



Texas Workforce Commission

Contract Management Handbook

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Table of Contents

Introduction.....	5
Purpose	5
TWC’s CMH Organization.....	6
Professional Certification.....	6
Contract Management Framework	6
Ethical Standards and Policies	6
Chapter 1 Contract Advisory Team.....	8
CAT Review of Contracts -- \$10 Million or More.....	8
Contract Value Determination.....	10
Chapter 2 Planning	11
General Planning.....	11
Determine Procurement Method.....	14
Procurement Lead Time.....	16
Chapter 3 Prepare Solicitation	17
Specification Types.....	17
Incentives	19
Prepare Statement of Work.....	19
Organize Statement of Work	20
Contract Term	20
HUB (Historically Underutilized Business) Requirements.....	21
Payment Types.....	21
Solicitation Document Considerations	23
Prepare Grant Announcement	28

Chapter 4 Advertise Solicitation..... 29

Solicitation Announcement/ Develop Bid List..... 29

Pre-Bid Conference 29

Communication with Respondents 31

Written Questions..... 31

Proposal Submission and Opening 31

Consulting Services 31

Professional Services..... 33

Mixed Services 33

Architectural, Engineering, or Land Surveying 34

Advertise Grant Announcement..... 34

Chapter 5 Evaluation and Award..... 36

Evaluation Team..... 36

Responsive Proposals..... 37

Single Response..... 37

Proposal Evaluation 38

References..... 38

Determine Competitive Range 39

Oral Presentations/ Demonstrations/ Discussions 39

Best and Final Offers 40

Negotiations 40

Award 42

Grants Evaluation and Award 42

Chapter 6 Contract Formation..... 44

Approach to Contract Formation..... 44

Legal Elements of Contract 45

Draft Contract..... 45

Contract Terms..... 46

State Contracting Standards/ Oversight..... 46

Authority to Contract 47
Federally Funded Contracts 47
Contract Formation for Grants 48

Chapter 7 Contract Administration 49

Contract Manager Responsibilities 50
Planning..... 51
Monitoring Performance 53
Risk Management 59
Payment Approval 59
Change Management..... 60
Dispute Resolution..... 62
Termination..... 63
Contract Administration File 66
Contract Close-Out..... 66
Grant Close-Out 67

Introduction

Contract management is the coordination and management of four core processes: Planning; Procurement; Contract Formation/Rate/Price Establishment and other relevant terms and conditions; and Contract Administration.

Texas law governs certain aspects of contracting. Various types of purchases and contracts may be subject to different statutory standards, practices, processes, and strategies for successful implementation. The nature and level of risk associated with each of these elements vary depending on the nature of the business relationship.

Purpose

TWC (Texas Workforce Commission) and TWC contractors are to ensure compliance with laws, rules, and regulations related to TWC specific programs and funding sources. TWC CMH (Contract Management Handbook) supplements, but does not replace existing statutory requirements and TWC rules, policies and procedures. A Contract Manager is responsible for coordinating the processes required for effective contract management. Contract Management is about planning, forming, and administering contracts. Contract management may involve a variety of distinct disciplines and roles including:

1. Executive Management;
2. Organization Management;
3. Project Management;
4. Planning;
5. Program Staff (subject matter experts and monitors);
6. Contractor Management;
7. Purchasers;
8. Accounting/Budget;
9. Legal;
10. Audit; and
11. Quality Control/Assurance.
12. TWC is responsible for developing sound business procedures in accordance with applicable federal and state laws, regulations, policies and procedures including:
13. Maximum contract term, after which a new competitive solicitation must be issued;
14. Time frames for the solicitation, evaluation, negotiation, and awarding of a contract; and
15. Procedure to determine why a single response is submitted to a TWC solicitation.

TWC's CMH Organization

TWC's CMH is companion to TWC Procurement Handbook and both should be used to achieve maximum benefit. In addition, TWC purchasing and contract staff must consult TWC legal staff to provide assistance regarding applicable legal cites and case law.

Professional Certification

All TWC contract management and purchasing personnel must be trained and certified to the extent required by state law and administrative rules of the CPA (Texas Comptroller of Public Accounts). See TGC (Texas Government Code), Chapter 2262 Statewide Contract Management, and Section 2262.053 Training.

TWC contract management and purchasing personnel includes all TWC purchasing personnel as defined in TGC and the Comptroller of Public Accounts/Texas Procurement and Support Services (TPASS) rules. It is not the intent of this definition to include (1) an executive level manager authorized to bind the governmental entity or (2) an attorney performing traditional legal functions – such as legal review of a contract.

CTCM (Certified Texas Contract Manager) - certification is earned pursuant to TGC §2262.053, after taking TPASS (Texas Procurement and Support Services) training courses and passing certification examination for state agency contract management personnel. Per Senate Bill #1681, 83rd Legislative Session (see TGC §2262.053) all members of the governing body of a state agency must complete an abbreviated contract management course.

Contract Management Framework

Effective contract management depends on interaction of the following elements:

- **Plan** – Identify contracting objectives and contracting strategy.
- **Procurement** – Fairly and objectively select the most qualified contractors.
- **Contract Formation/Rate/Price Establishment** – Ensure the contract contains provisions that hold the contractor accountable for producing desired results, including all relevant terms and conditions as well as establish processes that are cost-effective and aligned with the cost of providing the goods and services.
- **Contract Oversight** – Monitor and enforce the terms of the contract.

Ethical Standards and Policies

- 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 must 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
- 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

Chapter 1

Contract Advisory Team

Pursuant to TGC, Section 2262.101, the CAT (Contract Advisory Team) was created to assist state agencies in improving contract management practices by reviewing and making recommendations on solicitation documents and contract documents for contracts that have a value of at least \$10 million dollars during the original term of the contract, not including any renewal periods. CAT also:

- reviews findings or recommendations of the State Auditor regarding a state agency's compliance with State of Texas CMG (Contract Management Guide);
- provides recommendations to Texas Comptroller of Public Accounts regarding the development of CMG and training of contract managers;
- provides recommendations and assistance to state agency personnel on entire contract management process;
- coordinates and consults with QAT (Quality Assurance Team) comprised of staff from DIR (Texas Department of Information Resources), LBB (Texas Legislative Budget Board), & SAO (Texas State Auditor's Office) on all contracts relating to major information resources projects; and
- performs risk assessments to determine appropriate level of state agency management and contracts oversight.

TGC, Section 2262.102 lists the following six members for CAT:

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

OAG (Texas Office of the Attorney General) provides legal assistance to CAT. LBB and SAO serve as technical advisors to CAT.

CAT Contracts Review – \$10 Million or More

A. General - To facilitate CAT contract solicitation review process, TWC must submit:

- Solicitation document(s) - May be; but is not limited to RFP (Request for Proposal), IFB (Invitation for Bid), RFA (Request for Application), RFO (Request for Offer), or RFQ (Request for Qualifications); and
- Any other documents related to solicitation or incorporated by reference into or are part of the solicitation.

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

Send solicitation document(s) to CAT for review using CPA web application CATRAD (Contract Advisory Team Review and Delegation) portal at <https://portal.cpa.state.tx.us/>. In addition to sending actual solicitation document(s), TWC personnel are required to fill out a brief submission form summarizing the contract solicitation. Submission form replaces Major Contract Questionnaire that is no longer required for CAT reviews. TWC has select group who: 1) are registered users of CPA web application portal and 2) have been granted portal membership rights to CATRAD. In order to gain CATRAD access, TWC personnel need to contact TWC "Superuser" listed on CPA website Superusers/Security Coordinators list. If you need assistance with CATRAD, check CPA website for address to email questions. As soon as CAT receives major contract solicitation document(s), CAT will send e-mail acknowledgement to TWC confirming receipt of solicitation and providing web link to view CAT review status. In order to avoid delays in TWC procurement process, submit major contract solicitation document(s) as soon as possible after final TWC approval or final executive-level approval [final executive-level approval may be necessary for some major contract solicitation document(s), especially for IT-related solicitations].

- B. CAT (Contract Advisory Team) Risk Assessment** - CAT periodically performs a risk assessment to determine appropriate level of management and oversight of TWC contracts. CAT risk assessment includes the following criteria:
- a. amount of TWC appropriations;
 - b. impact of TWC functions and duties on health, safety, and well-being of Texas residents;
 - c. total contract value as a percentage of TWC appropriations; and
 - d. any other risk factors chosen by CAT.
- C. State Agency Recommendations** - Under TGC, Section 2262.101(d), TWC is required to:
- a. comply with CAT's recommendations on solicitation and contract documents submitted for mandatory CAT review; or
 - b. submit a written explanation to the CAT regarding why a specific CAT recommendation is not applicable to the contract under review.
- D. Substantial Changes to Solicitations** - If initial major contract solicitation document(s) submitted to CAT changes substantially, TWC is required to resubmit solicitation document(s) for CAT review. Major contract solicitation changes are considered substantial when:
- a. solicitation change caused estimated value for original contract term, not including renewal periods, to increase by **25 percent** or more; or
 - b. **significant revisions, deletions and/or additions** were made to specifications, SOW (statement of work), set(s) of deliverables, performance measures, payment methodology, etc.
- E. Scheduling Compliance** - CAT recommends Procurement, Contract Management, and Legal personnel incorporate *20 business day* CAT review period into procurement schedule to avoid potential delays to TWC's solicitation, evaluation, and award process. Should CAT request TWC to submit a more

complete major contract solicitation draft or require clarification, *20 business day* turnaround timeframe restarts when CAT receives all document revisions needed to conduct its review.

- F. Exceptions to CAT Review** - Per TGC, Section 2262.002, institutions of higher education as defined by TEC (Texas Education Code), Section 61.003 are exempt, as are contracts of TxDOT (Texas Department of Transportation) that relate specifically to highway construction, highway engineering, or contracts subject to TTC (Texas Transportation Code), Section 201.112.

Contract Value Determination

TWC bases its determination of contract proposed length and compensation during original term and renewal periods on best business practices, state fiscal standards and applicable law, procedures and regulations. TWC does not artificially split any of these factors to avoid \$10 million dollar threshold during original contract term and therefore solicitation submission for CAT review. TWC method of payment and source of funds are not factors in determining estimated total value of \$10 million dollars or more. TWC must make a good faith determination of estimated total value at time solicitation is submitted to CAT and must advise CAT prior to issuance of any changes in this estimated amount that would impact CAT review.

Chapter 2

Planning

Planning, first step in contract management, is crucial to successful outcome of any procurement to achieve their contracting objectives. TWC contract planning assists in determining need, preparing the statement of work, choosing appropriate procurement type, solicitation, negotiation, drafting contract, and contractor monitoring plus oversight. These steps are complex and there are many instances where errors can be introduced into the process. Proper planning will reduce or eliminate the risk of error. During contract planning phase each of following contract management elements must be considered:

A. General Planning

General Planning includes several areas which assist in getting project started – such as develop contract management team, assess risk, prepare communication plan, determine procurement method, plan procurement content, and establish cost estimate.

1. **Contract Management Team** - Each contract management initiative should include an executive sponsor, a contract manager, purchasing department staff, and program staff to assist in contract management process. The extent and degree of executive sponsorship and participation should be directly related to risk level associated with procurement. Contract manager should be experienced with proposed procurement type and size. Certified purchasers should be familiar with this handbook to ensure purchasing statutes are followed and procurement is handled in a fair and competitive manner and may be contract managers. TWC Program staff members provide input on technical requirements and serve as SMEs (subject matter experts) to mitigate risk during SOW development phase on all TWC contracts. In addition, PMO (Project Management Office) reviews and mitigates risk on all IT (Information Technology) contracts.

