conflict of Interest, P.6](#)

A. [General, P. 6](#)

B. [The Texas A&M University System Conflict of Interest Policy, P. 6](#)

[Section 6 – Planning, P. 8](#)

A. [Risk Assessment, P. 8](#)

B. [Risk Management, P. 8](#)

C. [Determining Procurement Method, P. 8](#)

D. [Exemptions, P. 9](#)

E. [Other Planning Considerations, P. 9](#)

F. [Planning for Grants, P. 10](#)

[Section 7 – Preparing and Advertising the Solicitation, P. 11](#)

A. [Statement of Work, P. 11](#)

B. [Advertising the Solicitation, P. 14](#)

[Section 8 – Evaluation and Award, P. 16](#)

A. [Evaluation Teams, P. 16](#)

B. [Responsive Proposals, P. 17](#)

C. [Single Responses, P. 17](#)

D. [Proposal Evaluation, P. 17](#)

E. [Presentations, P. 18](#)

F. [Award, P. 18](#)

G. [Negotiations, P. 18](#)

H. [Evaluation and Award of Grants, P. 19](#)

[Section 9 – Contract Formation, p. 20](#)

A. [Legal, P. 20](#)

B. [Drafting the Contract, P. 21](#)

C. [Contract Review Checklist, P. 23](#)

D. [Authority to Contract, P. 24](#)

E. [Federally Funded Contracts P. 24](#)

F. [Contract Formation for Grants, P. 24](#)

[Section 10 – Contract Administration, P. 25](#)

A. [Contract Manager Responsibilities, P. 26](#)

B. [Posting of Contracts, P. 28](#)

C. [Contract Reporting, P. 29](#)

D. [Contract Monitoring, P. 29](#)

E. [Payment Approval, P. 32](#)

F. [Change Management, P. 33](#)

G. [Dispute Resolution, P. 35](#)

H. [Termination, P. 35](#)

- I. [Contract Close-out, P.37](#)
- J. [Grant Close-out, P. 38](#)
- K. [Contract Administration File, P. 39](#)
- L. [Retention Policy, P. 39](#)

[Section 11 – Training and Continuing Education, P. 40](#)

- A. [Purchasing Personnel, P. 40](#)
- B. [Contract Management Personnel, P. 41](#)

[Section 12 – Definitions, P. 43](#)

[Section 13 – Acronyms, P. 47](#)

[Section 14 – Appendix, P. 48](#)

## Section 1 – Introduction

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

- Planning
- Procurement
- Contract Formation (Rate/Price Establishment and other relevant terms and conditions)
- Contract Administration

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

## Section 2 – Purpose

The purpose of the Contract Management Handbook (CMH) is to offer The Texas A&M University System members' contract managers guidance on improving existing contract management processes and practices. The CMH is not designed to relieve the member and contractors of their responsibility to ensure compliance with laws, rules, and regulations related to their specific programs and funding sources.

A Contract Review Guidelines and Checklist has also been developed to identify steps used to evaluate and process contracts to be signed on behalf of the System or System members. This checklist can be found at the following link; <http://www.tamus.edu/business/hub-procurement/contract-administration/>

## Section 3 – This Handbook

- Has been created to provide suggestions as well as best practices to improve member contracting processes.
- Describes the processes within contract administration, including how to develop and negotiate a contract, select a contractor and monitor contractor performance.
- Describes the procurement process as it relates to contract administration and management.
- Does not replace existing statutory requirements and member rules, policies or procedures. Each member is responsible for developing sound business procedures in accordance with applicable state and federal laws, regulations, policies and procedures.
- Is not intended to be a manual on the law of contracts or constitute legal advice. General principles of law will be discussed, but these are only general principles which include many exceptions. **ALWAYS CONSULT THE OFFICE OF GENERAL COUNSEL FOR LEGAL ADVICE CONCERNING CONTRACTS.**
- Includes sample contract provisions, distinguishing between essential, recommended and optional contract provisions.

## Section 4 – Code of Ethics

### A. General

State officials and employees are responsible for protecting the safety and welfare of the public's monies. All state officials and employees should endeavor to pursue a course of conduct that does not raise suspicion among the public. Therefore, they shall avoid acts which are improper or give the appearance of impropriety. This conduct is particularly important for state purchasing personnel and contract management personnel who are charged with the disposition of state funds.

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

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

### B. State Ethics Policy

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

### C. Standards of Conduct

A state officer or employee should not:

- a. Accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;
- b. 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;
- c. Accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;
- d. Make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or
- e. Intentionally or knowingly solicit, accept or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officers or employees official duties in favor of another.

#### **D. Prohibition of Economic Benefit**

In accordance with 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 material issued by a department or agency of the executive branch. A person who violates this section shall be dismissed from state employment.

#### **E. The Texas A&M University System Ethics Policy**

For specific policies related to Ethics within The Texas A&M University System please visit:

<http://policies.tamus.edu/07-01.pdf>

<http://policies.tamus.edu/25-07-03.pdf>

<http://policies.tamus.edu/07-03.pdf>

### Section 5 – Conflict of Interest

#### **A. General**

To avoid conflicts of interest state agencies shall require all potential contractors to disclose, in their responses to solicitations, any actual or potential conflicts of interest in their proposed provision of services or other performance under any contracts resulting from the solicitations. Specifically, principals of debarred vendors (i.e. owner, proprietor, sole or majority shareholder, director, president, managing partner, etc.) shall be identified to ensure such vendors/principals are not awarded, extended or renewed any contract. Further, respondents should also be required to update that information throughout the terms of any contracts resulting from the solicitations. In cases where there is no solicitation the contract shall include a clause addressing contractor disclosure of conflict of interest. See Appendix (Section 14.E).

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

Further, effective January 1, 2016, a contracting business entity must submit a notarized copy of the disclosure of interested parties form prescribed by the Texas Ethics Commission to members for any contract (including an amendment, extension, or renewal) that has a value of at least one million dollars or requires action by the Board of Regents, unless it falls into one of the following categories:

- Contracts with other state agencies (including other state institutions of higher education), municipalities, counties, public school districts, or special-purpose districts or authorities;
- Contracts with the federal government;
- Contracts with foreign governments;
- Employment contracts;
- Sponsored research contracts;
- Contracts to perform research, educational, instruction, or service activities consistent with a member's mission;

- Contracts related to health and human services if the value of the contract cannot be determined at the time the contract is executed and any qualified vendor is eligible for the contract; or
- Grant (non-contract) documents.

A “contracting business entity” includes a sole proprietorship, partnership, corporation, limited liability company, nonprofit entity, foreign company, or other legally-recognized business entity other than those governmental entities indicated above. Information regarding contracts that require Board action can be found at <http://policies.tamus.edu/25-07.pdf>. The member may not execute a contract until the entity provides the form. Further, no later than 30 days after the full execution of the contract the member must provide the form’s certification number to the TEC as described on the TEC website. More information regarding this requirement can be found at <https://www.ethics.state.tx.us/tec/1295-info.htm>, [documents in Appendix G and H](#), or by contacting the Office of General Counsel.

Members shall also require respondents to:

- Represent and warrant that their provision of services or other performance under the agreement will not constitute an actual or potential conflict of interest and represent and warrant that it will not reasonably create even the appearance of impropriety.
- Disclose any current or former employees who are current or former employees of the member.
- Disclose any proposed personnel who are related to any current or former employees of the member.
- Represent and warrant that they have not given, nor intend to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to a public servant or employee or representative of the State of Texas in connection with the solicitation.
- Note: these items shall be included as a statement within a contract/PO if no solicitation was issued.

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

## **B. The Texas A&M University System Conflict of Interest Policy**

Additional detail regarding Conflict of interest as related to procurement is included in a later section of this contract management handbook.

For specific policies related to Conflict of Interest within The Texas A&M University System please visit:

- Conflict of Interest:
  - <http://policies.tamus.edu/07-03.pdf>
  - <http://policies.tamus.edu/07-01.pdf>
- Conflict of Commitment:
  - <http://policies.tamus.edu/07-01.pdf>
  - <http://policies.tamus.edu/31-05-02.pdf>

- Outside Activities:
  - <http://policies.tamus.edu/31-05.pdf>
  - <http://policies.tamus.edu/31-05-02.pdf>

## Section 6 - Planning

### A. Risk Assessment

Risks are inherent in all stages of the contracting and procurement process. The use of risk assessment during the planning stage may be necessary depending on what is being procured. This preliminary risk assessment may be used to determine the level, type, and amount of resources and management oversight needed to plan and implement the contract from beginning to end. An effective risk assessment will help resources focus on the highest risk aspects of the contract. Depending on the level of risk of a specific contract members should continue to do assessments throughout the life of the contract. Such assessments should be updated to reflect changes/results of the contractor's performance. See Appendix (Section 14.A) for sample risk assessment.

### B. Risk Management

The risk management process includes 1) risk identification, 2) risk analysis, 3) risk evaluation, 4) risk treatment and contingency plan and 5) risk monitoring. Risks can vary from contract to contract, and should be reviewed for each new contract. Common risk categories are:

- a. Product risk – What impact can the product have externally? (i.e. chemicals)
- b. Process risk – How complex is the procurement related to objectives and procedures? (i.e. construction)
- c. Financial risk – Total cost/value (major contract?). What payment method will be utilized?
- d. Schedule risk – How complex is the procurement related to time constraints and staffing requirements? (i.e. software development)
- e. Contractor risk – Has the potential vendor been vetted for potential conflict of interest issues?

Some options to assist in mitigating risk include the request or requirement of bid deposits, bid samples, or performance bonds from vendors. Risk analysis procedures will be discussed throughout this CMH.

### C. Determining Procurement Method

- a. Invitation for Bids (IFB) - This method is appropriate when requirements are clearly defined, negotiations are not necessary and price is typically the determining factor. Best Value criteria may also be included so that factors other than price can be considered in the evaluation. The IFB uses the competitive sealed bid method.
- b. Request for Information (RFI) - This is used as a planning tool and may be used to gather information in order to prepare a complete solicitation when the member does not yet have the necessary information to do so. RFI's can help to identify industry standards, best practices, potential performance measures and cost or price structures. It can also be used to ascertain the level of interest of prospective respondents. The hope is that the respondents will provide useful information to be used in developing a competitive solicitation.

- c. Request for Proposal (RFP) – The RFP process is used when competitive sealed bidding is not practicable, such as when factors other than price need to be considered or when objective criteria are not clearly defined. With an RFP, as opposed to an IFB, negotiations are allowed. The member may have discussions with the respondents such as interviews or presentation, and solicit best and final offers from one or more selected respondents.
- d. Request for Qualifications (RFQ) – An RFQ is normally used for soliciting Professional Services and the respondents are evaluated solely on their qualifications. Pricing is not considered until after vendor selection is made. Professional Services are covered under Texas Government Code, Section 2254 <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2254.htm>.

#### **D. Exemptions**

Some purchases may be exempt from competitive bidding. Examples include emergency purchases, sole source purchases and best value justifications.

- a. Emergency Purchases – occur as a result of unforeseeable circumstances that require immediate response to avert an actual or potential public threat. It is a situation where normal procurement practice is impracticable or contrary to the public interest. An emergency purchase may be necessary to prevent a hazard to life, health safety welfare, property or to avoid undue additional cost to the state.
- b. Sole Source Purchases – is the purchase where the specification or conditions of the proposed purchase allow only one product to be supplied, and preclude any other product or supplier from meeting the specifications. Please note that a product/service is proprietary if it has a distinctive feature or characteristic that is not shared or provided by competing companies or similar products/services. A proprietary product/service may be available from multiple distributors therefore allowing a competitive process. Written justification must be provided and is subject to member level review based on their internal requirements.
- c. Best Value Purchases – is a purchase where a vendor/individual has been identified as possessing the knowledge, experience, and resources to meet the required needs to be considered as the best value to the member and a request is being made to bypass any member required solicitation process. Justification for best value purchases must be submitted in writing to the member Procurement department prior to making a commitment with the vendor. The justification shall provide at a minimum the detail of the reason(s) why the selected vendor was chosen and the request to bypass the formal competitive solicitation process. All best value purchases requesting to bypass any member required solicitation process must be approved by the Director of Purchasing and any other level of personnel established by the member with total contract value as the basis.

#### **E. Other Planning Considerations**

- a. Needs Assessment – Should include the original assessment conducted when the member decided to contract out the service rather than doing in-house. The purpose of the needs assessment is to ensure you are working towards the correct contracting objective. Having a clear objective and purpose will assist later in developing the statement of work, solicitation, negotiation, preparing contract documents and verifying contractor performance.

It may be useful to identify existing statutory requirements, system policies and regulations, member rules and procedures, business processes that will be impacted by the contract, if the contract supports/changes member statutory duties. If business processes affected are not documented, it may be useful to do so. Having these items clearly documented may help determine how the contract will modify them. Note any risks or concerns raised by the needs assessment so that you can manage or mitigate risk in the contract documents.

The success of many contracts is dependent on how well your requirements are documented. Detailed member business practices may need to be incorporated in the statement of work, to better outline the requirements for the contractor. The need for this should be determined in the needs assessment step.

- b. Objective/Purpose – A well informed objective will provide a good understanding of what will be accomplished by a contractor and will help guide and keep the contracting process focused and on track. Defining the objective may be more difficult than expected. Questions that may help clarify the objectives include: 1) What does the member specifically need? 2) What will fulfilling this need do for the member? 3) How will the member know when the need has been met? Because each procurement is different, the objective, assumptions and constraints will vary. A good measure of the quality of the statement of work is whether the objectives, assumptions and constraints make sense. If they do, the reader of the statement should be able to answer the three questions listed above.
- c. Research – There are many avenues for researching prior to procurement. Contact people within the member or other TAMUS members that have a project similar to the one under development. Document lessons learned from those contracts. Check with universities, trade associations and professional organizations to identify industry practices, methods, standards and rules that will help deliver the goods or services. Consider publishing an RFI where potential vendors may respond with information that will assist in the contract management process. Potential vendors may be contacted to discuss procurement so long as information is solicited from more than one vendor and the potential vendors are advised that it is strictly for research purposes. Advise such potential vendors that any formal requests for pricing or other information will be made through a formal competitive sealed bid or proposal process.
- d. Cost Estimates – Cost estimates should be developed in the planning stage of procurement. The estimate will help determine what type of procurement process (formal/informal) to use and will provide an idea of the range of services which can be included in the statement of work. Work with someone within the member who has knowledge in the area to help determine the cost estimate. If unable to find a subject-matter expert, vendors may be contacted to receive estimates. Again, advise any vendors contacted that only price estimates only are being sought and that it is not a formal solicitation. Take care to avoid giving a potential bidder a competitive advantage.

## **F. Planning for Grants**

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

award that is going to be used to fund the procurement. For sponsored research/instruction agreements (grants, cooperative agreements, and contracts) members should comply with system regulation 15.01.01.

## Section 7 – Preparing and Advertising the Solicitation

### A. Statement of Work

The statement of work is the basic framework for the contract. Success or failure of a contract can be linked to adequate planning, analysis and thoroughness of the statement of work. It is important that the statement of work: 1) secure the best economic advantage using best value; 2) be clearly defined; 3) be contractually sound; 4) be unbiased and non-prejudiced toward respondents; 5) encourage innovative solutions to the requirements, if appropriate and 6) allow for free and open competition to the extent possible. Included in this section are examples of things that may be included in the statement of work. Not all items are applicable to every contract.

- a. Specification – should include the quality of the product, the amount of completion, the suitability of the product or service for the job to be done and the method of evaluation used in making an award and determining the best value bid for purchase. Specifications may be performance based, design based, or a combination. Performance based specifications focus on the results or outcomes rather than how goods and services are produced. This type of specification also allows the respondent to bring their own expertise and creativity into the bid process. When using performance specifications, the member must ensure that the specifications are reasonable and measurable. Design specifications outline exactly how the contract must perform the service or how the product is made.

An effective specification should be:

- i. Simple – avoid unnecessary detail, but complete enough to ensure requirements will satisfy their purpose.
  - ii. Clear – use understandable terminology and avoid legalese type language when possible.
  - iii. Accurate – use units of measure compatible with industry standards. All quantities and packing requirements should be defined.
  - iv. Competitive – identify at least two commercially available brands, makes or models when possible. Avoid unneeded extras that could reduce competition.
  - v. Flexible – avoid inflexible specs which prevent acceptance of a bid that could offer greater performance.
- b. Deliverables – should include: 1) description of work; 2) standard of performance; 3) test conditions/method/procedure to verify standards are met; 4) process to monitor or ensure quality; 5) acceptance process; 6) compensation structure consistent with the type and value of work and 7) contractual remedy (if appropriate).
  - c. Contract Term – reasonable term that is compliant with applicable laws must be established prior to solicitation and must be included in all solicitation documents. Contracts typically have a specific end date. It is recommended that the maximum time for contracts without reissuing a competitive solicitation be five (5) years, including any renewal/extension periods. Contracts must also include a “funding out” clause.

- d. HUB Requirements – agencies should make a good faith effort to utilize HUBs in accordance with the goals specified in the most recent State of Texas disparity study. Goals may be achieved through contracting directly with HUBs, or indirectly through subcontracting opportunities. For contracts over \$100,000 when subcontracting opportunities are identified as probable, HUB subcontracting forms must be completed and returned with the bid/proposal or the proposal will be considered non-responsive. If subcontracting opportunities are not anticipated, a waiver which includes the justification must be approved and signed by the HUB Director/Manager and kept in the file. Federal sponsored research/instruction awards also have requirements for utilization of disadvantaged or minority entities. Members should follow the federal requirements for such sponsored research/instruction awards.
- e. Federal Small Business Administration (SBA) Requirements – if applicable, agencies should make a good faith effort to meet the goals and requirements of their small business sub-contracting plan. A small business subcontracting plan is required if an agency has a negotiated federal acquisition expected to exceed \$700,000.
- f. Payment Terms – have a direct impact on how the statement of work is written and how the contract is managed. Payment terms outline how work is measured/verified and how much is paid and how often payment is made to the contractor. Payment should be consistent with the product or service delivered, and structured to fairly compensate the contractor and encourage timely performance. Payment should reflect the value of the work performed. Agencies can control the payment process by dividing overall payment into smaller amounts to reflect increments of work or deliverables. By doing so, you can mitigate financial risk and limit the scope of a dispute to a discrete deliverable. Please see Appendix (Section D) for examples of payment types.
- g. Standards/Warranty – established standards (where available) can help in defining contract performance requirements. National and international standards include American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM) and International Organization for Standardization (ISO). If a standard is incorporated by reference, identify any industry, state or agency standards of performance that relate to the activity, task or deliverable. Simply referencing “industry standards” is inadequate; the standard should be specifically identified by number. A warranty is a type of standard that can describe performance. You may use warranty language as a contractual standard of performance. Unless excluded, warranties or standards may be implied or imposed by a statute or case law. Best practice is to include clear standards for performance or an expressed warranty describing the objective expectation of performance.
- h. Contractor Qualifications – statement of work should include minimum qualifications required of the contractor. At a minimum, the statement of work should require the contractor have a specified level of experience in the type of work to be performed.
- i. Bonding Requirements – three most common forms are: 1) bid bonds (deposits); 2) performance bonds and 3) payment bonds. You must advise respondents in a solicitation if a bond is required and what types are acceptable. The cost of a bond is usually passed on to the member, so you should take that into consideration when determining whether to use a bond. Consult with our legal counsel if you have questions about bonding requirements.

- j. Evaluation Criteria – should be included in your solicitation document so respondents know how the proposal will be evaluated. Criteria must reflect essential qualities or requirements to achieve the objective(s) of the contract. Evaluation criteria may take multiple sources into consideration, such as: 1) written response, 2) oral presentation, 3) past performance and 4) relevant references. Each evaluation criteria should be addressed within a specific portion of the required response. Only requirements specified should be used as evaluation criteria. Respondents must have notice of all requirements in the solicitation, and the solicitation should clearly state the consequence of failing to meet requirements. Requirements that may disqualify a respondent should be carefully considered. Criteria not included in the solicitation may not be used in the ranking of a proposal. It is up to the member to determine how much information to provide regarding evaluation criteria. When deciding on evaluation criteria, also consider proposal submission requirements associated with each criteria. For example, if experience is your criteria, what information is required to evaluate this criterion – years in business, years of staff experience, certified/ licensed employees, performance on similar projects, etc. While cost is typically the most significant factor, there are times when skills and experience of the vendor may be more important than cost. When determining the weight of each factor, consider the importance of it as it relates to the overall project goals. The criteria deemed most important should carry the highest weight.
- k. Best Value considerations – should be considered when drafting the statement of work. Lowest cost does not always mean the best value for all procurements. Members need to think strategically when considering their needs. Determine what the desired outcome is and the best way to achieve this outcome. Examples of other items to be considered when determining best value are: 1) installation cost; 2) life cycle cost; 3) quality/reliability of goods and service; 4) delivery terms; 5) vendor performance indicators ( past performance, financial resources, experience, etc.); 6) cost of employee training associated with purchase and 7) effect of purchase on member productivity. For example, if the member is purchasing a heating and air conditioning unit, simply going on cost may not provide the best value. They should also consider items such as life span of the unit, electricity consumption and maintenance cost, which all add to the total cost of ownership.
- l. Submission Requirements – the solicitation should include a section listing all of the information that respondents are required to submit. This section should also include recommended or required proposal formats including items such as page number limitations, paper size, number of copies, etc. In this section you should ensure that solicitation documents requested cover those items to be evaluated.
- m. Monitoring – within the solicitation, clearly state the methods used to monitor the contractor performance. Not disclosing requirements upfront could be grounds for legal challenge. The amount of monitoring should be adequate to meet the need and to ensure contracts with serious issues or risks are reported to the Board of Regents, but limited enough to achieve the desired results without unnecessarily increasing cost. Overly restrictive monitoring can interfere with the contractor’s ability to complete the work and may result in increased cost to the work. The statement of work should set deadlines, schedules for deliverables and other activities. Setting these items out clearly will allow for easier monitoring of the contract. Keep in mind that different funding sources (i.e. – federal grants) may have specific monitoring requirements.

- n. Reporting – status, performance and activity reporting are terms used to describe information a contractor must provide to show the status of the contract. It is important to define these terms in the statement of work and outline the frequency and audience for each report. If specific deliverables are necessary, include the format and number of copies in the statement of work. Include an example of the desired format in the solicitation document when possible.
- o. Inspection and Testing – should be included in the statement of work if applicable. This will ensure compliance with the specification of the solicitation and contract. Cost of inspection and testing should be borne by the contractor. If goods fail to meet all requirements of the solicitation and contract, they should be rejected in whole or in part at the contractor’s expense. Latent defects can result in contract cancellation at no expense to the member. The member should contact legal counsel if latent defects are found.
- p. Final Acceptance – the statement of work should clearly define how the member determines that the contract has been successfully completed. The statement of work sets standards for acceptance of the deliverable and establishes the procedure to receive or reject the deliverable. If you have multiple phases or deliverables, having a formal acceptance process for each allows the contract manager and contractor to know the status of the contract performance.
- q. Additional issues to consider – when determining if the statement of work is complete, you should verify that it answers: who, what, when, where, why and how. Below are a few examples of other items that may need to be considered in answering those questions and finalizing your statement of work. These may affect pricing or add to the requirements included in the response, and therefore may need to be added into the statement of work: 1) licenses/permits required; 2) use of state agency equipment; 3) storage space for contractor materials/supplies; 4) intellectual property/copyright issues; 5) subcontractor requirements; 6) insurance requirements; and 7) conflict of interest/organizational restrictions.

## **B. Advertising the Solicitation**

When marketing a solicitation, consideration must be given to the type of procurement used. Advertising methods may differ depending on what is being procured.