If TWC staff does not have necessary technical expertise for developing a solicitation, TWC contracts out for that expertise. For example, a building construction contract needs a licensed architect and a licensed engineer expertise when preparing building plans and specifications.

2. **Risk Assessment** - Risks are inherent in all stages of procurement process. Limited resources require use of risk assessment as there is not sufficient time to oversee all aspects of a contract. An effective risk assessment model will help focus monitoring resources on contractors with highest noncompliance risk. First, identify risk factors. Risk factors are indicators that assess risk of contract or project objectives not being achieved. General risk factors may include, but are not limited to:
 - Contractor's past performance (and past performance of similar contractors);
 - Turnover in key personnel;
 - Dollar amount of contract;

- Factors from desk reviews, such as variance between expected and actual performance;
- Significant problems with payment requests;
- Results of previous monitoring visits;
- Monitoring visits results completed by other agencies or TWC divisions that contract with same contractor;
- Length of time since last monitoring visit; and
- How experienced contractor is with type of work to be performed.

Once risk factors are identified, assign weights to each factor. Weights describe how significant each factor is in identifying contractors who should be monitored. However, weights can also be designed to ensure statutory or policy requirements. For example, if statute requires a site visit every three years, assigned weight would be indicative of time period since last site visit. Next, rate each contractor on risk elements. Consider using a three-point scale, where 3 is high risk, 2 is medium risk and 1 is low risk.

- CAT (Contract Advisory Team) Risk Assessment** - Pursuant to TGC, Section 2262.101(a)(6) CAT periodically performs a risk assessment to determine appropriate level of TWC management and contracts oversight. CAT risk assessment includes following criteria: amount of TWC appropriations; total contract value as percentage of TWC appropriations; impact of TWC functions and duties on health, safety, and well-being of Texas residents; and any risk factors chosen by CAT.
- Risk Management** - Risk management process includes: 1) risk identification, 2) risk analysis, 3) risk evaluation, 4) risk treatment and contingency plan and 5) risk monitoring. Contract management risks are as varied as contract types. Risk categories common to contract management include product risk, process risk, financial risk and schedule risk.

There is no objective or mathematical formula to be used to identify or quantify risk imposed by a particular contract. Risk determination is based on subjective experience. Several factors that may be useful in identifying the level of risk may include:

- Complexity and procurement subject matter;
 - Dollar amount of procurement and whether procurement will result in a major contract;
 - Anticipated payment methodology;
 - Experience TWC staff has with this procurement type;
 - Will procurement results impact Texas public or TWC only;
 - Time constraints or expected procurement duration ; and
 - Type, availability or experience of staff resources required to implement procurement objectives.
- Communication Plan** - TWC External Relations Division has a plan to manage and control internal and external communication. After identifying internal and external stakeholders TWC executive management, External Relations Division, or oversight entities:
 - Develop and communicate status report on a timetable with key decision points and milestones;

- Determine type, content, and frequency for reporting status; and
 - Determine who, what, when, where and how information will be communicated to contractors regarding potential procurement opportunities.
4. **Procurement Content Plans** - Clearly identify general contract objectives, assumptions, and constraints is an important step in contracting process. Content plans may seem obvious, but a contract often fails because expectations were not met and there was not a true meeting of the minds. A clear understanding of contract objectives is essential to success. Typically a TWC contract is part of a larger organizational project. Contract planners must carefully consider how objectives, assumptions and constraints integrate into larger organizational project. Identify and document potential integration risks, so strategy to mitigate or manage risks can be developed.
- a. **Technology Contracts** - Many major IT (information technology) projects procurement of technology-related goods and/or services. Technology-based procurement projects present a unique level of complexity that requires specific contract management practices, processes, and strategies.
 - b. **Plan for Grants** - If TWC uses grant funds to procure a good or service, TWC is required to follow state purchasing guidelines. In addition, when using grant funds for procurement purchases, TWC must also comply with any applicable grant requirements or special conditions imposed by underlying grant award used to fund procurement.
5. **Grant Awards** - Prior to grant award (to other entities, not the procurement of goods or services) announcement, TWC must follow UGMS (Uniform Grant Management Standards) prepared by Texas Governor’s Office of Budget and Planning. In making determination about which situation UGMS is applicable, TWC staff must contact TWC Procurement & HUB Services Director, who consults with TWC-OGC (Office of General Counsel) early in planning process. Likewise, a state agency, if given statutory authority to do so, may also be responsible for awarding grant funds to other entities such as other State agencies, local governments, non-profit organizations or private entities. In this situation, state agency is “grantor”.
- a. **General Grant Announcement Planning** - Before preparing grant announcement, TWC needs to develop good internal control systems to ensure that grant funds are properly used and achieve intended results. Internal control systems serve to ensure grants are awarded to eligible entities for intended purposes and are managed appropriately. When new grant program is being developed give attention to grant goals, criteria applicants will need to satisfy, activities eligible for funding, and how funding decisions will be made. TWC policies are guidelines to ensure grant program includes provisions to hold grantee accountable for properly using funds and achieving approved grant purposes within a defined grant scope. “Grantee” award may result from a competitive process or merely from TWC, “grantor”, making pre- determined amount of funding available. If TWC uses competitive process, grant announcement as RFP (Request for Proposal) does not bring competitive process into procurement provisions of this Handbook.
 - b. **Grants Received** - When TWC receives grant funds (federal or other sources), TWC is “grantee” of a grant. Even when TWC makes grant award TWC may be a “grantee”, if

grant funds were received from another entity and are being awarded to ‘sub-recipient’ entity.

- c. **Grant Agreements** - All grant agreements involve a contractual relationship. The form of grant agreements can be either a “contract” or other grant document such as “Statement of Grant Award”, “Grantee’s Acceptance Letter”, and/or “Terms and Conditions”. TWC staff must contact TWC Procurement & HUB Services Director, who confers with TWC-OGC in developing grant document(s).

- 6. **Needs Assessment** - Needs assessment purpose is to ensure TWC contract team plans for correct contract objectives and must incorporate TWC initial needs assessment conducted when determination was made to contract out for service instead of performing in-house. A clear definition of contract objectives and purpose to be accomplished assists TWC contract team later in developing statement of work, solicitation, negotiation, and contract documents and in verifying contractor performance.

If contract purpose implements, changes, or supports TWC’s statutory duties; remember to identify existing statutory requirements, TWC rules, policies, and business processes that contract will impact. If TWC business processes or practices are not documented, it is helpful to document them. Once legal requirements and business processes are clearly identified TWC can assess how these duties or processes will be changed or impacted. Document any concerns or risks identified by needs assessment so changes and risks can be managed or mitigated in contract document.

Success of many contracts depends on how well business requirements are documented, communicated, and understood by contractor community. Do not assume contractor community understands TWC’s business. Detailed TWC business practices are frequently incorporated into contract’s SOW, so TWC staff input and cooperation is critical when planning and developing a SOW and during acceptance testing.

B. Determine Procurement Method

Please refer to TWC Procurement Manual for more complete and detailed guidance. Following table is provided to assist in making appropriate choice in selection of procurement method. As a reminder, TWC Procurement & HUB Services first refers to any applicable legislation which may require use of a specific procurement method.

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

C. Procurement Lead Time

In order to ensure each contract is awarded by needed effective date(s), table below is provided to assist TWC program staff with planning process.

TASK	SUGGESTED LEAD TIME FROM CONTRACT START DATE	EXAMPLE
Begin Preparation of Solicitation Document – Program Staff works with Procurement & HUB Services to develop SOW and TWC Legal Division on contract language.	180 days	March 1
Submit final solicitation with required approvals to TWC Procurement & HUB Services and they will refer to CPA (if required).	150 days	April 1
Advertise and Issue Solicitation.	120 days	May 1
Receipt of Responses.	90 days	June 1
Evaluation of Responses.	60 days	July 1
Contract Negotiation (if allowed by procurement method) and Formation.	30 days	August 1
Contract Execution – All signatures are obtained.	15-60 days	August 15
Performance Begins (effective date).	0 days	September 1

Chapter 3

Prepare Solicitation

After TWC Procurement & HUB Services determines which statutory solicitation method is appropriate, solicitation document is prepared. (Refer to Chapter 2 for various procurement types). Keep in mind that except as otherwise provided by statute, a purchase/contract for goods or services must, whenever possible, be accomplished through competitive solicitation. In preparing solicitation document, review relevant statutes and rules to identify each of statutory and regulatory requirements necessary to comply with law before drafting a solicitation document. Employees involved in preparing a solicitation must sign and submit a Non-Disclosure Statement and Conflict of Interest Statement prior to beginning work on a solicitation.

Specification Types

Specification is a description of a product or service a user seeks to procure, and is also a description of what a bidder must offer to be considered for an award. Specifications are primary means of communication between TWC and a vendor. Two of most common specification types are:

- Performance-Based Specifications
- Design Specifications

1. Specifications Control

- quality level of product;
- amount of completion;
- suitability of product or service for job to be done; and
- evaluation method used to make award and determine best value bid for purchase.

2. Effective Specification Characteristics

- **FLEXIBLE:** Avoid totally inflexible specifications which prevent acceptance of a bid that could offer greater performance for fewer dollars. Use approximate values such as dimensions, weight, speed, etc. (whenever possible); if they will satisfy intended purpose. If approximate dimensions are used, best to be within a 10 percent rule of thumb unless otherwise stated in specification.
- **ACCURATE:** Use units of measure compatible with industry standards. All quantities and packing requirements should be clearly identified.
- **CLEAR:** Use terminology understandable to both TWC and bidders. Use correct spelling and appropriate sentence structure to eliminate confusion. Avoid legalese type language and jargon whenever possible.
- **COMPETITIVE:** Identify at least two commercially available brands, makes, or models (whenever possible) that will satisfy intended purpose. Avoid unneeded “extras” that could reduce or eliminate competition and increase costs.
- **SIMPLE:** Avoid unnecessary detail, but complete enough to ensure requirements satisfy

intended purpose.

3. Performance-Based Specifications vs. Design Specifications – Performance-based specifications focus on outcomes or results instead of process, and required goods and services rather than how goods and services are produced. Conversely, design specifications outline exactly how contractor must perform service or how product is made. Performance-based specifications allow respondents to bring their own expertise, creativity, and resources to bid process without restriction to predetermined methods or detailed processes. This allows respondents to provide product(s) or service(s) at less cost and shifts some of risk to contractors. For example, if TWC uses a design specification for a unit of equipment and equipment does not work correctly, then results may be the fault of TWC specification. However, if TWC wrote a performance-based specification, equipment unit must operate properly in order to meet performance standards. Consider following specification types for media/advertising services:

- **Performance-Based Specification:** Contractor must provide media services for Texas Tourism which will increase tourist dollars by a minimum of 3 percent in next fiscal year. Visits by out-of-state tourists must increase a minimum of 10 percent. These figures will be measured as reported by Texas Chamber of Commerce.
- **Design Specifications:** Contractor must conduct at least seven media campaigns for Texas Tourism during fiscal year. Three of these campaigns must be directed to out-of-state tourists.
- **Mixed Specifications:** Contractor must provide media services for Texas Tourism which must include a minimum of seven media campaigns during fiscal year. Media services must provide for a minimum increase of 3 percent in next fiscal year as measured and reported by Texas Chamber of Commerce.