- a. Solicitations with an estimated value exceeding \$25,000 may be posted on the Electronic State Business Daily (ESBD). If the solicitation is being administered electronically through an eProcurement system, then a notification directing vendors to the appropriate site may be posted in lieu of the actual solicitation document.
- b. Pre-Solicitation Conferences – may be mandatory or non-mandatory, but caution should be exercised before making them mandatory, as this may limit competition. Conferences have many benefits:
  - i. Allow potential respondents to address specific questions. Any issues identified in the conference will be published in an addendum to the solicitation.
  - ii. Allow contractors an on-site visit. In some cases, simply sending pictures of the site may work in place of an on-site conference.

- iii. Allow the member to provide additional information that is not easily transferable through hard copy (i.e. schematics, plans and reports).
- iv. Ensure all respondents receive the same information.
- v. Allow for the development of subcontracting relationships through contacts established at the conference.

The solicitation document must include the date, time and location of the conference. Conference attendees must be documented. The Purchasing department should facilitate the meeting and answer procurement questions. The department staff will attend and respond to technical questions. Any changes to the solicitation as well as all questions, of a material nature, submitted with their respective answers should be included in an addendum to be issued by the Purchasing department. This addendum is provided to all potential respondents, usually by posting to the ESBD. If an addendum is made, you may need to extend the bid opening or proposal date.

- c. Communication with Respondents – should be made through the Purchasing Department or other designated staff. Department staff should not have contact with potential respondents outside of pre-solicitation conferences. Respondents that contact someone other than authorized staff in regards to a solicitation may be disqualified. Purchasing staff may not be able to answer all technical questions, but they will ensure that the information is obtained and provided to all potential respondents. The solicitation document should only provide a purchasing point of contact along with all acceptable forms of communication. Should a potential respondent contact the Member's department staff, they must politely decline to discuss the procurement and forward the inquiry to Purchasing Department.

Within your solicitation, you may invite respondents to submit written questions concerning the solicitation. This option may be in addition to or in lieu of a pre-solicitation conference. The date and time for submission of written questions should be specified in the solicitation document, if applicable. If the solicitation is posted on the ESBD, the questions and answers should be posted with the solicitation document as they become available.

- d. Grant Preparation and Award Announcements – in addition to the Uniform Grant Management Standards published by the Governor's Office, members should follow any applicable federal or state grant funding requirements described in applicable laws or regulations. For sponsored research/instruction grants, members should comply with system regulation 15.01.01.

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

Grant opportunities should be open and accessible to the public. Competitive grants opportunities should be posted on TexasOnline, the eGrants system established under Texas Government Code,

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

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

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

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

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

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

## Section 8 – Evaluation and Award

Members must conduct evaluations in a fair and impartial manner. The following are included as the generally accepted tools that may be employed to conduct fair and impartial evaluations for a Request for Proposal. As previously discussed, the solicitation document should include a general description of the evaluation process and criteria or categories to be used. The solicitation may also include the relative weights to be assigned to each criteria/category. Prior to opening the responses, the member should develop and approve an evaluation guide which lays out the details of the evaluation process. This should include number of evaluation team member, the scoring matrix and decision making apparatus for the evaluation of the responses. Below is more information on evaluation tools that may be used for more complex solicitations.

### A. Evaluation Teams

Evaluation teams should be comprised of individuals who are stakeholders in the final product or service and of individuals who have the necessary technical or program expertise. A representative from the purchasing department is usually the team leader and serves as a non-voting member. The remaining team members are typically chosen by the department staff, and approved by management. All team members should understand the need and desired outcome of the procurement. The evaluation team may have input

into the solicitation, particularly the evaluation criteria and weights. It is important that team members fully understand the requirements of the solicitation and are able to critically read and evaluate responses. Team size can vary, but 3-5 members are recommended.

A scoring matrix should be part of your evaluation guide, and will be used to score the individual responses based on the criteria previously defined. The scoring matrix should be completed prior to publishing the solicitation document because it may bring up a need for the solicitation document to be updated.

Prior to distributing proposal responses to the evaluation team members, the team leader provides training and outlines the team's duties and responsibilities. Team members should be instructed on their responsibilities including the critical nature of confidentiality of the evaluation process. Each team member should submit a signed Non-Disclosure Statement to the Purchasing department prior to engaging in any discussion about, or having access to proposal documents.

## **B. Responsive Proposals**

Once proposals are opened and recorded, the Purchasing Department must determine if the proposals submitted are responsive. At a minimum, this includes submission of the signed Execution of Offer, technical proposal or similar document, HUB subcontracting Plan, if applicable, and any other required documents such as bid bonds. Purchasing will also review that the minimum qualifications are met. Occasionally, consultation with legal counsel may be necessary to determine a proposal's responsiveness. An administrative review checklist is a good tool for ensuring the proposals are responsive. It also can be used to compile your complete list of respondents and their contact information. Please see Appendix (Section B) for a sample review checklist. Only proposals deemed responsive will be provided to the evaluation team.

## **C. Single Responses**

If only one response is received to a competitive solicitation, the Purchasing Department should determine why this occurred. The member should review the solicitation for any unduly restrictive requirements. If it is determined that the requirements were unduly restrictive, the member may choose to re-advertise the solicitation. Otherwise, the member should consider the reasons that other responses were not received and determine if it is in the best interest of the state to make an award, negotiate with the single respondent, re-advertise with a revised solicitation or to determine if a single source purchasing justification is required.

## **D. Proposal Evaluation**

Once the proposals have been deemed responsive by the Purchasing Department, the evaluation team shall be provided with the qualified responses. Evaluations may be conducted in the same room, evaluating the proposals at the same time. This will facilitate questions by team members to the purchasing staff or technical experts. Due to time constraints and other factors it is typical to have evaluation members working from their own workspaces. If this is the case, purchasing staff and technical experts should be available to answer questions. Evaluation team members should only ask questions in the areas related to the evaluation criteria presented in the solicitation document or the evaluation guide. Unless stated

otherwise in the evaluation guide, members may not conduct independent conversations, but should ask questions through the team leader.

The evaluation team may verify references at this point in the process. This can be done through the Purchasing Department, who would contact all references and attempt to receive answers to questions developed by the evaluation team. The team may choose to only contact references from a short list of responses based on initial scoring/ranking. Another option is to use the Vendor Performance System in evaluating past performance ([http://comptroller.texas.gov/procurement/prog/vendor\\_performance/](http://comptroller.texas.gov/procurement/prog/vendor_performance/))

#### **E. Presentations**

Oral presentations or interviews are conducted at the option of the member. The solicitation document should state this as an option and provide an estimated timeframe of when presentations may occur. These discussions provide an opportunity for respondents to highlight the strengths of their response and to provide answers to questions the member may have. Demonstrations of product functionality may also be done when appropriate. Oral presentations can be scheduled for all respondents or limited to the top ranked vendors. Oral presentations should be fair to all parties. Allotted time and format should be the same for all presenters. It is helpful to use a prepared script to ensure consistency. The team leader shall identify a method to determine the order of presenters that will ensure impartiality of the process.

#### **F. Award**

The member shall select a finalist(s) for award for the purchase of goods and/or services that provides the best value for the state. The following may be considered in evaluation for award:

- a. Determine responsiveness to solicitation requirements
- b. Evaluation of responses according to the criteria laid out in the planning process and included in your statement of work. During the evaluation and award step, each response will be rated individually against each criterion. An example evaluation can be found in the Appendix (Section C).
- c. Consideration of presentations and interviews if applicable.
- d. Best and Final Offers if applicable.
- e. Explanation of Selection – documentation shall be maintained to verify each of the steps taken in the evaluation process described above.

Upon award and execution of a contract the member shall make any notifications required by law.

#### **G. Negotiations**

Members may negotiate terms and conditions on some, but not all, solicitations. A competitive sealed bid, for example, does not typically allow for negotiations, while a competitive sealed proposal (Request for Proposal) does. Best practice is to read the requirements of the applicable procurement procedure to verify that negotiation is permissible.

Negotiators are not authorized to use technical leveling or technical transfusion techniques. Technical leveling is helping a respondent to bring their proposal up to the level of others through successive rounds of discussion, usually pointing out proposal weaknesses. Technical transfusion is the disclosing of technical information approaches from one response to other competitors in the course of discussion.

Prohibited disclosures during negotiations include:

- Disclosing competing respondents cost/price (even if the vendor name is not disclosed)
- Advising respondents of their price standing relative to other respondents.

In negotiations, always take care to avoid inadvertently changing the stated contracting objectives. If the contracting objectives are changed, the pool of potential respondents will no longer be on an equal level. Additional vendors may have competed, had the new objectives been part of the original solicitation. If it appears that contracting objectives may have been changed, legal counsel must be consulted before moving forward.

When determining negotiation strategy, be careful if you choose to give vendors a cost/price that must be met to obtain further consideration, as this could deprive the competitive process from generating the best value to the state. Remember that the above prohibitions still apply, disclosing competing respondents cost/price is not allowed, even if done without tying information to a specific vendor. Negotiations should be tailored to the particular circumstances of the competition. The member may continue to negotiate until the best interest of the state is achieved and an award has been made.

Planning is essential in negotiations. Best practice is to meet with members of the contracting team and divide the terms and conditions into groups. Identify the terms that are essential to the agreement. These are the terms which the member is unwilling or unable to compromise. Then identify the terms and conditions that are desirable but not essential, which the agency is willing to compromise or relinquish.

## **H. Evaluation and Award of Grants**

In addition to the Uniform Grant Management Standards published by the Governor's Office, agencies should follow any applicable federal or state grant-funding source laws or regulations.

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

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

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

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

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

## Section 9 – Contract Formation

The information in this section is not intended to provide legal advice. These are general guidelines regarding contract formation; however, there are exceptions to each of these. Consult with the Office of General Counsel for the applicable rules of law for each procurement type.

The purpose of any written contract is to serve as a reference document recording the terms of the agreement to prevent misunderstanding and conflict as to those terms at a later date. A contract creates a legal, binding and enforceable obligation between the parties. Clarity of the terms is of primary importance. The person drafting the contract must know the subject matter and concerns of the parties well enough to anticipate potential areas of disagreement and address them in the contract.

It is important to be thorough when determining the scope of the contract, as contract law does not allow parties to add terms to the contract without the consent of both parties. This is typically seen as an advantage, but may become a liability if the member does not include all necessary terms.

When creating contracts for the System or its members, potential conflicting interests must be balanced, including state requirements, fiscal constraints, statutory requirements and contractor requirements. The main concern should be the benefit of the contract to the System and state as a whole, more specifically, the taxpayers. The best contract for the System or member does not mean taking advantage of the contractor. Harsh provisions may be legal, but typically have negative impact that can outweigh the initial gain. Contractors who feel they are being taken advantage of typically provide less quality work and are more likely to take legal action if a conflict arises. They may also decide not to do work for the System or state again, thus limiting competition for future contracts.

### A. Legal

The following are the elements essential to form a binding contract:

- a. Offer –a manifestation of willingness to enter into a bargain such as a response to a solicitation.
- b. Acceptance – is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
- c. Legal Purpose – objective of a contract must be for a legal purpose.
- d. Mutuality of Obligation – also known as meeting of the minds, refers to the parties’ mutual understanding and assent to the expression of their agreement. The determination of meeting of the minds is based on the objective standard of what the parties said and not their subjective state of mind. Unexpressed subjective intent is irrelevant. The offer must be clear and definite just as there must be a clear and definite acceptance of all terms contained in the offer.
- e. Consideration – is an essential element of any valid contract. Consideration consists of either a benefit to the promisor or a detriment to the promisee. It is a present exchange bargained for in return for a promise. It may consist of some right, interest, profit or benefit that accrues to one party, or some

forbearance, loss or responsibility that is undertaken or incurred by the other party. It is not necessary for a contract to be supported by a monetary consideration.

- f. Competent Parties – all parties to a contract must be competent and authorized to enter into a contract.

## **B. Drafting the Contract**

Contracts typically contain a set of terms and conditions referred to as ‘boilerplate’ or ‘standard’ terms and conditions. While many agencies include similar terms and conditions in their contracts, there is no set of generally accepted terms and conditions to be used by all state agencies. If a member repetitively contracts for the same or similar goods/services, the member may develop a contract with terms that are standard for that type of transaction.

Terms that are appropriate to include in a contract are ones that fully describe the actual agreement of the parties. Some examples of typical terms include (but are not limited to):

- Administrative provisions
- Financial provisions
- Provisions to allocate risk
- Statement of work
- Provisions relating to the contract term, termination and dispute resolution
- Provisions that relate to the rights and ownership of work product and intellectual property

### **a. Planning the Contract**

As with other contract management processes it is important for the member to plan for drafting of the contract. It is common to include a draft of the standard member contract in the solicitation document. Doing so allows respondents to make an offer with knowledge of the proposed terms and conditions. It may be difficult to include a detailed statement of work at this time, so be sure to plan adequate time to prepare the final contract.

Your planning effort may include reviewing similar contracts used by your institution or agency or contracts from other System members. You should review and make changes as needed rather than automatically accepting terms and conditions from another contract. Another planning tactic may be to make an outline containing headings for major terms, conditions and provisions. This will allow you to group related terms together and may illustrate any potential gaps in the contract. During planning, allow for adequate time for legal counsel review.

### **b. Form of the Contract**

Evidence of an agreement/contract can be documented in different formats, including but not limited to a “four-corner” contract, a purchase order or an exchange of correspondence. A four-corner contract is a single document that contains all of the terms and contract within it. With a purchase order, the contractor delivers an offer, in a form requested by the agency and the agency accepts the offer by issuing a purchase order. The documents that comprise the offer and acceptance are the evidence of the agreement.

Each form of contract has its advantages and disadvantages. When determining which form to use, base your assessment on the risks involving contract construction and interpretation.

A four-corner contract offers the greatest opportunity to avoid conflicting provisions because each provision is contained in one document. Contract management may be easier since all terms and conditions are easily found in one document. However, the time requirement to plan and prepare a four-corner contract is greater. In a major or complex transaction, a four-corner contract format is best to clearly document the agreement.

A purchase order uses a layered approach, meaning it relies on a number of documents that, in combination, comprise the contract. There is potential for conflicting terms when using a purchase order. For example, the member may issue the solicitation with product specifications, contractor qualifications and other terms and conditions. The contractor's response may include additional or contradictory terms and conditions. In order to avoid conflict, the contractor's terms and conditions should not become the basis for the agreement. Rather, the member should insure the inclusion of their terms rather than blindly accepting terms proposed by the contractor. Despite the potential for conflict of terms, when used properly, a purchase order is quick, efficient and rarely has problems. All final terms and conditions that vary from either the offer or the acceptance must be contained in a written document signed by both parties.

c. Contract Terms

During contract development take care and pay attention to details. Certain clauses are essential and should be included in all contracts. Consult with your legal counsel to ensure all necessary clauses are included. A list of essential and recommended clauses and provisions is described below (additional clauses and provisions may apply in specific situations):

**Essential Clauses and Provisions:**

Scope of Work	Force Majeure
Term of Contract	Loss of Funding
Payment Terms	Venue
Termination	Non-Waiver
Public Information Act	Price
Dispute Resolution	Confidential Information
Indemnification	Abandonment of Default
Independent Contractor	Affirmation Clauses
Child Support Obligations	Ownership/Intellectual Property, including
Previous Employment	Rights to Data, Documents and Computer
Franchise Tax	Software (if applicable)
Debt or Delinquency	Technology Access (EIR) if applicable
State Auditor's Office	Insurance (if applicable)
Severability	

**Recommended Clauses (as applicable):**

Notices	Drug Free Workplace Policy
Order Precedence	Patents and Copyrights
Assignment	
Proprietary Information	Substitutions
Antitrust	Public Disclosure

#### d. State Contracting Standards and Oversight

Texas Government Code, Chapter 2261, other than Subchapter F, does not apply to institutions of higher education. However, Subchapter F addresses the following items which do apply to institutions of higher education:

- i. Disclosure of potential conflicts of interest and certain prohibited contracts. These are addressed in System Policy 07.03 and members must assure that procedures are in place to avoid conflicts as outlined in this policy.
- ii. Posting of certain contracts with a value of \$15,000 or more on each member's website until the contract expires or is completed. Refer to Contract Administration, Section B – Posting of Contracts for additional requirements.
- iii. Each member shall establish a procedure to identify contracts that require enhanced contract or performance monitoring with notification submitted to the A&M System CFO. The A&M System CFO will work with the Chancellors Office and the Office of General Counsel to assure the Board of Regents is aware of all high risk contracts.
- iv. For contracts exceeding a value of \$1 million, each member shall complete the reporting form. A word copy is available at the following link; <http://www.tamus.edu/business/hub-procurement/contract-administration/>.
- v. For contracts with value exceeding \$5 million each member contract management office or procurement director must verify in writing that the solicitation and purchasing methods and contractor selection process comply with state law and agency policy. The A&M System CFO must be notified of any potential issue that may arise in the solicitation, purchasing or contractor selection process.
- vi. Each member shall comply the purchasing accountability and risk analysis procedures outlined in this Handbook which provide for the following: (1) assessing the risk of fraud, abuse, or waste in the contractor selection process, contract provisions, and payment/reimbursement; (2) identifying contracts that require enhanced contract monitoring or the immediate attention of the contract management office; and (3) establishing clear levels of purchasing accountability and staff responsibilities related to purchasing. The procedures for items (2) and (3) shall be posted on each member's website with a link sent to the comptroller.

#### C. Contract Review Checklist

Institutions of higher education are required to have a contract review checklist that has been approved by the institutions legal counsel. This checklist should include:

- a. A description of each step of the procedure used to evaluate and process contracts
- b. A description of the process that must be completed before contract execution
- c. A value threshold that initiates the required review by the institution's legal counsel, unless the contract is a standard contract previously approved by the counsel.

A copy of the approved contract review checklist can be found at the following link; <http://www.tamus.edu/business/hub-procurement/contract-administration/>.

#### **D. Authority to Contract**

- a. Contract Administration and Delegation of Authority are governed by System Policy and Regulation as referenced below. Each member per Regulation must prepare a Delegation of Authority for Contract Administration chart in the format developed and distributed by the System Office of Budgets and Accounting. This delegation chart shall include written expressed delegations of authority specifying those officers, by title, which are authorized to execute contracts and specifying the type of contract and dollar or other limitations applicable to each delegation.
  - i. Contract Administration - <http://policies.tamus.edu/25-07.pdf>
  - ii. Contract Administration Delegations & Reporting - <http://policies.tamus.edu/25-07-01.pdf>

#### **E. Federally Funded Awards**

Federal grants, cooperative agreements, and contracts (“awards”) have specific requirements, some of which are outlined in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards described in Title 2 CFR Part 200 (“Uniform Guidance”). Other requirements may be described in the applicable federal agency’s primary regulations. For federal contracts, specific requirements can be found in the Federal Acquisition Regulations (“FAR”) found at title 48 of the Code of Federal Regulations and the supplemental acquisition regulations for the specific agencies. Members are encouraged to ask federal agencies administering the particular grant programs to clarify any questions concerning lower-tier agreements entered into pursuant to an award if adequate guidance is not found in the foregoing references and the award document. Please note that TAMUS is not implementing the procurement standards in the Uniform Guidance until September 1, 2017. Until that time, members should follow the requirements of the current OMB Circular A-110. Also see the Uniform Grant Management Standards published by the Governor’s Office. <http://comptroller.texas.gov/procurement/catrad/ugms.pdf>

The federal regulations referenced above establish consistency and uniformity among Federal agencies in the management of grants and cooperative agreements.

#### **F. Contract Formation for Grants**

In addition to the Uniform Grant Management Standards published by the Governor’s Office, agencies should follow any applicable federal or state grant funding source laws or regulations. For sponsored research/instruction agreements (grants, cooperative agreements, and contracts) members should comply with system regulation 15.01.01.

##### **a. Authority to Grant**

There are a few Texas Constitutional provisions that limit the ability of a state agency to award grants using state funds. Article III, Section 51 of the Texas Constitution provides that the “Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever.” Article III, Section 52 of the Texas Constitution prohibits the Legislature from authorizing any political corporation or subdivision of the state “to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.” Hence the intent of Sections 51 and 52 is to prevent

the state from freely giving public funds to private persons; however, Sections 51 and 52 do not prohibit grants to a private person or entity “if the appropriate governing body (i) determined that the expenditures serves a public purpose and (ii) places sufficient controls on the transaction to ensure that the public purpose is carried out”. Tex. Att’y Gen. Op. No. JC-0146 (1999); see e.g., Tex. Att’y Gen. Op. Nos. DM-256 (1993); JM-1146 (1990); JM-551 (1986); H-966 (1977).

b. Special Conditions and Specific Provisions

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

## Section 10 – Contract Administration

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

- Planning
- Monitoring Performance
- Change Management
- Payment Approval
- Dispute Resolution
- Termination
- Contract Closeout

Primary tasks of persons responsible for the administration of contracts (generically referred to as “contract administrators”) are to:

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

Contract administration begins at the time the statement of work is developed. This statement for work should be clear and concise, as it is the roadmap for contract administration. The goal of contract administration is to ensure the contract is satisfactorily performed and the responsibilities of both parties are properly discharged. Effective contract administration minimizes problems and potential disputes.

A key factor in successful contract administration is communication. Contract administration personnel must understand the provisions of the purchase document and be able to communicate the obligations to all parties involved and maintain control over the contract performance. It is the duty of contract administration to ensure requirements are met, goods and services are delivered in a timely fashion and that the financial interests of the member are protected. It is the contractor’s responsibility to perform and meet the requirements stated in the contract. Sometimes the contractor may need the assistance and approval of member personnel, usually the

contract manager as defined below. It is the responsibility of the member to provide this assistance in a timely and effective manner, and to ensure all guidance is within the scope of the contract.

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

#### **A. Contract Manager Responsibilities**

- Participate in development of solicitation and writing of draft documents
- Consult with legal counsel
- As part of solicitation development, determine if contractor's compensation structure is appropriate for the work
- Serve as point of contact for disseminating the instructions regarding work to the vendor
- Receive and respond to communications between the member and contractor
- Manage, approve and document contract changes
- Manage state property used by contractor (computers, telephones, etc.)
- Identify and resolve disputes with contractor
- Implement quality control/assurance process
- Maintain records
- Document significant events
- Monitor contractors progress and performance to ensure conformity to contract requirements
- Exercise state remedies if contractor's performance is deficient
- Inspect and approve final product by submitting written document accepting the deliverables
- Monitor budget to ensure sufficient funds are available
- Verify accuracy of invoices and authorize payment consistent with contract terms
- Perform contract closeout process; ensuring contract file contains all necessary documentation

The number of participants in the contract administration process will vary depending on the complexity and risk of the contract. The member should identify participants early in the procurement process, selecting one contract manager and others to assist with the process. Various roles and responsibilities may be assigned:

- Determine sequence of activities, dependencies, expected outcomes and acceptable performance levels
- Develop a timetable and start/end date for each performance component
- Determine milestones with accompanying timeframes, monitoring and reporting requirements.
- Monitor and document contractor activity
- Meet with contractor on a regular basis to review progress and discuss issues
- Provide access to state facilities, equipment, staff, data, etc.
- Establish scope of authority and lines of communication
- Establish control of correspondence, data and report
- Identify potential problems and solutions
- Define terms/conditions of default
- Establish procedure for handling noncompliance

- Establish procedure for making modification to the contract

Contract managers are not authorized to:

- Instruct contractor to start work before the contract is fully executed
- Change the scope of the contract without going through the formal amendment process
- Direct the contractor to perform work not specifically described in and funded by the contract
- Extend the time period for the contract without execution of an approved amendment
- Allow the contractor to incur additional costs over the limit set by the contract

Planning should begin when drafting the statement of work. Within the solicitation document, contract administration procedures should be described. Once the contract is executed, planning activities should be focused on general administrative activities such as management of contract amendments for changes to scope, schedule or payment. In this phase, the contract administrator should ensure that they thoroughly understand all of the components of the solicitation and contract. These components include:

- Expected outcome measures – staging of deliverables. Significant deliverables should be tied to the payment schedule.
- Costs – total cost, including any indirect cost allocation of the goods and services to be performed.
- Risk – identifying and managing potential risk.
- Contract performance – when, where and how the goods/services are to be delivered.
- Acceptance/Rejection Terms – the member’s right to inspect and accept or reject the goods/services and conditions of the acceptance or rejection.
- Contract dates – effective date, completion date, renewal terms and any additional dates necessary to monitor contractor performance.
- Complete addresses – where correspondence is to be sent and payments are to be made.