As you can see, performance-based specification focuses on results, whereas design specification focuses on resources. With design specifications, contractor may provide all seven campaigns, but desired result of increased tourist dollars and visits may or may not occur. As with all performance measures, TWC must ensure performance-based specifications are reasonable and measurable.

Note: specification clearly outlines how results will be measured. While performance-based contracts are sometimes preferable, when using this type of specification planning, expertise and contract management may be different than design specifications.

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

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

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

system.

- **New installation, system provided by various suppliers.** In this case, TWC may need to use a design specification to ensure all characteristics of system will work together. For example, a project to bid out HVAC controls, chillers, fire alarms, etc. will all need to work together.
- **Expansion of existing installation.** Design specification would be required in this instance as new equipment must connect and integrate with existing system.

Incentives

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

Prepare Statement of Work

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

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

Organize Statement of Work

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

Elements of a Deliverable - Each deliverable in a solicitation should include following elements:

1. Description of work;
2. Standard for performance;
3. Test conditions, method or procedure to verify deliverable meets the standard;
4. Method or process to monitor and/or ensure quality in deliverable;
5. Acceptance process for each deliverable;
6. Compensation structure consistent with type and value of work performed; and

Statement of work must have clear and thorough description of goods or services to be provided. If appropriate, identify relevant environment where product/service will be used. In certain types of procurements, it may be critical to describe existing business processes. If existing business process will change because of procurement, then also detail how business process will change after procurement is done. If TWC wants respondents to suggest new business processes, ensure this information is included in solicitation.

Contract Term

A contract term compliant with all applicable law must be established before solicitation to be included in solicitation document. All contracts must have specific end date as indefinite contracts are generally prohibited. General TWC policy is 4-year maximum contract time limit including renewals or extension periods without reissuing competitive solicitation. Individual business needs may dictate a different time period and end users should contact TWC Procurement & HUB Services Director, who consults with TWC-OGC for advice on time limits early in contract planning process.

TWC is prohibited from incurring excess obligations above amounts lawfully appropriated by Texas Legislature for biennium. Contracts must include “funding out” clause either:

- TWC Terms & Conditions **Termination Provisions** Section 10.2.1, “Failure to obtain or sustain funding from either Federal or State funding sources.” or
- “Contract is contingent upon continued availability of funding. If funds become unavailable through lack of appropriations, legislative or executive budget cuts, amendment of Appropriations Act, state agency consolidations, or any other disruptions of current appropriations, termination provisions must apply.”

HUB (Historically Underutilized Business Requirements)

TWC is required to make a good faith effort to utilize HUBs in state contracts according to 1996 State of Texas disparity study specified goals achieved through contracting directly with HUBs or indirectly through subcontracting opportunities in accordance with TGC, Chapter 2161, Subchapter F and TAC, Title 34 Part 1, Chapter 20, Subchapter B. All contracts **over \$100,000**, respondents must complete and return **HUB Subcontracting Plan** forms with proposal to avoid being considered non-responsive (see TAC, Title 34 Part 1, Chapter 20, Subchapter B, Section 20.12(28)).

Payment Types

Payment method has direct impact on how statement of work is written and contract is managed. TWC must measure or verify contract work is complete and how much and how often TWC will pay the contractor. Various payment types consistent with type of product or service delivered can

be considered. Payments should be structured to fairly compensate contractor and encourage both timely and complete work performance. As a general rule, make progress payments approximately equal to value of completed work. Below is table illustrating various common payment types and how each applies to various contract types.

Good business practice is each payment reflects value of work performed. TWC needs to control payment process by dividing overall contract payments into smaller amounts reflecting a small increment of work or deliverable (effective technique for managing financial risk). If any vendor dispute, by using deliverable elements, scope of dispute can be contained to discrete deliverable rather than entire contract. Likewise, amount of money associated with deliverable is also known and limited. In slightly different ways, each of deliverable elements either lessens risk or shifts risk from State to contractor.

COMMON PAYMENT TYPES

Payment Type	Commonly used for:	Payment based on:
Cost Reimbursement	Client services contracts, usually associated with state and federal grants. Example: Contracts for services in remote areas.	Reimbursement of allowable costs in accordance with approved budget. See Uniform Grants Management Standards published by Texas Governor's Office.
Cost Plus Incentives	Materials contracts where materials are unknown at time of contract award. Example: Construction contracts.	Contractor's cost plus a percentage of cost or cost plus a fixed fee. This type of payment is usually discouraged as there is no incentive for contractor to minimize State's cost.
Fee For Service	Contracts where a fee can be set for a unit of service. Example: Give patient flu shot. Service unit = 1ea flu shot.	Specific fee for unit of service. Payment is made for each completed service unit.
Firm Fixed Price	Contracts where firm fixed price can be established for work to be performed. Requires statement of work with clear and accurate specifications. Example: Goods & services like furniture, office supplies, etc.	Firm fixed price at time of contract award. Contractor carries all risk as payment does not change, regardless of how much it costs contractor to provide goods or services.
Firm Fixed Price with Escalator	Same as above for longer term contracts and/or contracts with materials cost and labor subject to market fluctuations. Contract allows for market adjustments, contractors are less likely to inflate prices to protect themselves against possible increased operating costs. Example: Lumber, steel, paper, etc.	Same as above except includes a provision for price escalation. Escalators are typically based on Consumer Price Index.
Progress (not allowed in client services contracts)	Construction contracts or contracts that are completed in phases or stages. Example: Building, Construction, Consulting Services.	Payment is based on pre-established deliverables. Deliverables must be measurable. See Note2

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

Solicitation Document Considerations

1. **Define TWC’s Agency Role** - Clearly define role TWC will play in work to be performed and any specific contributions, resources or tasks TWC will provide. Detail any background data or work already accomplished that anticipated contract will build on and make it available during procurement solicitation phase. Specify whether contractor should rely on accuracy of any such background data or work or whether data or work is provided for information purposes only. If provided for informational purposes only, then advise that contractor is responsible for verifying accuracy of information to extent necessary to perform contract. Define TWC staff members’ roles to administer contract and monitor contractor’s progress.
 - a. **Quantity** - Quantify amount, frequency and/or location required to meet performance.
 - b. **Quality** - Identify level of quality required for acceptable performance. For example: All dusting must be done to ensure cleanliness of surfaces, as determined by inspection of contract administrator.
 - c. **Contractor Qualifications** - Statement of work should specify minimum qualifications required of contractor. Typically in RFP, contractor qualifications are less stringent than in IFB because contractor qualifications are part of evaluation criteria. At a minimum, TWC needs to require contractor have specified level of experience in type of work to be performed.
2. **Established Standards** - If established standards (international, national, state, local) are available, they can be used to assist in defining contract performance requirements. Examples of national and international standards include American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM) and International Organization for Standardization (ISO). Using established standards provides consistency in measuring acceptability, quality, or accuracy of performance of one or more parties to a contract. Contracts often incorporate by reference “standards” maintained by entities representing particular industries such as Generally Accepted Accounting Principles (GAAP), Institute of Electrical and

Electronic Engineers (IEEE) or ISO. If a standard is incorporated by reference, identify any industry, state or TWC standards of performance relating to each activity, task, work product, or deliverable (mere reference to “industry standards” is usually inadequate). If an industry standard is used, specifically identify standard by number.

- 3. Warranty** - Warranty language should be included as contract standard of performance. An express warranty and an implied warranty are technically different. However, each standard describes a type of contract-based performance.

Unless excluded or modified by contract language, warranties or standards may be implied or imposed on contract by statute or case law. For example, sale or lease of some types of personal property or goods may have statutory contract warranties implied, such as: warranty of title, warranty that goods are marketable, or warranty that goods are fit for particular purpose. It is TWC best practice to include clear standards for contractual performance or express warranty describing objective performance expectation rather than rely on implied warranty. Generally, it is not necessary in express warranty to use formal words such as “warrant” or “guarantee” or have specific intention to make a warranty. However, mere affirmation of goods value or statement praising goods does not create a warranty.

- 4. Bonding Requirements** - Three most common forms of bonding are bid bonds (deposits), performance bonds, and payment bonds. TWC must advise respondents in solicitation if bond is required and what form(s) are acceptable (e.g., irrevocable letter of credit or cashier’s check). When considering whether or not to use a bond, remember cost of bond is typically passed on to TWC by contractor. Some bonds are required by statute for specific procurement types. Contact TWC Procurement & HUB Services Director, who consults with TWC OGC, if any questions about bonding requirements.

- 5. Evaluation Criteria** - TWC must advise respondents of proposal evaluation criteria. Evaluation criteria should be measurable allowing evaluation team to fairly evaluate proposals and reflecting essential qualities or performance requirements necessary to achieve contract objectives. These criteria may use a variety of information sources; such as, written response, oral presentation, documented past performance of respondents, and references relevant to contract. Specific portions of required response should directly relate to evaluation criteria.

For competitive fairness, evaluation criteria must be only requirements specified in solicitation document. Language in solicitation will determine scope of evaluation criteria and flexibility evaluation team has when evaluating proposals, so evaluation criteria should not be unduly restrictive. Respondents must receive all requirements in solicitation which clearly states consequence of failing to meet requirements such as reduction in evaluation score or disqualification. Carefully consider any requirements that may disqualify a proposal. For example, HSP (HUB Subcontracting Plan) is required by State statute; so TWC has no choice but to disqualify respondents, if they do not submit HSP. However, if respondent fails to submit copy of a license; is it valid reason for disqualification?

Criteria omitted from solicitation must not be used in proposal ranking or selection. For example, if respondents receive additional points for possessing national accreditation or meeting unique customer needs; criteria must be included in solicitation so respondents know about opportunity to

score higher by providing these options. Likewise, if information is not requested in solicitation; respondents who fail to offer these options must not be penalized. At minimum, criteria must include assigned weight for each criterion. Consider proposal submission requirements to determine evaluation criteria. What information to include in response to fairly evaluate respondent’s methodology – did they copy a project management technique straight from a training manual, or tailor technique specifically to meet solicitation needs? Another example is experience, company and staff skills and qualifications. What information does evaluation team need to score criteria – years in business, years of staff experience, certified or licensed employees, performing similar size projects, etc? In following table sample criteria, methodology is a criterion to evaluate respondents.

SAMPLE EVALUATION CRITERIA	SAMPLE WEIGHT
<i>Cost</i>	<i>60%</i>
<i>Proposed services, including work plan and methodology.</i>	<i>20%</i>
<i>Experience, skills and company & staff qualifications.</i>	<i>20%</i>

Most significant evaluation factor is typically cost. However, in some procurement skills and experience of contractor or other factors may be more important than cost. For example, if a trainer needs specific set of skills, TWC may wish to pay more for these skills. When establishing criteria weight, consider importance of criteria to overall project. Criteria deemed most important by TWC should be weighted higher than other criteria.

- 6. Best Value Considerations** - Be sure to include best value considerations in statement of work as lowest cost is not necessarily best value for all procurements. For example, a commodity or service of higher quality, such as longer life span, may be a better value and investment for TWC, even if initial cost is more. TWC needs to think strategically when considering procurement needs instead of making mistake of obtaining only what is necessary to meet TWC immediate needs. Ask “What is desired outcome of procurement” and “What is best way to achieve this outcome?”