Post award conferences should be held soon after the contract is awarded, and are held with the contractor and the principals responsible for administering the contract. This meeting should be used to ensure a clear and mutual understanding of all contract terms and responsibilities of all parties. The post award conference ensures all those involved with the contract administration process understand all requirements of contract performance.

Agency personnel will decide if a post award conference is necessary. Not all contracts will require the post award conference, but there should still be a formal conversation between the parties to verify there is agreement on the performance requirements and administrative procedures. In the post award meeting/conversation, the member should review the major points of the contract and time and place of delivery. Factors that are used to determine if a post award conference is needed include:

- Type of contract
- Level of risk associated with contract
- Contract value
- Length of contract
- Procurement history of the supplies/services
- Expertise of the contractor

- Urgency of delivery schedule
- Member's prior experience with the contractor
- Special or unusual contract requirements
- Special or unusual payment requirements

During the post award conference, it should be made clear that the purpose is to explain the contract requirements, not make changes or re-negotiate the contract. The agenda should cover:

- Introduction – introduce all participants and identify key agency and contractor personnel
- Scope – discuss the scope of the contract, ensuring a meeting of the minds now will help avoid problems down the road
- Terms – summarize terms and conditions, particularly any unusual contract provisions.
- Requirements – discuss technical and reporting requirements of the contract. The contractor must understand the importance of any reports required under the contract and the importance of submitting them as outlined in the contract.
- Administration – discuss applicable contract administration procedures including monitoring and progress measurement
- Rights – outline the rights and obligations of both parties and the contract performance evaluation procedures. Member should explain that the contractor will be evaluated on their performance during the contract and at the conclusion of the contract.
- Potential problems – address any potential contract problem areas and solutions.
- Payment – summarize the invoicing requirements and payment procedures, especially if the payments will be made according to milestones achieved by the contractor.
- Authority – identify the roles and responsibilities of contract managers, contract administrators, project managers, key personnel and other staff from both the member and the contractor. It is helpful to explain the limit of authority for each responsible party.

After the conference, the contract manager should prepare a summary of the meeting for the contract file. The summary shall include areas requiring resolution, a list of participants, especially those individuals assigned responsibility for further action and due dates for outstanding items. Copies of the summary shall be distributed to all conference participants.

## **B. Posting of Contracts**

Members must post each contract (including purchase orders) for the purchase of goods or services with a private vendor of \$15,000 or over, on its web site. The posting must include the following:

- The fully executed agreement or purchase order issued, whichever is applicable. If it is necessary to post a redacted copy of the document, OGC must review the proposed document prior to posting.
- The solicitation document related to a competitively bid contract. If the member did not competitively bid a purchase then the statutory authority under which the contract was established shall be listed.

Each member shall post these documents on a monthly basis for the preceding month no later than the end of each month. Each contract must remain on the website until the contract expires or is completed.

### **C. Contract Reporting**

Reporting may include contract administration reporting to executive management, the contractor reporting to the contract manager and applicable member personnel reporting to the Legislative Budget Board.

#### **a. Status reports and activity reports.**

Status reports describe the progress of the work. The content of the report should be consistent with and track the structure of the statement of work. A status report describes what work is complete and what is pending and that status should be compared against the contract schedule. Only work that has been verified should be categorized as complete. Any unresolved issues the member is obligated to resolve, should be included in the status report and resolution should be requested. Unless a contract change revises the contract schedule, the status report should track to the original contract schedule. If the contract does not provide for periodic status reports, the member should ensure that sufficient progress is being made by the contractor. This can be accomplished by requesting a status update from the contractor or doing a site visit.

Activity reports describe activity on the project. This is not the same as a status report, as a project may have a great deal of activity and make little progress. However, activity reporting can be a core feature of contract management.

#### **b. Members are required to report certain contract awards to the Legislative Budget Board (LBB). The contract information must be input into the LBB database not later than the 10th day after the date the member enters into the contract. Further detail regarding reporting requirements and exemptions can be found at:**

[http://assets.system.tamus.edu/files/budgets-acct/pdf/contract\\_reporting\\_requirements.pdf](http://assets.system.tamus.edu/files/budgets-acct/pdf/contract_reporting_requirements.pdf).

In addition to these requirements members must complete and submit attestation forms for contracts that are funded in part or in whole by appropriated funds that exceed \$10 million no later than ten days prior to making the first payment.

All submissions to the LBB shall be entered in the following website:

<http://contracts.lbb.state.tx.us/DataEntry/LogOn.aspx>

#### **c. Reporting to the Board of Regents may also be necessary in certain circumstances. Each member is required to notify the board of any serious issue or risk regarding a monitored contract over \$1 million.**

### **D. Contract Monitoring**

Monitoring the performance of the contractor is a key function of proper contract administration. The purpose is to ensure that the contractor is performing in accordance with the contract and for the member to be aware of and address any developing issues. Small dollar or less complex contracts may require little

to no monitoring. However that does not preclude the possibility of more detailed monitoring if deemed necessary by the member. Conversely, large dollar contract may need little monitoring if the items or services purchased are not complex, and the member is comfortable with the contractor's performance and level of risk associated with the contract.

Contract monitoring may be viewed as a preventative function, an opportunity to determine the contractor's need for technical assistance, or a valuable source of information concerning the effectiveness and quality of services being performed.

When determining what to monitor, consider these questions:

- How will the member know it received what it is paying for?
- How will the member know that the contractor is complying with the terms of the contract?
- How will the member know the contract is complete and determine closure?

Review the statement of work and contract terms. These requirements are the deliverables the contract agreed to. Design the monitoring program to focus on the most important items, generally the outcomes that result from the contract.

Consider the effect that the contract payment methodology has on what needs to be monitored. If payment is based on firm fixed price it is not necessary to verify contractor's expenses as they are not relevant to this type of contract. Under a fixed price contract the member should ensure the number of units billed is the same as the number of units received, quantity and price agree with the contract amounts and the units meet or exceed the contract specifications.

If a member receives grant money from a federal agency to pay for a contract, the member must consider the nature of the relationship with the contractor. Is the relationship a vendor relationship or a sub-recipient relationship? See 2 CFR 200.330, Sub-recipient and contractor determinations, for guidance on relationship determination. If the relationship is that of a sub-recipient, then federal guidelines and cost principles must be followed. The Uniform Grant Management Standards published by the Governor's Office (<http://comptroller.texas.gov/procurement/catrad/ugms.pdf>) will provide guidance as well.

If the contract is a cost reimbursement based agreement, the member needs to consider the following monitoring reviews:

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

a. Types of Monitoring

- i. Site visits are typically for more complex contracts or those that the member feels carry a higher degree of risk. Site visits may be used to measure actual performance against scheduled or

reported performance and to reinforce the importance of the contract to the contractor. Site visits also provide a good opportunity to enhance communication between the parties. Site visits can vary in scope of what is being reviewed. Full scope visits are typically at the contractor's place of business. They are based on risk assessment and cover a broad range of compliance and performance issues. Limited scope visits focus on a particular issue such as problems with the use of funds, problems that have occurred with other contractors that need to be specifically addressed, and times when the member feels a proposed corrective plan does not resolve the issue.

When performing a site visit, the member should develop a comprehensive and objective monitoring checklist. The checklist should focus on the outcomes, referencing the applicable contract requirement. The plan should also assess contract performance the same way so the contractor is monitored consistently. The checklist should also specify the sample size to be reviewed, without disclosing the specifics to the contractor.

Site visits require documentation of the visit. You should allow for space on the checklist or another document to write down results of the visit. You should also describe documentation required for the monitor to bypass an area (i.e. areas with no issue on prior visits may not need to be monitored, leaving more time to review higher risk areas.)

During monitoring ensure the file is complete by including all documents relevant to the contract. The contractor should not be the one selecting samples for review. Samples may be taken from expenditure draw client lists provided by the contractor, if you ensure the clients are paid by the member. If a sample cannot be located, you may select a substitute. However, consider the circumstances of the "lost" sample and determine if the explanation is reasonable or if the contractor did not want the site monitor to see the file/sample. If the latter seems to be the case, request more information and take appropriate action. When doing site monitoring, while there will be some standard items to review, you should tailor the checklist to the contractor/contract. Review any specific contract requirements to determine if they require monitoring. Look for items that fall just below amounts requiring approval. Consider problems you may have had with the contractor in the past, are these likely to be an issue again? What are low risk items that may not need monitoring? Has another member conducted a review? You may be able to coordinate the reviews of shared contractors with other members.

After the site visit, the member should complete a site monitoring report. This will serve as a record of the monitoring work. A copy of the report should be provided to the contractor. Even when a problem is corrected in front of the site manager, the monitor is required to include the problem in the report. This serves as an indicator to follow up on future site visits to ensure the problem was corrected. If the monitor recommends changes for the next contract, this should be noted in the monitoring report.

- ii. Desk reviews are member reviews of reports submitted by the contractor to the member. The member should review the reports for actual performance against contract requirements, actual expenditures vs. approved budget, and contractor's performance against that of other contractors performing similar work. The member should also compare relationships between

key components of the report such as the percentage of the fees charged to the program, change in the variable cost compared to the units of service provided and reported salary expense vs the staffing plan.

- iii. Expenditure document reviews are reviews of contractor invoices and expenditure draw requests to determine if the rates and services are the same as allowed by the contract. Determine if supporting documents such as cost reports, third party receipts, and detailed client information, etc. adequately support the request for payment. If the contractor consistently provides incorrect invoices and/or supporting documentation is insufficient to support the request, then additional monitoring such as an on-site visit may be necessary.

b. Enhanced Monitoring

Contracts may require enhanced monitoring for different reasons. Some examples may include outsourcing, construction, and high dollar value contracts. Also, if a vendor is failing to meet the obligations of their contract, it may require enhanced monitoring until the issue(s) are resolved. Enhanced monitoring may require additional reviews and reporting or a change in the type of review that is done. The purpose of enhanced monitoring is to identify potential issues and risks in the contract and either mitigate or avoid the risk completely. System members shall take these issues into account when determining which contracts will require enhanced monitoring.

Monitoring reviews, audits and investigations should be followed up on to ensure corrective actions are taken, identify common problems that may require training and improve future contracts. The member should design a system that includes criteria and defined follow up actions. The goal of follow up is to bring the contractor back into compliance with contract requirements. Follow-up is essential as the problem will not fix itself simply by identifying it and including it in the monitoring report. Monitoring results should also be used to improve future contracts, if there are unnecessary or insufficient restrictions; this is the time to make a note of recommended changes for future contracts.

**E. Payment Approval**

Costs incurred by the contractor should be in accordance with the contract rate schedule. Invoices should be reviewed by the member to ensure the contractor's billing coincides with the contract's progress. Therefore, the contractor's progress must be measureable, cost incurred or invoices submitted are not a sufficient indicator of the contractor's progress.

If the member believes the requested payment exceeds the contractor's progress, an explanation should be requested prior to the approval of the invoice. Payment should be withheld pending member review. Members have the responsibility to protect their interests and under appropriate circumstances, it may be necessary to withhold contractor payments. Examples of these circumstances include a material breach of contract by the contractor, errors in the invoice, unsupported or undocumented costs, to remedy previous overpayments on the same contract and contractor's performance is non-conforming or unacceptable.

Payments must be made in accordance with Texas Prompt Payment law, which requires that correct invoices be paid within 30 days from the date the correct invoice was received or the goods received and/or

services completed, whichever is later and in accordance with the member's invoice review and payment procedures. The invoice review should ensure the contractor is billing only for goods or services received by the member, the goods have been inspected and accepted, the invoice is correct and complies with pricing, terms and conditions of the contract and the total payments do not exceed the contract limits.

Client service contracts are unique in that the acceptance of goods or services is not an indicator that invoices should be paid. Contract managers dealing with client service contracts should ensure mechanisms exist to implement remedies with contractors for poor performance and that future payment may be withheld until performance improves. Further, if appropriate, members shall include provisions for liquidated damages in contracts where damages are difficult to calculate or measure when failure to perform the services in compliance with the contract is at issue.

## **F. Change Management**

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

Members should have effective change management processes in place. Failure to manage and control change can result in an unintentional modification to scope, change in schedule, increase in contract cost, circumvention of management controls and diminished contractor accountability. An effective change management process includes:

- Formal, written approval of all changes prior to the change taking place. Do not verbally authorize the vendor to begin working on a change before formal process is fully analyzed, documented and approved in writing.
- Evaluation of the impact of each change to the contracting objective, the corresponding deliverable and/or products, the schedule, cost, and increase in member overhead resulting from the change, impact to work in progress/completed work, standards, and acceptance criteria.
- If the contract contains a contingency allowance, develop a plan for how draws against this allowance will be requested and approved.
- Documentation of all changes, no matter how small, to 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.

### Contract Changes and Contract Scope

Whether or not a contract can be changed depends on many things. If the goods or services were procured through a competitive process, the resulting contract must be consistent with what was asked for in the solicitation document. Inconsistencies can violate the competitive process requirements.

If changes need to be made, they must be within the scope, or range, of what was provided in the solicitation. A significant difference would be a material change in the scope of services, which is not allowed because it had not been originally subject to fair competition. For example, if a contract to buy 10 desks is amended to include 300 file cabinets, the change is outside of scope of the contract because vendors did not have the opportunity to compete for the sale of the file cabinets. Vendors who did not bid on the desks may have been interested in bidding on the file cabinets.

In order to determine what constitutes scope changes to advertised specifications, the significant question is whether the changes are material or substantial. Material or substantial changes are not measured by the number of changes made, but rather by whether the extent of the changes would substantially alter the original specifications. If much is revised, the changes will be treated as a new proposal and a new solicitation is needed to ensure compliance with applicable procurement rules and regulations. Not re-advertising revised specifications may deny a procurement opportunity to a qualified vendor.

As a general rule, whether a change is material or substantial is a fact question. What is fundamental is the principle that materially changing solicitation specifications after receipt of responses denies an opportunity for others to participate in the solicitation. Any contract amendments are required to be within the scope of the original contract and the competitive process underlying the original contract. It is important to remember that application of the above principles will depend upon your particular fact situation, and may not apply to specifics of a request for proposal or request for offer.

The following are types of contract changes:

a. Administrative Changes

These are changes that are within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed via a unilateral amendment. Examples include changes in billing instructions or address, corrections to typographical errors not affecting the substance of the contract, changes as permitted by the contract language and changes in member personnel assigned to the contract.

b. Substantive Changes

These are contractual changes that affect the rights of both parties. Such changes generally require bilateral amendments. Examples of substantive changes include change in the price of the contract, change in the delivery schedule, change in the quantity, change or nature of deliverables, change in key personnel and changes of any terms and conditions.

c. Constructive Changes

If a contractor perceives that work beyond the scope of the contract was ordered by the member, 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 member personnel provide suggestions to

a contractor, accelerate the delivery schedule, direct the work to be performed differently, change the sequencing of the work, delay accepting or rejecting deliverables, delay reviewing invoices and approving payment and interfere with or hinder performance.

## G. Dispute Resolution

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

- a. Identify the problem – many times what may appear to be a problem can be resolved by providing the contractor with information or clarification.
- b. Research facts – the member should obtain all the information regarding the potential problem from all relevant sources, including the project manager and contractor.
- c. Evaluation – the member should review all of the facts in conjunction with the requirements and terms and conditions of the contract. The member should then determine the appropriate course of action.
- d. Proper dispute resolution is a core skill of successful contract management. Identification of problems early in the performance period, effectively communicating and formalizing the process in writing via a cure notice procedure or less formal written procedure is essential. A contract termination is a failure by BOTH parties to a contract. Termination is the last resort that rarely needs to be done.

## H. Termination

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

### a. Termination for Convenience

A termination for convenience, also known as no-fault termination, allows the member to terminate any contract, in whole or in part, at any time in its sole discretion.

- i. The member shall provide the contractor with written notice specifying whether the member is terminating all or part of the contract. The notice of termination shall give the effective date of termination. If the contract is being selectively terminated, the member should specify which part(s) of the contract are being terminated.
- ii. A termination notice should be issued which includes the following:

Pursuant to Section \_\_\_\_, Termination, this contract is hereby terminated effective [date]. [Contractor name] is directed to immediately stop all work, terminate subcontracts and issue no further orders.

In accordance with this Notice of Termination, members shall:

1. Keep adequate records of 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 member Contract Administrator [Name], of any and all matters that may be adversely affected by this Termination; and
  4. Take any other action required by [member name] to expedite this Termination.
- iii. The contractor will generally be paid for allowable costs incurred up to the termination. The member 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.
- iv. Upon receipt of any invoice from the contractor for work performed prior to the Notice of Termination, the member should thoroughly review the invoice to ensure that no excessive costs are included.

b. Termination for Default

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

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

- i. Factors to consider prior to making a termination for default decision include:
1. Has the member done everything within reason to assist the contractor in curing any default?
  2. The provisions of the contract and applicable regulations.
  3. The specific contractual failure(s) and the explanation provided for the failure(s).
  4. The urgency of the need for the contracted supplies or services. The member may need to weigh the respective benefits and/or disadvantages of allowing a delinquent contractor to continue performance or re-soliciting a new contractor.
  5. The availability of the supplies or services from other sources and the time required to obtain them (compared to the additional time the current contractor needs to complete the work).
  6. Availability of funds and/or resources to re-purchase in the event such costs cannot be recovered from the delinquent contractor. Under a termination for default, the member is within its right to demand re-procurement costs from the defaulting contractor. Nevertheless, the contractor may not be financially capable to finance the re-purchase, or such demand may result in protracted legal action.

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

- ii. Excusable Delay (Force Majeure) – A contract may not be terminated for default when the failure to perform is due to excusable causes. In order to qualify as an excusable delay, the cause must be beyond the control, and without the fault or negligence of the contractor. Such excusable delays include , but are not limited to :
  - 1. Acts of God
  - 2. Acts of the agency
  - 3. Fires
  - 4. Floods
  - 5. Epidemics
  - 6. Strikes
  - 7. Freight embargos
  - 8. Unusually severe weather

If the contractor’s failure to perform is due to the default of a subcontractor, in order to qualify as an excusable delay, the default must arise out of causes beyond the control and without the fault or negligence of both the contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.

- iii. Termination for Default and Cure Notices – Prior to terminating a contractor for default, a cure notice should be sent to the contractor. A cure notice is a letter provided to the contractor that provides them a period of time, usually 10 days, or whatever timeline may be outlined in the contract to correct or “cure” the deficiency or violation. Example cure notices are included in the Appendix (Section F).
- iv. Notice of Termination – If the contractor fails to cure the situation or provide a satisfactory explanation as requested, the contract may be terminated. The Notice of Termination should include the following:
  - 1. The contract number and effective date of contract
  - 2. The effective date of the termination
  - 3. Reference to the clause under which the contract is being terminated
  - 4. A concise, accurate statement of the facts justifying the termination
  - 5. A statement that supplies or services being terminated may be re-procured and that the contractor will be held liable for any additional costs incurred due to the re-purchase. Before including this statement, the contract should be reviewed to determine whether the right is available under the contract.

## **I. Contract Close-out**

The contract close-out process is usually a simple but detailed administrative procedure. The purpose is to verify that both parties to the contract have fulfilled their contractual obligations and there are no

responsibilities remaining. In addition, contract close-out is the time to assess the success of the contract and determine if there are any lessons learned for future contracting.

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

- a. All deliverables, including reports have been delivered and accepted by the member. Contract managers should compare actual performance against performance measures, goals and objectives to determine whether all required work has been completed.
- b. Final payment has been made.
- c. All monitoring issues have been resolved.
- d. All property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract.
- e. Final acceptance from the Project Manager has been received (if applicable).
- f. Contractor is aware of and in compliance with records retention requirements and a plan has been developed for contract file maintenance.
- g. Any deficiencies found as part of the closeout process are documented and communicated to all appropriate parties.

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 member furnished equipment and material have been returned; and final payment has been made to the contractor.

## **J. Grant Close-out**

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

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

Grant close-out period should be not less than 45 days nor later than 90 days (120 days for Federal grants) after the expiration or termination of the grant. The grantee must submit all financial, performance, and other reports required in the grant. Upon request by the grantee, federal/state agencies may extend this timeframe. These close-out reports may include but are not limited to:

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

## **K. Contract Administration File**

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

- a. A copy of the current contract and all modifications.
- b. A copy of all specifications, drawings or manuals incorporated into the contract by reference.
- c. A reference list of prior contracts with this specific vendor (if they offer valuable historical data).
- d. The solicitation document, the contractor's response, evaluation determination and the notice of award document.
- e. A list of contractor submittal requirements.
- f. A list of government furnished property or services.
- g. A list of all information furnished to the contractor.
- h. A copy of the pre-award conference summary (if conducted).
- i. A schedule of compliance review, internal correspondence (if applicable).
- j. A copy of all general correspondence related to the contract.
- k. The original of all contractor data or report submittals.
- l. A copy of all routine reports required by the contract such as sales reports, pricing schedules, approval request, and inspection reports.
- m. A copy of all notices to proceed, to stop work, to correct deficiencies, or change orders.
- n. A copy of all letters of approval pertaining to such matters as materials, the contractor's quality control program, prospective employees, and work schedules.
- o. The records/minutes of all meetings, both internal and external (including sign-in sheets & agendas).
- p. A copy of all contractor invoices, information relative to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments.
- q. A copy of all backup documentation for contractor payment or progress payment.
- r. Copies of any audits.

Members should maintain an original of all contracts on file in a central repository. This may be the member's electronic document management system in lieu of hard copy files. A central repository allows contract managers to reference past or current contracts for useful information relating to a current project. Note that some documents and information may be filed in a separate system. In those instances, a note in the file shall refer to the specific location of the other documents and information.

## **L. Retention Policy**

The System is committed to maintain an active and continuing state records management program in compliance with federal and state law. To that end, System Regulation 61.99.01 *Retention of State Records* lays out the procedures and responsibility for the System Records Management Program and management of the Records Retention Schedule. This Schedule lays out the requirements for maintaining all procurement and contract documents. For further information, please visit <http://policies.tamus.edu/61-99-01.pdf>, or visit the System Records Management page at <http://www.tamus.edu/legal/records-management/>.

## Section 11 – Training and Continuing Education

### A. Purchasing Personnel

Member purchasing personnel must receive training according to Government Code 2155.078. Training and continuing education must include:

- Training on the selection of an appropriate procurement method by project type
- Training conducted by the Department of Information Resources on purchasing technologies
- Ethics Training

Visit website <http://www.hr.sao.state.tx.us/Compensation/JobDescriptions.aspx> for SAO classifications as a reference to help identify individuals who are required to receive purchaser training. Use “Procurement” in the "Filter Descriptions" box then click the "Filter" button.