For example, consider purchase of HVAC (heating and air conditioning) unit. TWC needs to consider total cost of ownership when purchasing these units. Average life span of unit, electricity consumption, maintenance record of unit and parts availability are just a few considerations when looking at total cost of ownership. In addition, TWC must consider qualifications and availability of service technicians and vendor’s performance history. CPA administers vendor performance program for TWC use per TGC, Title 10, Subtitle D, Section 2155.077.

Several statutes refer to best value use in procurements. Refer to these statutes before including best value considerations in TWC solicitations. Some items which may typically be considered under best value include:

- Installation costs;
- Life cycle cost;

- Quality and reliability of goods and service;
- Delivery terms; indicators of probable vendor performance under contract such as past performance (see above), contractor’s financial resources and ability to perform, contractor’s experience or demonstrated capability and responsibility, and contractor’s ability to provide reliable maintenance agreements and support;
- Employee training costs associated with a purchase;
- Effect of purchase on TWC productivity;
- Contractor’s anticipated economic impact to State or any subdivision, including potential tax revenue and employment; and
- Other factors relevant to determining best value for State in context of a particular purchase.

7. Proposal Submission Requirements - Solicitation document must include one section listing all required information respondents must submit with response. This assists respondents to ensure required documentation is submitted with proposal. Additionally, recommended or required proposal formats must be specified in this section, such as page number limitations, size of paper, number of copies, etc. As stated previously, ensure solicitation document requests information on all items to be evaluated. For example as follows:

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

8. Monitoring - Methods used to monitor contractor performance must be clearly stated in solicitation. Forcing a contractor, without prior knowledge, to produce time-consuming reports or maintain stringent testing requirements outside normal industry parameters is grounds for legal challenge. It is important that TWC develop and include a monitoring strategy in solicitation. Monitoring amount must be balanced and adequate to meet TWC needs, but limited in type,

scope, and frequency sufficient to achieve desired result without unnecessarily increasing costs. Overly restrictive oversight can interfere with contractor's ability to accomplish work and may inadvertently increase cost of work.

Statement of work must set specific deadlines for completion of tasks and schedule for submittal of deliverables, required meetings, presentations, or other activities. Contract manager must consider monitoring methods to ensure contractor performs as specified in statement of work. Additionally, different funding sources like federal grants may have specific requirements for contract monitoring. Contract manager must be familiar with these requirements and include them in statement of work.

- 9. Reporting** - Status reporting, performance, and activity reporting are terms used to describe information a contractor must provide to show contract status. These term(s) must be defined in statement of work and definition of each should include content, frequency, and audience for each report. A status report describes level of work completion (percent complete is often used) and/or contract cost. For useful report, a baseline must be established for timelines and budgeting. If deliverables are specified, include deliverable format and number of required copies. For example, if deliverable is final project report, state how many report copies report are needed and specify electronic copy format. State all required items to include in report that must be listed in statement of work on solicitation document with desired format or a sample of any required reports. If vendor-provided information is anticipated to be reported as part of TWC's performance measures, ensure requirements allow for data verification and data corresponds with data required for performance measures.
- 10. Inspection and Testing** - TWC statement of work must include inspection and testing of goods and services purchased under contract to ensure compliance with contract and solicitation specifications. Test(s) need to be performed on samples submitted with proposal and samples taken from regular shipments. All costs of inspection and testing should be borne by contractor. If items tested fail to meet or exceed all conditions and requirements of solicitation and contract, items must be rejected in whole or in part at contractor's expense. Latent defects can result in cancellation of contract at no expense to State. TWC program staff must contact TWC Procurement & HUB Services Director, who consults with TWC-OGC regarding latent defects.
- 11. Final Acceptance** - Statement of work must clearly define how TWC will determine contract has been satisfactorily completed. Statement of work sets standard for acceptance of deliverable and establishes a procedure to receive or reject deliverable based on specific factors. Tracking the status of several phases, segments, and deliverables; where each deliverable may have multiple tasks, activities, and products; can be challenging. Formal acceptance process for each step in contract allows contract manager and contractor to know conditions of contract performances.
- 12. Additional Issues to Consider** - Listed below are additional issues TWC end users must consider when writing statement of work. Items may affect pricing, so it is important respondents are aware of these requirements. Statement of work answers – who, what, when, where, why and how. If all of these questions are addressed for following, it is reasonable to assume statement of work is complete.

 - Licenses or permits required;

- Use of TWC equipment;
- Storage space for contractor materials/supplies;
- Intellectual property/copyright issues;
- Subcontractor requirements;
- Insurance requirements; and
- Conflict of interests/organizational restrictions.

Prepare Grant Announcement

This section has precedence over some considerations in other procurement sections of TWC Contract Management Handbook. In addition to UGMS (Uniform Grant Management Standards) published by Texas Governor's Office, TWC must follow any applicable federal or state grant funding source laws or regulations. With regard to grant announcement, UGMS requires grantor be responsible for "efficient and effective administration of federal and state awards through application of sound management practices" and is "responsible for assuming responsibility for administering federal and state funds in a manner consistent with underlying agreements, program objectives, and terms and conditions of federal and state award." Therefore, a grant announcement must refer to underlying federal or state program funding requirements that are being incorporated into grant award. In addition, TWC grant announcement must refer to "State Assurances" required by UGMS to be included in any grant award. TWC grant announcement must be developed to include any additional requirements.

Chapter 4

Advertise Solicitation

When posting solicitation online, TWC must consider type of procurement method used. For example, advertising requirements of goods and services are different from those of building construction or client service contracts. TWC must refer to appropriate statute to ensure proper advertising procedures are followed. Below is table to assist in determining appropriate advertising procedure.

ADVERTISING METHODS

Type of Procurement	Applicable Statute*	Advertising Method(s)
Common Goods and Services, including AIS (Automated Information Systems)	TGC, Sections 2155 & 2166	ESBD (Electronic State Business Daily)
Professional and Consulting Services	TGC, Section 2254	ESBD
Building Construction.	TGC, Section 2166.	ESBD Newspaper

*If not covered by one of these statutes, TWC must review agency-specific enabling legislation regarding procurement authority; in addition to, statutes referenced above.

Solicitation Announcements / Develop Bid List

Announcements reduce mailing costs when advertising large solicitations. If required to use CMBL, TWC must send a solicitation copy to all vendors on CMBL bid list for advertised commodity code which may include several hundred vendors. TWC announcement is one-page document sent to all vendors on CMBL advising them of bid opportunity and location to find complete solicitation document.

Pre-Bid Conference

TWC may conduct mandatory or non-mandatory pre-bid conferences. TWC staff must carefully consider use of mandatory conference and contact TWC Procurement & HUB Services Director, who consults with TWC-OGC as this may limit competition. Conferences should be mandatory only if on-site visit is required to have full understanding of procurement or if solicitation is so complex TWC staff believes attendance is critical for potential respondents to fully understand procurement. Pre-bid conferences provide forum for TWC staff to respond to questions regarding solicitation. Benefits from pre-bid conferences include:

- Allow potential respondents to address specific questions or concerns with solicitation. If any

issues are identified at conference, TWC will publish an addendum to solicitation.

- Importance when needed for on-site visits by contractors prior to submitting response. In some cases, it may be sufficient to take digital pictures of sites and provide slide presentation at conference in lieu of conference attendees traveling to various sites. A copy of slide presentation can be provided to conference attendees and is posted on ESBD, if needed.
- Forum for TWC to provide additional information, schematics, plans, reports, or other data not easily transferable or distributed by hard copy.
- All potential respondents receive same information.
- Subcontracting relationships may develop by networking at conferences.

Solicitation document must indicate pre-bid conference date, time and location. Conference is usually held approximately ten days after publication of solicitation. All conference attendees must be documented with sign-in sheet which is especially important if conference is mandatory as sign-in sheet is used to verify respondent attendance at conference.

TWC program staff facilitates pre-bid conference(s) and TWC Procurement & HUB Services must answer procurement-related questions, while TWC program staff responds to technical questions. Answers to all questions at pre-bid conference are posted on ESBD. TWC program staff must record minutes of pre-bid conference.

All TWC changes to solicitations must be posted addendum on ESBD for all potential respondents. When issuing an addendum, consider amount of time remaining until solicitation opening date as it may be necessary to extend bid opening or proposal deadline which must be part of addendum process.

Audio record TWC pre-bid conferences for future reference. Below is typical agenda for pre-bid conference:

- Opening – Facilitator introduces TWC representatives and explains their procurement roles.
- Introduction – Attendees introduce themselves and identifies company they represent.
- Solicitation Overview/Review – Main focus is solicitation document review page-by-page or section-by-section. It is not necessary or recommended to read entire document, but entire document should be addressed. Answer questions as pages or sections are discussed unless research is required.
- Closing Summary – Summarize agreed changes to be made by addendum. Review any unanswered questions to be addressed at later date. Remind attendees that no oral changes are binding and official changes are by written addendum.

Communication with Respondents

All communication with potential respondents must be made ONLY with TWC Procurement & HUB Services or other designated TWC program staff. It is not recommended for TWC program staff to have contact with potential respondents outside of pre-bid conferences. Likewise, respondent(s) contacting TWC staff other than authorized staff about solicitation may be disqualified. While TWC designated staff may not be able to answer all of technical questions asked by potential respondents, they will ensure answers are provided to all potential respondents. Solicitation document must ONLY provide designated TWC point of contact with all applicable forms of communication such as telephone, email, etc. Should a potential respondent contact non-authorized TWC staff, these TWC

staffers must politely decline to discuss procurement and forward inquiry to authorized TWC staff.

Written Questions

Solicitation document may invite respondents to submit written questions concerning solicitation which may be; in addition to, or in lieu of pre-bid conference. If applicable, deadline date and time for submission of written questions must be specified in solicitation document. Written questions may be submitted by mail, facsimile, email or hand delivery. If solicitation is posted on ESBD, questions and answers should be posted with solicitation document as they become available.

Proposal Submission and Opening

Solicitation documents must indicate deadline date, time, and location when TWC holds public opening. Respondents' proposals may be evaluated on variety of factors; in addition to, price. For negotiable proposals respondent(s) must be informed that respondents names are public information before award, but pricing tabulations are private information until award and will not be provided before Contract(s) award.

Consulting Services

Notice of Intent: Major Consulting Services "Consulting service" means service of studying or advising state agency under a contract that does not involve traditional relationship of employer and employee. "Major consulting services contract" means consulting services for which it is reasonably foreseeable that value of contract will exceed \$15,000 or \$25,000 for an institution of higher education other than public junior college. Before award of major consulting services contract, TWC is required to notify and give information to Legislative Budget Board and Texas Governor's Budget and Planning Office demonstrating TWC has complied or will comply with TGC, Sections 2254.027 and obtain "finding of fact" from Governor's Budget and Planning Office that consulting services are necessary. Solicitations for consulting services contracts of \$10 million or more must be submitted to Contract Advisory Team (CAT) for review per TGC, Section 2254, Subchapter B, which establishes six oversight requirements for State agencies using private consultants. Because different state entities oversee these requirements, distinctions between them may not be obvious. Statutory guideline for each requirement is:

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

Archives	Section 2254.036	Texas State Library and Archives Commission
Payment	Sections 2254.034 and 2254.039	Texas Comptroller of Public Accounts

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

Consulting Services involve studying or advising TWC under contract that does not involve traditional employer and employee relationship. Major Consulting Services Contracts (\$15,000 or greater) require “finding of fact” from the Governor’s Office of Budget, Planning and Policy and publication in **Texas Register** before contract execution. Consulting services have defined procedures for advertisement and award established by Texas Governor’s Office and located online at <http://www.governor.state.tx.us/divisions/bpp/guidelines>. TWC staffers must be familiar with these rules when considering use of consulting services. Any contract entered into in violation of Sections 2254.029 through 2254.031 and Section 2254.033 (non-compliant private consultant) is void. Per TGC, Section 2254.026, TWC may contract with consultant only if: (1) substantial need for consulting service and (2) cannot adequately perform services with its own personnel or obtain consulting services by contract with another state government entity. Texas Governor may grant TWC limited waiver from requirements of consulting statute because of unforeseen emergency (See TGC, Section 2254.026). “Unforeseen emergency” means situation that suddenly and unexpectedly causes TWC to need consultant services and there is insufficient time to comply with statute’s requirements; e.g., court order issuance, new legislation, or natural disaster. TWC must comply with Texas Comptroller of Public Accounts adopted rules that impact contracting for consulting services (see 34 TAC Part 1, Chapter 5, Subchapter E).