In addition, the following tasks may help identify individuals who are required to receive training:

- Develops and/or interprets rules, policies, or procedures regarding public purchasing.
- Advises member representatives on proper interpretation and application of purchasing policies and regulations.
- Reviews and/or oversees the review of requisitions for completeness and compliance with applicable requirements prior to processing solicitation documents.
- Prepares or assists with the preparation of specifications.
- Determines the appropriate procurement method.
- Prepares and advertises solicitation documents.
- Distributes bid invitations to vendors, notifies vendors of procurement outcome (award, rejection, denied etc.)
- Identifies and/or selects potential vendors.
- Assists with reviewing tabulations and analyzing bids to determine the lowest and best responses, codes bids, and prepares or oversees the preparation of purchase orders.
- Coordinates and schedules solicitation evaluation with team members.
- Evaluates offers and/or proposals submitted by vendors in response to solicitation documents.
- Purchases or oversees the purchasing of commodities, services, and/or equipment.
- Issues purchase orders to awarded vendors.
- Rejects items that do not meet specifications.
- Monitors legal and regulatory requirements pertaining to purchasing.
- Acts as a single point of contact for most purchases.
- Initiates and approves local and emergency purchases.
- May maintain or oversee a perpetual inventory control on warehouse items through the use of stock cards or a computer system.
- Establishes quotas, needs, and issuing schedules on commonly used items.
- Distributes solicitation addendums and updates as needed.
- Seeks ways to streamline purchasing and increase efficiencies.

Personnel who are required to receive the training described above may not participate in purchases unless the employee has received the required training or received equivalent training from a national association recognized by TPASS. The equivalent training may count toward the continuing education requirements.

## **B. Contract Management Personnel**

Pursuant to Gov't Code §2262.053, the Texas Procurement and Support Services (TPASS) administers a system of training, continuing education and certification for state agency contract management personnel. Each state agency shall ensure that the agency's contract managers complete the training and certification developed under this section.

Visit website [www.hr.sao.state.tx.us/Compensation/JobDescriptions.aspx](http://www.hr.sao.state.tx.us/Compensation/JobDescriptions.aspx) for SAO classifications as a reference to help identify individuals who are required to receive contract management training. Use "Contract Manager" in the "Filter Descriptions" box then click the "Filter" button.

In addition, the following tasks may help identify individuals who are required to receive contract management training:

- Develops and/or interprets rules, policies, or procedures regarding contract management or contract administration.
- Recommends the development of new contracts based on end-user requirements.
- Develops contracts by identifying needs, analyzing resources, describing services to be rendered, and negotiating pricing and other contract features/terms.
- Coordinates and facilitates the activities of a Contract Management team.
- Manages contracts using project management tools (i.e. work breakdown structures, GANTT charts, Performance Evaluation and Review Technique (PERT) charts, Critical Path Method (CPM), Microsoft (MS) Project, etc.)
- Prepares and presents reports regarding member contracts by compiling, reviewing, and analyzing data and reporting to member management and the Legislature.
- Coordinates the risk assessment process for contract planning and monitoring.
- Mitigates risks by addressing potential threats during contract development.
- Leads negotiations for major contracts.
- Inspects and/or audits contractors to ensure compliance with contract terms and conditions.
- Monitors contractor performance.
- Mediates and/or resolves contract related protests or disputes.
- Reviews and approves (in conjunction with the end user), all change orders.
- Cancels or terminates contracts.
- Provides guidance to member staff and the community regarding contract administration policies, and procedures.
- Identifies training needs and provides training and technical assistance to clients, boards, or public entities during the contracting process in order to comply with statutes, rules, and policies.
- Continually refines best practices guidelines for contract management.

### **C. Authorized Contract Signatory**

All System member employees authorized to execute contracts or exercise discretion in awarding contracts must receive training in ethics, selection of appropriate procurement methods, and information resources purchasing technologies as required by TEC 51.9337.

This training shall be developed and/or approved by the Director of Purchasing (or equivalent level) and administered through TrainTraq or an alternate approved method.

## Section 12 – Definitions

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

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

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

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

**Amendment:** Written addition or change to a contract.

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

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

**Best Value:** Factors to be considered in determining lowest overall cost and value in making certain purchases. Ref. Texas Education Code 51.9335 (Acquisition of Goods and Services).

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

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

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

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

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

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

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

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

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

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

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

**Contract:** A written agreement (including a purchase order) where a contractor provides goods or services and the member pays for such goods and services in accordance with the established price, terms and conditions.

**Contract Administration:** This generally refers to the processes that occur after a contract is signed and is explained in detail in Section 10.

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

**Contract Manager:** A Contract Manager is the person responsible for coordinating the processes required for effective contract management.

**Comptroller of Public Accounts** referenced in Texas Government Code, Section 2155.078, and the Commission's rule 113.

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

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

**Electronic State Business Daily (ESBD):** The electronic marketplace where member bid opportunities over \$25,000 may be posted.

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

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

**Grant:** The term "grant" refers to an award of financial assistance, including cooperative agreements, in the form of money, equipment, supplies, or other resources paid or furnished by the state or federal government to carry out a program in accordance with the terms of the grant award and all applicable state and federal laws, rules, and regulations.

**Historically Underutilized Business (HUB):** An economically disadvantaged business as defined by Texas Administrative Code [34 TAC §20.11](#).

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

**Institution of Higher Education:** Any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education.

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

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

**Member(s):** All members of The Texas A&M University System.

**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."

**Opening Date:** The date and time, after submission of responses, when sealed responses are opened. Also referred to as the due date.

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

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

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

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

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

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

**Proprietary Purchase:** A purchase request of a product that is proprietary to one vendor/manufacturer and does not permit an equivalent product to be supplied.

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

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

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

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

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

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

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

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

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

**Service:** The furnishing of labor by a contractor which may not include the delivery of a tangible end product. In some cases, services and goods may be combined such as film processing. In these instances, agencies determine whether labor or goods is the primary factor. In the case of film processing, the labor to process the film is the primary factor, therefore film processing is considered a service.

**Sole Source Purchases:** A purchase where the specification or conditions of the proposed purchase allow only one supplier to meet the specifications.

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

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

**State:** The State of Texas.

**Statute:** A law enacted by a legislature.

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

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

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

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

## Section 13 – Acronyms

**CMH:** Contract Management Handbook

**HUB:** Historically Underutilized Business

**IFB:** Invitation for Bid

**LBB:** Legislative Budget Board

**RFI:** Request for Information

**RFP:** Request for Proposal

**RFQ:** Request for Qualifications

**OGC:** Office of General Counsel

**SBA:** Small Business Administration

**TAMUS:** The Texas A&M University System

## Section 14 – Appendix

### A. Risk Assessment

The assumptions for this sample risk assessment include:

- The member has contracts with many vendors for providing the same service. Only three contractors are rated in this example but there are many contractors involved.
- The three risk elements used are dollars, past performance, and experience.
  - Dollars: 40% of the contractors receive less than \$100,000 from the agency per year. 50% receive between \$100,000 and \$250,000. 10% receive more than \$250,000.
  - Experience:
    - High Risk – the vendor has never done this type of work before.
    - Medium Risk – the vendor has contracted with the state before but not for this type of work.
    - Low Risk – the vendor has previously contracted with the state for the same type of work.
  - Past Performance: If the contractor has at least one significant finding from a prior monitoring or three less significant findings the contractor is considered high risk. Agencies should define their own past performance risk factors and weights.

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 = <b>1.7</b>
#2	\$75K	1	.2	New to type of work	3	1.5	New – no findings	1	.3	.2 + 1.5 + .3 = <b>2.0</b>
#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 = <b>2.3</b>

In this example Contractor #3 has the highest risk, followed by Contractor #2 and #1,

respectively. Typically, there will be many different risk elements. The above is a simple example shown for illustration purposes only.

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

**B. Review Checklist**

<b>#</b>  <b>Request Title:</b> <b>DUE DATE:</b>	<b>Proposers</b>				
	<b>1</b> <b>Vendor</b> <b>Address</b> <b>City, ST</b> <b>Zip</b> <b>Phone</b> <b>e-mail</b>	<b>2</b> <b>Vendor</b> <b>Address</b> <b>City, ST</b> <b>Zip</b> <b>Phone</b> <b>e-mail</b>	<b>3</b> <b>Vendor</b> <b>Address</b> <b>City, ST</b> <b>Zip</b> <b>Phone</b> <b>e-mail</b>	<b>4</b> <b>Vendor</b> <b>Address</b> <b>City, ST</b> <b>Zip</b> <b>Phone</b> <b>e-mail</b>	<b>5</b> <b>Vendor</b> <b>Address</b> <b>City, ST</b> <b>Zip</b> <b>Phone</b> <b>e-mail</b>
<b>Contact</b>	Contact Name				
<b>HUB Vendor</b>	YES	YES	YES	YES	NO
<b>Criterion One: Statement of Qualifications</b>	YES	YES	YES	YES	YES
<b>Criterion Two: Company Profile</b>	YES	YES	YES	YES	YES
<b>Criterion Three: Performance on Past Projects</b>	YES	YES	YES	YES	YES
<b>Exhibit A: Signed Execution of Offer</b>	YES	YES	YES	YES	YES
<b>Exhibit B: Signed Non-Collusion Affidavit</b>	YES	No	YES	YES	YES
<b>Exhibit C: Service Location Matrix</b>	YES	YES	YES	No	YES
<b>HSP (if applicable)</b>	N/A	N/A	N/A	N/A	YES
<b>1 Original, 1 electronic copy</b>	YES	YES	YES	YES	YES
<b>NOTES</b>					

### C. Evaluation Example

For each criteria rank the vendor from 1-5 with 5 being the best

Request # Title:	Vendor 1	Vendor 2	Vendor 3
<b>Proposed Services</b>	<b>Score</b>	<b>Score</b>	<b>Score</b>
Ability to provide legal guidance	5	3	4
Team Lead is permanent staff member	3	2	4
Proposed website is sufficient for the needs of the contract	4	5	5
Respondent has adequate staff levels	5	4	2
Proposal shows understanding of needs	3	4	3
Respondent has training plan in place	4	4	5
<b>Proposed Services Score</b>	<b>24</b>	<b>22</b>	<b>23</b>
<b>Experience &amp; Qualifications</b>	<b>Score</b>	<b>Score</b>	<b>Score</b>
Respondent has been performing service for a minimum of 5 yrs.	5	4	4
Respondent has been determined to have solid finances to perform services for the contract term	3	4	2
Proposed account manager has a minimum of 3 years experience	3	5	4
Respondents references	4	3	4
<b>Experience &amp; Qulifications Score</b>	<b>15</b>	<b>16</b>	<b>14</b>
<b>Total Score</b>	<b>39</b>	<b>38</b>	<b>37</b>

#### D. Payment Types

Payment Type	Commonly used for:	Payment based on:
<b>Cost Reimbursement</b>	Client services contracts, usually associated with state and federal grants.  <b>Example:</b> Contracts for services in remote areas.	Reimbursement of allowable costs in accordance with the approved budget.
<b>Cost Plus Incentives</b>	Materials contracts wherein the materials are unknown at the time of contract award.  <b>Example:</b> Construction contracts.	Contractor's cost plus a percentage of cost or cost plus a fixed fee. <b>This type of payment is usually discouraged as there is no incentive for the contractor to minimize the cost.</b>
<b>Fee For Service</b>	Contracts wherein a fee can be established for a unit of service.  <b>Example:</b> Providing flu shots to patients. Unit of service is one flu shot.	A specific fee for a unit of service. Payments are made for each unit of service completed.
<b>Firm Fixed Price</b>	Contracts wherein a firm fixed price can be established for work to be performed. Requires that the statement of work provide clear and accurate specifications.  <b>Example:</b> Common goods and services such as office supplies, furniture, etc.	A firm fixed price at the time the contract is awarded. Contractor carries all risk as the payment does not change, regardless of how much it costs the contractor to provide the goods or services
<b>Firm Fixed Price with Escalator</b>	Same as above and for longer term contracts and or contracts where the costs of material and labor are subject to market fluctuations. Because the contract allows for market adjustments, contractors are less likely to inflate prices to protect themselves against possible increases in operating costs.  <b>Example:</b> Lumber, steel, paper.	Same as above except includes provision for price escalation. Escalators are typically based on the Consumer Price Index.
<b>Progress (not allowed in client services contracts)</b>	Construction contracts or contracts that are completed in phases or stages.  <b>Example:</b> Building,	Payment is based on pre-established deliverables. Deliverables must be measurable. See Note2

Payment Type	Commonly used for:	Payment based on:
	Construction, Consulting Services.	
<b>Time and Material</b>	<p>Labor contracts wherein the amount of labor or material required for the work cannot be forecast. Recommend other payment types if possible. For example – instead of paying the contractor \$25 per hour for labor plus the cost of the materials, establish pricing for common units of work such as “labor and material to install a 120 power outlet”.</p> <p><b>Example:</b> Electrician, plumber, carpenter, etc.</p>	Payment is based on the number of hours worked for a specific scope of work, i.e. install a 120 power outlet.