Professional Services

Contracts for professional services are exempt from compliance with TGC, Chapter 2254, Subchapter B provisions. “Professional services” means services, within scope of practice, as defined by State law, for:

- accounting ;
- architecture;
- landscape architecture;
- land surveying;
- medicine;
- optometry;
- professional engineering;
- real estate appraising;
- professional nursing; or
- provided in connection with professional employment or practice of a person who is licensed or registered as:
 - certified public accountant;
 - architect;

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

Contracted services provided by above-listed professionals falling outside their scope of practice may be governed by other procurement requirements. For instance, management consulting services provided by certified public accountant are not exempt as professional service. In order to contract for such services, TWC needs to follow consulting services contract requirements. TWC may have statutory authority to acquire professional services not listed above. An example is Texas Department of State Health Services authorized by Section 12.0121, Health and Safety Code to adopt a rule expanding scope of professional services.

Mixed Services

When contract involves both consulting services and one or more other services, TWC must comply with consulting services requirements when primary objective of contract is purchase of consulting services. For instance, if contractor proposes to analyze TWC's information systems needs to develop and implement an automated information system, primary objective of contract is not analysis provided. Primary objective is delivery of data information system and contract is not consulting contract. Therefore, consulting contracts requirements do not apply. However, TWC must comply with purchasing procedures under TGC Chapters 2151-2158 administered by CPA. TWC is prohibited from using competitive bidding to purchase or award a contract for "professional services". Vendor selection or contract award for "professional services" must be based on two criteria:

1. Demonstrated competence and qualifications to perform services; and
2. Fair and reasonable price for professional fees under contract:
 - a. Must be consistent with and not higher than recommended practices and fees published by applicable professional associations; and
 - b. May not exceed any maximum provided by law.

Architectural, Engineering, or Land Surveying Services

When procuring professional architectural, engineering or land surveying services, TWC must follow special procedures as follows:

1. Select most highly qualified provider of those services on sole basis of demonstrated competence and qualifications – no consideration of price at this point; and
2. Then attempt to negotiate contract with chosen provider at fair and reasonable price.

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

- Formally end negotiations with 1st provider;
- Select next most highly qualified provider; and
- Attempt to negotiate contract with 2nd provider at fair and reasonable price.

Advertise Grant Announcement

This section has precedence over some considerations in other procurement sections of TWC Contract Management Handbook. In addition to UGMS published by Texas Governor's Office, TWC must follow any applicable federal or state grant funding source laws or regulations. Grant opportunities should be open and accessible to public. Competitive grants opportunities must be posted on **TexasOnline** and **eGrants system** established under TGC, Chapter 2055, if required. In addition to eGrants, TWC may also announce grant opportunities in **Texas Register** or use TWC's own distribution list of interested parties, such as existing or previous grantees; in addition to, more global announcements.

TWC may schedule conferences for potential grant applicants to provide basic information regarding eligibility, scope of grant award, and general grant requirements. Likewise, TWC may provide "Grant Toolkit" or similar written materials to provide information to potential grant applicants. Webinars and web-based resources; such as, explanatory brochures or videos; can be very helpful.

All communications with potential grant applicants must be channeled to designated TWC staff. While an existing grantee may wish to discuss an upcoming grant opportunity with other TWC staff member assigned as "grant program staff", this contact must be discouraged and direct question(s) related to upcoming grant opportunity to designated TWC staff. Guide potential applicants to designated TWC staff to submit written question(s) regarding grant opportunity. Written question(s) and answer(s) provided by TWC staff must be posted on TWC's website, as developed or on e-grants, if appropriate.

Grant requests must state deadline date, time, place, and method of submission for grant applications. TWC generally uses "Application Kit" which includes request for grant application, instructions document, and other documents; such as, certifications or assurances that need to be completed and returned with grant application. Care should be taken to document receipt of grant application.

Chapter 5

Evaluation and Award

TWC must conduct evaluations in fair and impartial manner consistent with Texas statutory limits and legal principles. Following topics are generally accepted tools employed to conduct fair and impartial evaluations. Each procurement TWC staff must contact TWC Procurement & HUB Services Director, who consults with TWC-OGC to ensure use of proper tools. Solicitation document must include general description of evaluation process, evaluation criteria or categories, and relative weights assigned to each evaluation criterion or category.

Before solicitation responses are received, TWC must develop, approve, and follow procurement-specific evaluation plan listing number of evaluation team members, detailed scoring matrix with decision-making apparatus for response evaluation, and resulting contract awards. Complex solicitations like RFO (Request for Offer) or RFP (Request for Proposal) process, TWC uses following tools beneficial for fair and impartial evaluation process.

Scoring Matrix - Scoring matrix is part of well-developed evaluation plan used by TWC evaluation team members to score individual responses based on evaluation criteria defined in solicitation document. TWC evaluation team scoring matrix must be developed before posting solicitation document as developing scoring matrix may reveal additions or revisions needed on solicitation document. If time does not permit scoring matrix completion before posting solicitation document, scoring matrix must be completed before opening and review of solicitation responses.

Evaluation Team

Evaluation team leader is usually from TWC program staff and TWC Procurement & HUB Services staffer serves as non-voting member. Other TWC evaluation team consists of stakeholders in final product or service and/or individuals with necessary technical or program expertise and members are selected by TWC program staff. Be sure to select team members who understand organization needs, desired procurement outcome, and bring together as much knowledge as possible to ensure best qualified vendor is selected. TWC evaluation team members must fully understand solicitation requirements, be able to critically read and evaluate responses, and document judgments clearly and concisely in accordance with evaluation plan. TWC evaluation team members may have input into developing solicitation document, especially evaluation criteria and assigned weights, if evaluation team leader so chooses. TWC evaluation team members have appropriate review and approval by TWC executive management.

TWC evaluation teams have three to five members recommended size. TWC avoids potential individual bias by teams with not less than three members. However, some projects may require additional members or additional teams due to procurement nature. Coordination and management of evaluation process becomes more difficult as size and number of teams increase.

Evaluation Team Training - TWC evaluation team leader provides team training to outline evaluation

team's duties and responsibilities in accordance with well-developed evaluation plan. Training may be separate meeting in advance of solicitation responses receipt for evaluation, but often times is held in conjunction with and just prior to evaluation. Team members are instructed on individual responsibilities including critical nature of confidentiality to evaluation process integrity. Each evaluation team member must submit a signed Non-Disclosure Statement to TWC Procurement & HUB Services before having access to solicitation response proposal documents.

TWC evaluation team leader reviews all evaluation criteria with team members and explains how evaluation process will be conducted. Communication between team members during evaluation must be limited to asking questions of team leader and; if allowed, obtaining clarification of technical information (team leader shares with entire evaluation team) from experts to understand proposal contents and requirements. Each proposal must be evaluated individually against solicitation document requirements. Each solicitation document response is considered independently, of all other solicitations.

Responsive Proposals

After all proposals are opened and recorded, TWC Procurement & HUB Services determines if proposals submitted are responsive meeting solicitation **Minimum Qualifications** checklist and is sometimes called an administrative review. At minimum, this includes timely submission, signed Execution of Offer, completed solicitation document, HUB Subcontracting Plan, and any other required documents like bonds. Sometimes TWC staff must contact TWC Procurement & HUB Services Director, who consults with TWC-OGC to determine proposer's responsiveness.

Single Response

TWC Procurement & HUB Services or TWC program staff member needs to determine why only one response was received for competitive solicitation by doing following:

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

If unduly restrictive requirements are present in solicitation document, TWC must consider reasons other responses were not received and determine if it is in best interest of State to make award, re-advertise with revised solicitation, or determine if proprietary or single source purchasing justification is required.

Proposal Evaluation

After proposals have been reviewed and deemed responsive by TWC Procurement & HUB Services, TWC evaluation team must be provided with qualified responses. Most evaluations are conducted with team members in same room evaluating proposals at same time to facilitate team member technical questions of TWC Procurement & HUB Services or technical experts. However, it is possible to have evaluation team member reviews from respective workspaces. For example, if proposal recommends use of software product that team members are not familiar with, then discuss pros/cons of software with technical expert if evaluation team is allowed to do so by evaluation plan. Otherwise; if not allowed, all questions must be presented to evaluation team leader, who may seek answers to such

questions. Evaluation team members must only ask questions in areas related to evaluation criteria presented in solicitation document per evaluation plan.

Once evaluations are complete, TWC evaluation team leader must collect all evaluation score sheets and solicitation response documents. TWC evaluation team leader totals evaluation score sheets and verifies accuracy of calculations for input into final evaluation formula. If it is apparent one or more team members’ evaluations differ significantly from majority, TWC team leader must facilitate meeting with all TWC evaluation team members to discuss situation to ensure criteria was clear to all team members and information was not overlooked or misunderstood. If after discussion, team member(s) feel they did not understand criteria, requirement, or missed information included in response, evaluator(s) may use their own discretion to revise evaluation score(s). Under no circumstances must any TWC evaluation team member attempt to pressure other members to change evaluation scores. TWC Procurement & HUB Services must score cost or price information as cost/price is objective criteria to calculate using pre-determined spreadsheet formulas.

References

TWC evaluation team designee may verify any references included in proposal and conduct any other reference or credit check deemed appropriate to answer questions evaluation team developed. TWC evaluation team must use CPA/TPASS Vendor Performance System in evaluating past vendor performance. All reference checks must be documented in writing and same script or questions format used when conducting reference checks so results are consistent and fair to all respondents.

Sometimes it is difficult to obtain information from references provided, either because references have policy of not providing reference information or because they cannot be reached in timely manner. Depending on procurement importance, TWC may use statement in solicitation document in lieu of checking references for all respondents as follows:

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

TWC is not required to check references, but may choose to do so by using this clause. Based on individual procurement TWC has discretion to do reference checks as part of evaluation criteria.

Determine Competitive Range

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

In 1st scenario, top five respondents are in competitive range. In 2nd scenario, competitive range could include top two respondents or top five respondents. In 3rd scenario, there is a six-point difference between 2nd and 3rd score, with remaining scores close behind. Therefore, best option is include all six respondents. TWC should look for “natural break” in scores to determine competitive range. Competitive range must consist of responses being reasonably considered for award selection.

Oral Presentations/ Demonstrations/ Discussions

Oral presentations, demonstrations, or discussions are conducted at TWC’s option. If conducted, solicitation document must state when oral presentations, demonstrations, or discussions will occur. These presentations provide opportunity for respondents to highlight strengths or unique aspects of their response and provide answers to questions TWC has regarding proposal. Demonstrations of product functionality are recommended when appropriate, such as information technology procurements or solution-based procurements. Presentations may be scheduled for all respondents or limited to top-ranked vendors in competitive range.

At TWC oral presentations, demonstrations, or discussions must be fair to all parties, so time allowed and format are same for all presenters. A prepared script ensures consistency. Since some presenters believe in advantage to presentation order, it is best to draw names for presentation order to ensure process impartiality.

Best and Final Offers

After any oral presentations or demonstrations are completed, discussions may be held. If discussions are held, respondents must be given equal opportunity to discuss and submit proposal revisions. Proposal revisions are normally done by formal request for BAFOs (Best and Final Offers) at conclusion of respondent discussions including deadline set for receipt of BAFO responses and instructions on exactly what to submit in BAFO response. After all BAFO responses are considered, TWC may decrease number of respondents included for negotiations

Negotiations

TWC may negotiate terms and conditions in some solicitations, but not in others. For example, competitive-sealed bid method does not allow negotiations, while competitive-sealed Request for Proposal and Request for Offer methods allow negotiations. Unless specifically authorized by statute, TWC may not negotiate price, specifications, terms or conditions when using competitive bid process unless single offer is received. Competitive proposal and qualification processes generally contemplate and allow certain amount of negotiation. Best practice is read requirements of applicable procurement procedure to verify negotiation is permissible.

Note: Request for respondent to clarify offer is not same as negotiation of specifications or terms and conditions so long as clarification request does not give one respondent advantage over another.

At TWC negotiations are not authorized for technical leveling and/or technical transfusion techniques which are prohibited by statute. Technical leveling helps respondent bring their proposal up to level of other proposals through successive rounds of discussion, usually by pointing out proposal weaknesses. Technical transfusion discloses technical information or approaches from one response to other competitors during discussions. Prohibited disclosures include:

- 1) Competing respondents’ cost/prices (even if disclosure is made without identifying respondent by name); and

2) Advising respondent of their price standing relative to other respondents.

Even in competitive proposal or qualification processes, TWC must take care to avoid inadvertently changing stated contract objectives. If contract objectives are changed during negotiation process, members of respondent pool who may have been interested in submitting proposal will no longer be on equal level. Additional pool members may have competed, had changed objectives been in original solicitation. Whenever it appears contract objectives may have been changed, TWC staff must contact TWC Procurement & HUB Services Director, who consults with TWC-OGC before proceeding further.

Similarly, TWC must take care in determining negotiation strategy whether to include, as part of strategy, giving respondents cost or price to meet before further consideration. However, suggesting cost or price could deprive competitive process from generating cost or price that is best value to State. Also, be mindful technical leveling and/or technical transfusion techniques prohibitions still apply, i.e., disclosing competing respondents' costs or prices is not allowed. Negotiation strategy must be tailored to particular facts and circumstances of specific competition. In all events, TWC may continue negotiations until best interest of State is achieved and award to one or more respondents is made.

Negotiation Strategies - Negotiation is based on each party's willingness to compromise. In any agreement, usually each party may be willing to relinquish some terms or conditions. TWC must identify essential or desirable terms or conditions subject to negotiation or relinquishment. Like other parts of contract management process, planning is essential to conducting successful negotiations. Planning allows TWC to differentiate essential from negotiable terms and conditions. TWC best practice is meeting with contracting team members and divide terms and conditions into groups. Identify terms and conditions essential to agreement on which TWC is either unable or unwilling to compromise. Then identify and prioritize desirable terms and conditions not essential to agreement and which TWC is willing to compromise or relinquish.

Negotiation Techniques - Each TWC negotiation has multiple approaches to facilitate successful negotiation efforts. Best practice is designate lead negotiator for organized and controlled negotiating ensuring contract management team's effort is efficient, coordinated, and unified. TWC lead negotiator controls meeting(s) and ensures everyone is hearing and discussing same issue. Side discussions are distracting and may inadvertently provide information to respondent to disadvantage of entire contract management team. If available, negotiation team needs private side room to use for private conversations or to "caucus" during negotiations. TWC must not provide list of essential or other prioritized issues to respondent as list may offer negotiation advantage. However, before negotiations with respondent, if objections to terms and conditions were not part of complete response, TWC requests list of respondent's objections to any contract terms or conditions with reasons that explain why respondent objects to each term or condition.

TWC must prepare to explain reason particular term or condition is essential or objectionable and place burden on respondent to identify an alternative solution meeting TWC needs. TWC should not feel pressured to agree or disagree with single term or condition without considering impact of entire group of negotiated terms and conditions within context of final agreement. Away from respondent's presence entire contract management negotiation team must:

- Take frequent breaks to discuss suggestions, options, or alternatives;
- Consider any new risks, costs, or benefits when all proposed terms or conditions are complete; and
- Record exact language (may be handwritten or laptop) of any proposed or alternative terms and conditions, so team evaluates exact proposed contract language.

Negotiations may reach impasse over conflicting terms each party considers essential. TWC must use three-question approach to assist parties in clarifying and harmonizing potentially divergent objectives and interests in contract objectives as follows:

1. What does TWC want, *specifically*?
2. What will having what TWC wants, *specifically*, do for TWC?
3. How will TWC know, *specifically*, when TWC received what it wants?

2nd question above may provide common ground for exploring options to meet needs of both parties. If an agreement is not reached consider beginning negotiations with next respondent or re-soliciting opportunity.

Award

TWC must award contract for goods and services purchase that provides best value for State. Upon contract award TWC must make any legally required notifications; as well as, any required notice to ESBD (Electronic State Business Daily) to announce award.

In electronic format CPA/TPASS produces and daily posts information about each state agency procurement exceeding \$25,000 in value as required under TGC, Section 2155.083. If or when TWC procurement awards are estimated to exceed \$25,000 TWC must provide CPA/TPASS required information for posting to ESBD and notice when procurement contract is awarded.

Grants Evaluation and Award

This section has precedence over same considerations in other procurement sections of TWC Contract Management Handbook. In addition to UGMS (Uniform Grant Management Standards) published by Texas Governor's Office, TWC must follow any applicable federal or state grant funding source laws or regulations. TWC must impose strict requirements to be followed regarding time, place, and manner of filing grant application on grant awards.

TWC initial review must occur to ensure timely filed grant application(s). TWC pre-screening must review and ensure any eligibility requirements for specific grantees or project types and filed application contains all required documents or attachments.

TWC grant applications must be scored using scoring matrix to evaluate grant applications. TWC scoring criteria may look to grantee's ability and capacity to accomplish grant purpose, meet requested targets, outputs and outcomes, and other performance measures. Other TWC scoring criteria may be initially scored on pass/fail basis including past performance, financial stability, or other items. Any TWC formula grants may also be scored; if desired, on criteria such as population, reported statistics, or other relevant criteria.

TWC scoring matrix must be developed at same time grant announcement and application are developed to ensure consistency. When scoring process starts, TWC team leader reviews scoring matrix with team and to ensure consistent review provides training to scorers. Scorers must consult TWC team

leader, if questions arise during scoring process.

Each grant application must be evaluated individually. However, TWC prefers more than one scorer rate each application. TWC recommendations for grant funding must be documented and based on scoring results. Any deviation from established TWC processes must be documented.

Chapter 6

Contract Formation

Information in this chapter is not intended as legal advice, but as general rules regarding contract formation. However, many variations and exceptions exist to these general rules, so on each procurement TWC Procurement & HUB Services Director consults TWC-OGC for applicable rules of law as needed. Texas courts define a contract as a promise or set of promises to which law attaches legal obligation(s). The law regards performance of these promises as a duty and provides a remedy for breach of this duty. Contracts that deviate substantially from requirements defined in solicitation document are open to challenge from unsuccessful respondents.

Approach to Contract Formation

Fundamentally, any written contract's purpose is to serve as reference document that records terms of agreement to prevent misunderstanding and conflict about those terms at a later date, and creates a legal, binding, and enforceable obligation. Most often, contract conflicts arise well into contract period – when memories prove to be unreliable. With this in mind, clarity of terms and completeness of issues addressed are of primary importance. Person drafting contract must know subject matter and concerns of parties thoroughly enough to anticipate potential areas of disagreement and specifically address them in the contract. Thoroughness and precision are necessary in determining contract scope because contract law does not allow parties to add terms not part of original contract without consent of both parties. Contract law rigidity is mostly seen as an advantage to both parties; but this advantage may become liability, if TWC does not include all necessary language.

Creating contracts for TWC is an exercise in balancing potential conflicting interests including State requirements, fiscal constraints, statutory requirements, and contractor's requirements. TWC primary concern should always be contract benefit to State as a whole; or more specifically, State taxpayers. Best contract for State does not necessarily mean taking excessive advantage of contractor. While onerous and unnecessarily harsh provisions may be legal, they usually have negative future consequences that outweigh initial gains. Contractors who feel they have been aggrieved by State are less likely to provide good service and are more apt to engage in legal action. Or these contractors may decide to never contract with State again thus limiting future competition on State contracts. In addition, contractors who are informed by other contractors of bad experiences with State may demand more money on future contracts to do same work as offset of perceived risk.

Legal Elements of Contract

Essential elements necessary to form binding contract are usually described as:

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

Draft Contract

TWC contracts usually include variety of terms and conditions often referred to as ‘boilerplate’ or ‘standard’ terms and conditions. Unless otherwise specified by TWC-OGC, ‘boilerplate’ or ‘standard’ terms and conditions may be modified to meet TWC program staff needs. TWC’s particular contractor that repetitively contracts for same or similar goods or services may develop contract with standard terms for specific transaction. Standard terms usually result from years of experience and are typically designed to favor party drafting contract. Except for contract terms contrary to public policy that may be void, voidable, or severable from contract, contract terms types that may be included in contract are only limited by drafter’s creativity. Appropriate terms to include in contract are terms that fully describe actual agreement of parties.

Types of provisions typically included in contracts include, but not limited to:

1. Administrative provisions;
2. Financial provisions;
3. Risk allocation provisions ;
4. Statement of work;
5. Provisions relating to contract term, termination, and dispute resolution; and
6. Provisions that relate to rights and ownership of work product and intellectual property.

Plan for Contract - Just like other contract management processes, TWC plans contract drafting.

Common TWC practice is include standard TWC contract draft in solicitation document allowing potential contractor to make offer with knowledge of proposed contractual terms and conditions. As practical manner, during TWC RFP process, it may be difficult to prepare draft contract with detailed statement of work due to potential negotiation. Be sure to plan for adequate time to prepare final contract. May be helpful in planning effort to collect and review similar contracts used by other agencies as study of risks, contract objectives, assumptions, and constraints in other contracts.

Do not automatically adopt terms and conditions from another contract without thorough and independent review of how terms and conditions relate to current procurement. Another method of contract planning is preparing outline with headings for major terms, conditions, and provisions making it easier to group related terms or conditions and illustrate gaps in contract structure. Finally, allow adequate time for TWC General Council to address potential legal issues.

Form of Contract - Evidence of agreement or contract can be documented in different formats including; but not limited to, “four-corner contract”, purchase order, or exchange of correspondence. Term “four-corner” contract describes single document including all terms and conditions within four-corners of single document. Purchase orders can be considered contract when contractor delivers an offer, in format requested by TWC, and TWC issues purchase order as offer acceptance. Documents that comprise offer and acceptance are evidence of agreement. Each of contract forms described has advantages and disadvantages. TWC determination of appropriate format must be based on risk assessment involving contract formation or interpretation.