**E. Clause and Provision Samples**

- a. **Indemnification.** PROVIDER agrees to indemnify and hold harmless [member] from any claim, damage, liability, expense or loss to the extent arising out of PROVIDER’s negligent or willful errors or omissions under this Agreement.
- b. **Independent Contractor.** PROVIDER is an independent contractor, and neither PROVIDER nor any employee of PROVIDER shall be deemed to be an agent or employee of [member]. PROVIDER will have no responsibility to provide transportation, insurance or other fringe benefits normally associated with employee status. PROVIDER shall observe and abide by all applicable laws and regulations, policies and procedures, including but not limited to those of [member] relative to conduct on its premises.
- c. **Public Information Act.**
  - i. PROVIDER acknowledges that TAMUS is obligated to strictly comply with the Public Information Act, Chapter 552, *Texas Government Code*, in responding to any request for public information pertaining to this Agreement, as well as any other disclosure of information required by applicable Texas law.
  - ii. Upon TAMUS’s written request, PROVIDER will provide specified public information exchanged or created under this Agreement that is not otherwise excepted from disclosure under chapter 552, Texas Government Code, to TAMUS in a non-proprietary format acceptable to TAMUS. As used in this provision, “public information” has the meaning assigned Section 552.002, Texas Government Code, but only includes information to which TAMUS has a right of access.
  - iii. PROVIDER acknowledges that TAMUS may be required to post a copy of the fully executed Agreement on its Internet website in compliance with Section 2261.253(a)(1), Texas Government Code.

- d. **Delinquent Child Support Obligations.** 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 receive payments from state funds under an agreement to provide property, materials, or services until all arrearages have been paid or the obligor is in compliance with a written repayment agreement or court order as to any existing delinquency. The Texas Family Code requires the following statement: “Under Section 231.006, Texas 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.”
- e. **Payment of Debt or Delinquency to the State.** Pursuant to Section 2252.903, Texas Government Code, PROVIDER agrees that any payments owing to PROVIDER under this Agreement may be applied directly toward certain debts or delinquencies that PROVIDER owes the State of Texas or any agency of the State of Texas regardless of when they arise, until such debts or delinquencies are paid in full.
- f. **Previous Employment.** PROVIDER acknowledges and understands that Section 2252.901, Texas Government Code, prohibits TAMUS from using state appropriated funds to enter into any employment contract, consulting contract, or professional services contract with any individual who has been previously employed, as an employee, by the member within the past twelve (12) months. If PROVIDER is an individual, by signing this Agreement, PROVIDER certifies that Section 2252.901, Texas Government Code, does not prohibit the use of state appropriated funds for satisfying the payment obligations herein.
- g. **Franchise Tax Certification.** If PROVIDER is a taxable entity subject to the Texas Franchise Tax (Chapter 171, Texas Tax Code), then PROVIDER certifies that it is not currently delinquent in the payment of any franchise (margin) taxes or that PROVIDER is exempt from the payment of franchise (margin) taxes.
- h. **State Auditor’s Office.** PROVIDER understands that acceptance of funds under this Agreement constitutes acceptance of the authority of the Texas State Auditor’s Office, or any successor agency (collectively, “Auditor”), to conduct an audit or investigation in connection with those funds pursuant to Section 51.9335(c), Texas Education Code. PROVIDER agrees to cooperate with the Auditor in the conduct of the audit or investigation, including without limitation, providing all records requested. PROVIDER will include this provision in all contracts with permitted subcontractors.
- i. **Entire Agreement.** This Agreement constitutes the sole agreement of the parties and supersedes any other oral or written understanding or agreement pertaining to the subject matter of this Agreement. This Agreement may not be amended or otherwise altered except upon the written agreement of both parties.
- j. **Severability.** If any provisions of this Agreement are rendered or declared illegal for any reason, or shall be invalid or unenforceable, such provision shall be modified or deleted in such manner so as to afford the Party for whose benefit it was intended the fullest benefit commensurate with making this Agreement, as modified, enforceable, and the remainder of this Agreement and the application of such

provision to other persons or circumstances shall not be affected thereby, but shall be enforced to the greatest extent permitted by applicable law.

- k. **Conflict of Interest.** By executing and/or accepting this agreement and/or purchase order, the VENDOR and each person signing on behalf of the VENDOR certifies, and in the case of a sole proprietorship, partnership or corporation, each party thereto certifies as to its own organization, under penalty of perjury, that to the best of their knowledge and belief, no member of TAMUS or the Board of Regents, nor any employee, or person, whose salary is payable in whole or in part by TAMUS, has a direct or indirect financial interest in the award of this agreement and/or purchase order, or in the services to which this agreement and/or purchase order relates, or in any of the profits, real or potential, thereof.
- l. **FERPA.** For purposes of the Family Educational Rights and Privacy Act (FERPA), University designates the [] as a school official with a legitimate educational interest in any educational records (as defined in FERPA) in Data to the extent the [] requires access to those records to fulfill its obligations under this Agreement. The [] shall comply with FERPA as to any such educational records.
- m. **Headings.** Headings appear solely for convenience of reference. Such headings are not part of this Agreement and shall not be used to construe it.
- n. **Non-Assignment.** PROVIDER shall neither assign its rights nor delegate its duties under this Agreement without the prior written consent of [member].
- o. **HUB Subcontracting Plan.** If a subcontractor will be used to provide any commodity or service as part of the scope on a specific assignment, the PROVIDER will be required to make a good faith effort and complete the state of Texas HSP found at <http://www.tamus.edu/business/facilities-planning-construction/forms-guidelines-wage-rates/>. If there are pre-existing agreements in place with companies who will be hired as subcontractors, the PROVIDER will show those companies as subcontractors on the HSP and provide an explanation as to why solicitations were not done, e.g. contractual requirements. If no pre-existing agreements with companies who will be hired as subcontractors exist, then the PROVIDER will be expected to make a good faith effort according to the HSP instructions.

In the event that you determine you will be using a subcontractor, please contact [member HUB contact] from the [member name]'s HUB Program at [HUB contact phone and e-mail address] for assistance in determining available HUB subcontractors and proper completion of the HSP.

- p. **Force Majeure.** Neither party is required to perform any term, condition, or covenant of this Agreement, if performance is prevented or delayed by a natural occurrence, a fire, an act of God, an act of terrorism, or other similar occurrence, the cause of which is not reasonably within the control of such party and which by due diligence it is unable to prevent or overcome.
- q. **Loss of Funding.** Performance by [member] under this Agreement may be dependent upon the appropriation and allotment of funds by the Texas State Legislature (the "Legislature"). If the Legislature fails to appropriate or allot the necessary funds, [member] will issue written notice to PROVIDER and [member] may terminate this Agreement without further duty or obligation hereunder. PROVIDER acknowledges that appropriation of funds is beyond the control of [member].

- r. **Governing Law.** The validity of this Agreement and all matters pertaining to this Agreement, including but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties, and interpretation or construction, shall be governed and determined by the Constitution and the laws of the State of Texas.
- s. **Venue.** Pursuant to Section 85.18, Texas Education Code, venue for any suit filed against [member] shall be in the county in which the primary office of the chief executive officer of [member] is located, which is [member County], Texas.
- t. **Non-Waiver.** PROVIDER expressly acknowledges that [member] is an agency of the State of Texas and nothing in this Agreement will be construed as a waiver or relinquishment by [member] of its right to claim such exemptions, privileges, and immunities as may be provided by law.
- u. **Notices.** Any notice required or permitted under this Agreement must be in writing, and shall be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address set out below. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, email or other commercially reasonable means and will be effective when actually received. [Member] and PROVIDER can change their respective notice address by sending to the other party a notice of the new address. Notices should be addressed as follows:

[Member]:      [Member]  
                                  [Member Address]  
                                  [Member City, State Zip]  
                                  Attention:  
                                  Phone:  
                                  Fax:  
                                  E-mail:

PROVIDER:      Vendor name  
                                  Address  
                                  City, State Zip  
                                  Attention:  
                                  Phone:  
                                  Email:

**F. Cure Notices**

- a. [Contractor name] is notified that the [member name] considers [specify failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days from the date of this letter, the [member name] may terminate for default under the terms and conditions of the Termination clause of this contract.
- b. Since [contractor name] has failed to perform the above referenced contract within the time required by its terms, the member is considering terminating the contract under the provisions for default. Pending

a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the questions to [member point of contact] within 10 days from the date of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist.

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

## G. TEC Form 1295 Request Letter

### Contractor Requirement for Submission of TEC Form 1295 Certificate of Interested Parties

Effective January 1, 2016, a contracting business entity must submit a disclosure of interested parties on a form prescribed by the Texas Ethic Commission (TEC) for any contract (including an amendment, extension, or renewal) that has a value of at least one million dollars. A "contracting business entity" includes a sole proprietorship, partnership, corporation, limited liability company, nonprofit entity, foreign company, or other legally-recognized business.

#### Procedure

The TEC rules prescribe the following procedure for complying with the statute:

1. The contracting business entity must complete TEC Form 1295, Certificate of Interested Parties, using the TEC's electronic filing application. Upon submission of the form, the application will provide the entity with a copy of the form that includes a unique certification number.
2. The entity must submit a signed and notarized copy of the form to (member information) with the contract signed by the entity. The contract will be signed and issued once the entity provides the form to the member.

If issuing a purchase order vs a contract use the follow no. 2.

2. The entity must submit a signed and notarized copy of the form to the member prior to issuance of the purchase order.
3. The TEC will match the certification number entered by the member with the form submitted by the entity and post the entity's form to the TEC website for public review within seven business days.

The TEC electronic filing application, is located @ [https://www.ethics.state.tx.us/whatsnew/elf\\_info\\_form1295.htm](https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm)

The ID number will be \_\_\_\_\_ (provide your PO number or Contact Number)

TEC has instructional videos on registering and on how to create a certificate. If you have any questions, please contact the TEC 512-463-5800.

Send electronic copy to:

H. TEC Form 1295

<b>CERTIFICATE OF INTERESTED PARTIES</b>		<b>FORM 1295</b>	
Complete Nos. 1 - 4 and 6 if there are interested parties. Complete Nos. 1, 2, 3, 5, and 6 if there are no interested parties.		<b>OFFICE USE ONLY</b>	
<b>1</b> Name of business entity filing form, and the city, state and country of the business entity's place of business.			
<b>2</b> Name of governmental entity or state agency that is a party to the contract for which the form is being filed.			
<b>3</b> Provide the identification number used by the governmental entity or state agency to track or identify the contract, and provide a description of the goods or services to be provided under the contract.			
4 Name of Interested Party	City, State, Country (place of business)	Nature of Interest (check applicable)	
		Controlling	Intermediary
<b>5</b> Check only if there is NO Interested Party. <input type="checkbox"/>			
<b>6 AFFIDAVIT</b> I swear, or affirm, under penalty of perjury, that the above disclosure is true and correct.			
_____ Signature of authorized agent of contracting business entity			
AFFIX NOTARY STAMP / SEAL ABOVE			
Sworn to and subscribed before me, by the said _____, this the _____ day of _____, 20_____, to certify which, witness my hand and seal of office.			
_____ Signature of officer administering oath		_____ Title of officer administering oath	
_____ Printed name of officer administering oath			
<b>ADD ADDITIONAL PAGES AS NECESSARY</b>			