‘Four-corner’ contract offers greatest opportunity to avoid conflicting provisions as all provisions are in single document. Contract management is sometimes easier when all provisions regarding duties, obligations, and responsibilities of each party can be easily found and logically organized. While ‘four-corner’ contracts require more time to plan and prepare especially for major or complex transaction, ‘four-corner’ contract is best format to clearly document an agreement.

Purchase order uses layered approach; i.e., usually relies on multiple documents that in combination comprise contract. TWC may publish solicitation document including product specifications, contractor qualifications, and other terms or conditions. Contractor’s response may condition offer on terms and conditions different from or in conflict with solicitation document. When TWC uses purchase order, contractor’s terms and conditions must not be included in agreement. Despite potential for conflicting or additional terms; purchase order is quick, efficient, and rarely has problems when used properly. When using purchase order as evidence of contract, TWC must ensure inclusion of TWC terms rather than blindly accept contractor proposed terms. All final terms and conditions that vary from offer or acceptance must be contained in written document signed by both parties.

Contract Terms

During formal contract development, devote careful attention to details as certain clauses are essential and some must be included in all contracts. TWC staff must contact TWC Procurement & HUB Services Director, who consults with TWC-OGC regarding any questions related to applicability of contract terms as TWC may have additional statutory requirements regarding specific contract.

State Contracting Standards/ Oversight

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

Authority to Contract

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

In TGC legislature established a comprehensive regime for State purchasing, which requires TWC to make purchases through CPA/TPASS unless an exception applies. CPA/TPASS broad purchasing authority has limitations. For example, definition of ‘services’ applicable to CPA’s authority includes skilled or

unskilled labor or professional work, but does not include professional service subject to TGC, Subchapter A, Chapter 2254; services of State agency employee; consulting services or services of consultant as defined by TGC, Subchapter B, Chapter 2254; or public utility services.

Binding Signatures - Original signatures by those in TWC authority to contract are usually accepted norm through which a contract becomes binding. Time considerations may dictate need to accept a faxed signature as evidence respondent will accept contract terms. Additionally, an email or chain of emails may make it clear a party accepts contract terms and can be enforceable. TWC requires fax or email signatures followed by original signatures.

Federally-Funded Contracts

Federal grants have specific contract requirements as outlined in Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments (OMB Circular 102). TWC must ask federal agencies that administer particular grant programs to identify essential and mandatory clauses used in State's sub-recipient agreements (see UGMS published by Texas Governor's Office). OMB Circular establishes consistency and uniformity among Federal agencies in management of grants and cooperative agreements with State, local, and federally-recognized Indian tribal governments. Current revision supersedes Office of Management and Budget (OMB) Circular No. A-102, dated March 3, 1988. Grants management common rule was issued in response to March 12, 1987, US President directive for all affected agencies to issue common rule adopting government-wide terms and conditions for grants to State and local governments. In 1988, OMB revised Circular to provide guidance to Federal agencies on other matters not covered in common rule.

Contract Formation for Grants

This section has precedence over same considerations in other procurement sections of TWC Contract Management Handbook. In addition to UGMS published by Texas Governor's Office, TWC must follow any applicable federal or state grant funding source laws or regulations.

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

Chapter 7

Contract Administration

Contract administration and oversight includes seven general processes:

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

Communication is key factor in successful contract administration. It is essential for contract administrators to understand provisions of procurement document, have ability to communicate contract obligations to all parties involved, and maintain control over contract performance. A good contract manager ensures contract requirements are satisfied, goods and services are delivered in timely manner, and financial interests of TWC are protected.

Primary tasks of contract administration are:

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

Contract administration starts with developing clear, concise performance-based SOW (statement of work). TWC SOW must be roadmap for contract administration. Therefore, planning for contract administration occurs before solicitation issuance. Goal of contract administration is ensure contract is satisfactorily performed and responsibilities of both parties are properly discharged. Effective contract administration minimizes or eliminates problems and potential claims and disputes.

Contract managers must have sufficient knowledge of contracting principles relating to their responsibilities in contract administration. It is contractor's responsibility to perform and meet contract requirements. Sometimes contractors need technical direction and TWC personnel approval. TWC personnel must provide needed technical direction and approval in timely and effective manner. All guidance provided to contractor must be within contract scope.

TWC must be careful to not impose additional requirements upon contractor or manage contractor's operations to extent contractor is relieved of responsibility to perform. Extent of contract administration will not be same for all contracts. Level of contract administration necessary must be consistent with complexity and level of contract risk, its' term, and dollar value.

Contract Manager Responsibilities

TWC primary contract manager responsibilities are:

- Participate in developing solicitation and writing draft documents. Contract administration must be considered during this process;
- Contact TWC Procurement & HUB Services Director, who consults with TWC-OGC to address any legal concerns and/or issues;
- Determine during solicitation development, if contractor's compensation structure is appropriate for work to be performed;
- Serve as point-of-contact for disseminating instructions regarding contractor/vendor work;
- Receive and respond to communications between TWC and contractor;
- Manage, approve, and document any contract changes;
- Manage any state property used in contract performance; e.g., computers, telephones, ID badges, etc;
- Identify and resolve disputes with contractor in timely manner;
- Implement quality control/assurance process;
- Maintain appropriate records;
- Document significant events;
- Monitor contractor's progress and performance ensuring goods and services meet to contract requirements;
- Exercise state remedies; as appropriate, when contractor's performance is deficient;
- Inspect and approve final product/services by submitting written document accepting deliverables;
- Monitor budgeting/accounting process to ensure sufficient funds are available;
- Verify accuracy of invoices and authorize payments consistent with contract terms; and
- Perform contract closeout process ensuring contract file contains all necessary contract documentation, formal written acceptance document, and document lessons learned.

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

- Determine sequence of activities, dependencies, required or desired outcomes, and acceptable performance levels;
- Develop timetable and start/end date for each performance component including milestones with accompanying timeframes, monitoring, and reporting requirements;
- Monitor and document contractor activity on specified frequency to identify problem areas;
- Meet with contractor on regular basis to review progress, discuss problems, and consider

necessary changes;

- Provide access to state facilities, equipment, data, staff, materials, and information;
- Contact other staff; as necessary, to provide equipment and data;
- Establish scope of authority, clear lines of communication, and report and specify individuals who interact directly with contractor;
- Establish control of correspondence, data, and reports;
- Identify potential problems and solutions;
- Define default terms or conditions;
- Establish procedure, identify responsible person, and establish timeframe to handle noncompliance; and
- Establish procedure, identify responsible person, and establish timeline to make necessary contract decisions, modifications, and changes.

Contract Manager is NOT authorized to:

- Instruct contractor to start work before contract is fully executed;
- Change contract scope without using formal purchase document amendment process;
- Direct contractor to perform work not specifically described in and funded by contract;
- Extend contract time period without execution of approved purchase document amendment; and
- Allow contractor to incur any additional costs over set contract limit.

Planning

As stated earlier, planning for TWC contract administration begins with drafting statement of work. Procedures for contract administration must be described in TWC solicitation document. After TWC contract is executed, planning activities must focus on general administrative activities including; but not limited to, contract amendments management by documenting any contract scope, schedule, and/or payment changes. Another central activity is advance coordination and scheduling of resources to assist in performance of contract administration processes.

In order to properly plan for contract administration, TWC contract manager must ensure thorough understanding of all solicitation and contract components. Such contract components examples include:

- Expected outcome measures – Significant deliverables must be tied to progress payment schedule including deliverables staging, if applicable;
- Costs – Total cost, including any indirect goods and services cost allocation to be performed;
- Risk – Identify and manage potential risks;
- Contract Performance – How, when, and where goods and services are to be delivered.
- Acceptance/Rejection Terms – TWC’s right to inspect and accept or reject goods and services plus acceptance or rejection conditions;
- Contract Dates - Effective, completion, renewal terms, and any additional dates necessary to

monitor contract performance; and

- Complete addresses – Where is correspondence sent, payment(s) made, etc.

Post-Award Conference - TWC post-award conference meeting with contractor includes TWC staff responsible for administering contract and is held soon after contract award. This conference is contractor orientation to ensure clear and mutual understanding of all contract terms and conditions, respective responsibilities of all parties, and resolve any potential misunderstandings early on. Although both contractor and TWC staff should be fully aware of contract requirements, post-award conference ensures those directly involved in contract administration process understand all contract performance requirements.

TWC staff decides if post-award conference is necessary as not every contract requires formal post-award conference. Some discussion form between contracting parties after award is needed to ensure all parties agree on performance requirements and administrative procedures applicable under contract terms. TWC post-award conference must NOT be used to change contract terms. For less complex, low risk, low-dollar value contracts, telephone call to contractor may be sufficient where TWC program staff reviews major contract points with contractor (e.g.; contract amount, major performance milestones, deliverables, reports, meetings, etc.) and delivery time and location. Factors to determine need for post-award conference include:

- Contract type;
- Level of associated contract;
- Contract value and complexity;
- Contract timeframe, performance period, and/or delivery requirements;
- Supplies or services required procurement history and contractor expertise;
- Delivery schedule urgency;
- TWC's prior experience with contractor;
- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

Post-Award Conference Agenda - At start of conference clearly communicate meeting purpose is explain or clarify contract's requirements and not make contract changes or re-negotiate contract terms. TWC post-award conference agenda must cover following:

1. **Introduction** - Identify TWC and contractor key personnel and introduce all participants;
2. **Scope** - Discuss contract scope (i.e., what is TWC procuring which may seem overly simplified), but total and complete meeting of minds avoids problems during contract life cycle;
3. **Terms** - Summarize contract terms and conditions, particularly any special contract provisions, to avoid any misunderstandings later on and allow contractor to gain better understanding of terms before work begins;
4. **Requirements** - Discuss contract technical and reporting requirements. Regarding technical requirements it is vital contractor and TWC have meeting of minds and discuss as part of Scope. Contractor must understand importance of any reports required under contract and submitting them according to contract requirements.

5. **Administration** – Relate applicable contract administration procedures including monitoring and progress measurement.
6. **Rights** – Summarize rights and obligations of both parties and contractor performance evaluation procedures. TWC must explain to contractor that they will be evaluated on contract performance from start to end and evaluation information is considered on future contracts selection.
7. **Potential Problems** – Address potential contract problem areas and possible solutions; i.e., any issues or contract areas subject to differing interpretations that may lead to problem later on.
8. **Payment** – Discuss invoicing requirements and payment procedures, especially for progress payment(s) made using contractor milestones achieved.
9. **Authority**. Identify roles and responsibilities of parties' contract managers, contract administrators, project managers, key personnel leads, and any other key staff. TWC staff must explain their authority limits and obtain same information for contractor personnel.

After conference, TWC contract manager prepares meeting summary for contract file that details topics covered including areas to be resolved, participants list, and especially assigned individuals' responsibilities with due dates for action item(s). Copies of meeting summary must be distributed to all conference participants.

Monitoring Performance

Monitoring contractor performance is key function of proper contract administration. Monitoring's purpose is ensure contractor is performing all duties in accordance with contract and awareness so TWC can address any developing problems or issues as early as possible. Little; if any, monitoring is normally required for small dollar value or less complex contracts. However, it does not preclude possibility of more detailed monitoring, if deemed necessary by TWC management. Conversely, large dollar contracts may need little monitoring, if goods or services purchased are not complex and TWC is comfortable with contractor's past performance and level of associated contract risk.

Contract monitoring may be viewed as:

- Preventive function;
- Opportunity to determine contractor's need for technical assistance; and
- Source of valuable information about effectiveness and quality of provided services.

Couple areas of contract monitoring to discuss are:

1. Determine what to monitor and monitoring type; and
2. How to use monitoring reviews results.

Determine what to monitor - When TWC determines what to monitor consider how TWC will know:

- Goods and/or services paid for are received;
- Contractor is complying with contract terms; and
- Contract is complete and ready for closure?

Design TWC monitoring program to focus on most important items that generally means to focus monitoring on contract outcome results. Review statement of work and other contract terms including contractor compliance requirements. All of these requirements are deliverables contractor agreed to when contract was executed or purchase order was issued. For example, consider if TWC is

concerned about following issues:

- Eligible taxpayers should, but do not receive specific services;
- Taxpayers are eligible for service, but receive less;
- Taxpayers receive wrong services;
- Service priorities for eligible taxpayers are inappropriate;
- Services cost more than appropriate;
- Money is spent on non-allowable costs (i.e., food, gifts, etc.);
- Contractor wastes money or does not protect assets purchased with tax dollars;
- Contractor gives inaccurate progress reports; and/or
- Contractor does not correct goods and/or services identified as not meeting requirement(s).

Consider contract payment methodology effect on what needs to be monitored. For example, if payment is based on firm fixed price (specific amount of money for each item), it is not necessary to verify contractor's expenses (costs for travel or advertising) as they are not relevant to this contract type. TWC knows item purchased and cost per item when buying box of pencils. Under firm, fixed price contract, TWC must ensure:

- Number of units billed is same as number of units received;
- Quantity and price agree with contract amounts; and
- Each unit meets or exceeds contract specifications.

If TWC receives grant money to pay for contract, TWC must consider nature of relationship with contractor. Is relationship (see OMB Circular A-133, Section 210 for relationship determination guidance) vendor or sub-recipient relationship? If sub-recipient relationship, then follow federal guidelines (see UGMS published by Texas Governor's Office) and cost principles.

If TWC contract is cost reimbursement contract where TWC pays contractor's cost plus a percentage of overhead and profit, TWC needs to consider reviews to monitor following:

- Billed really purchased by contractor?
- Billed used for TWC contract purpose?
- Necessary and reasonable for TWC contract purpose?
- Quality and quantity specified in contract?
- Duplicated in either overhead or profit?
- Listed in contractor's budget and approved by TWC?

TWC must review contract to see how costs are reimbursed. Many contracts require all costs be included in original budget provided by contractor and approved by TWC. In some cases, contract may specify certain costs; such as, vehicle purchase or subcontractor use, require approval by TWC before purchase.

Monitoring Types - Following sections explain how to establish expectations so individuals responsible for contract monitoring and contractors all understand what will be monitored and criteria used to

evaluate contractor performance. There are different types of monitoring available including; but not limited to:

A. Site Visits - More complex contracts and contracts TWC decides have higher degree of risk may require both reviews and contractor's facilities visits to ensure progress follows contract schedule. Site visits can verify actual performance against scheduled or reported performance ensuring contractor dedicates sufficient resources and appropriate personnel to contract. Site visits reinforce contract importance to contractor; as well as, provide opportunity to enhance communications with contractor. When performing site visit, TWC must:

1. Develop comprehensive and objective site monitoring checklist to:
 - Focus on outcomes including compliance and criteria references applicable to contract requirements;
 - Assess contractor performance same way noting any errors considered minor or inconsequential outlined up-front for consistent contract monitoring and clarify flexible areas where monitors may exercise judgment; and
 - Specify sample size for review, but do not disclose specifics to contractor. For example, TWC may state August case documents will be reviewed, but must not disclose case #XXX will be reviewed.
2. Tailor site monitoring checklist for each contractor. Some standard items TWC will review for all contractors, but specific site monitoring requirements unique to each contract/contractor must be reviewed. In addition, consider following:
 - Review specific contract requirements to determine, if they merit site monitoring;
 - Look for items just below amount requiring additional approval;
 - Consider past contractor problems or what may cause contractor problems like contract parts new to contractor (i.e., contractor may provide same services, but to different population during this contract);
 - Monitor item types not needed and document reason (i.e., if contractor uses database TWC tested under previous contracts, then risk is low in this area and database review may not be needed); and
 - Coordinate reviews of multiple agency/ TWC multi-division shared contractors (i.e., if TWC provides job services to people with disabilities, and another agency provides same services).
3. **Site Visit (full and limited scope)** - Full scope site visits are typically scheduled visits to contractor's business place based on risk assessment and cover broad range of contract compliance and performance issues. Limited scope site visits typically focus on particular problem. Examples of some typical reasons for considering limited scope site visit include, but are not limited to:
 - Contractor is responsible for administering funds from two sources and one source has noted serious problems with way contractor used funds;
 - Other contractors have experienced problems in specific area and indicators show

this contractor may be experiencing same problem;

- Expenditure draw requests inconsistencies are identified (source document clarification is necessary); and
 - Contractor has provided corrective action plan for problem, but TWC is not certain proposed solution will resolve problem.
4. **Documentation Requirements** - Allow space on checklist (or separate document) to note site visit results. For example, if site monitor is to review 10 case files, documentation must include identification of files monitored (e.g., case number, staff member salary allocations tested, and expenditures reviewed).

Note: Monitor area bypass allows TWC more time to review higher risk areas. Describe documentation required for area bypass by site monitor; i.e., “No compliance requirement issues identified last year – not monitored this year.”

5. **Sampling and Population:**
- Ensure population is complete by including all files relevant to contract. TWC contractor must never select review samples;
 - If contractor submits client names list as part of normal expenditure draw that TWC pays, sample can be selected from client list; and
 - If contractor cannot locate sample item selected, problem may or may not indicated. Before agreeing to substitute an alternate file, consider circumstances of “lost” sample item and determine if explanation is reasonable or if site monitors suspects contractor did not want site monitor to see file.
6. **Site Monitoring Reports** - TWC site visit report alone serves as site monitoring work record. A copy of report must be sent to contractor and any others who may benefit from TWC report. Even if contractor corrects problem in front of site monitor, TWC site monitor must include problem in report serving as indicator to follow-up on future visits ensuring problem was corrected and include what is learned during site visit in next risk assessment and future contract requirements. If site monitor recommends changes for next contract include recommendations in site monitoring reports and include any contractor recommendations for next contract.

B. **Desk Review** - Typically TWC reviews of TWC contractor reports submitted must include compare following:

- Actual performance against contract requirements, so contractor meets contract requirements;
- Actual expenditures to approved contract budget ensuring contractor follows approved budget plan;
- Current period to prior periods for any unexplained trends (i.e., Is contractor performing work same way or significantly different from last period or last year?);
- Relationships between key report components; such as:
 - Cost per service unit or percentage of fees charged to program;

- Variable cost changes compared to service units provided; and
- Reported salaries match staffing plan.
- Current contractor is doing compared to other contractors performing similar work; and
- Report what is known about contractor's operating environment (i.e., Did area weather emergency recently increase construction supplies cost or was reason given for temporary services reduction?)

C. **Expenditure Document Review** - Reviews of contractor invoices and expenditure draw requests determine rates and services are same as contract allows and/or supporting documents (such as; cost reports, third party expense receipts, detailed client information, etc.) adequately support payment request. If contractor consistently provides incorrect invoices and/or supporting document is insufficient to support request, then additional monitoring (such as on-site visit) may be necessary.

D. **Use monitoring review results.** TWC monitor reviews, audits, and investigations routine follow-up includes:

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

TWC program staff designs system including criteria and defined follow-up actions. Follow-up goals must bring contractor back into contract requirements compliance and is essential as problem will not correct itself simply by identification and inclusion in monitoring report. Monitoring results must also be used to improve future contracts requirements including removal of unnecessary restrictions or insufficient restrictions. Be sure to note now any recommended changes, so future contracts can incorporate contract improvement changes.

E. **Third Parties Monitoring** - In some instances obligation of monitoring contract progress is assigned to another contractor and is; also known as, independent oversight. (i.e., for construction contracts, task of ensuring progress in accordance with contract may be performed by architectural firm providing construction plans). For highly technical work, monitoring services may be performed independently by subject matter experts or coordinated with TWC staff.

F. **Reporting** – TWC reports include contract administrator to executive management, contractor to contract administrator, and TWC to CPA/TPASS. Generally three report category types (all serve useful functions) are:

- Status Reports – Describe work progress and content is consistent with and tracks organizational structure of contract's statement of work (i.e., phases, segments, deliverables, and products). TWC status report separately describes completed and pending work and status must be contrasted against contract schedule. Only work verified as completed or accepted must be categorized as complete. If any unresolved issues TWC is contractually obligated to resolve and those issues must be included in status report with resolution requested from contractor. If TWC scope of work changes during contract (by written contract amendment) period insist status reports track original contract schedule, not revised contract schedule, unless amendments provide for revised contract schedule. If status is tracked against

revised contract schedule, there is risk schedule will continually change and status report is rendered meaningless.

If contract does not provide for periodic status reports, TWC must ensure sufficient contractor progress is being made and is accomplished by asking contractor for status update or site visit to view contract progress.

- Activity Reports – Describe any project activity which is not same as status report. Project may have great deal of activity without making substantive progress. On other hand, activity reporting can be core contract management feature (i.e., contractor payment in outsourcing contract may be based on number of completed transactions. In this example, activity reporting is critical to contract administration.).
- Vendor Performance Reports – At minimum TWC files Vendor Performance Report when contract procurement is completed on CPA/TPASS Web Portal, as required by rule 34 TAC §20.108(b). This report facilitates issues resolution between TWC and vendor. In addition, TWC report provides evaluation resource for use by other State agencies in subsequent solicitation awards.

Risk Management

TWC preliminary risk assessment must be conducted to make initial determination about level, type, and amount of management, oversight, and resources required to plan and implement contract from beginning to end. As associated risk with particular procurement increases, level and degree of TWC executive management's sponsorship, participation, and oversight must be increased by corresponding level (see Chapter 2 risk assessment section). After TWC preliminary risk assessment level has been determined primary approach to managing risk is document initial risk level perception and/or list related specific risks, identify and assign experienced staff resources to assist contract management process.

Payment Approval

TWC contractor costs incurred must be in accordance with contract rate schedule. Invoices must be reviewed to ensure contractor's billing matches contract's measurable progress. Cost incurred or invoices submitted alone are insufficient indicators of contractor's progress. TWC is required to confirm requested payment matches contractor's progress before invoice payment approval. Payment is withheld pending TWC satisfaction with contractor's measurable progress.

Invoices must be approved by TWC program staff before payment. Payments must be made in accordance with Texas Prompt Payment law which requires correct invoices be paid within 30 days from date correct invoice was received or services/goods received, whichever is later. TWC must be review invoices to ensure:

- Contractor is billing only for goods or services TWC received;
- Goods or services have been inspected and accepted by TWC program staff;
- Invoice is correct and complies with contract pricing, terms, and conditions; and
- Total TWC payments do not exceed contract limits.

Client services contracts are unique in that acceptance of goods or services do not indicate invoice should be paid. Problems with client services contracts generally surface after invoices are paid.

Contract managers dealing with client services contracts must design mechanisms to implement remedies for poor performance and withhold future payments until contractor performance improves.

Withhold Payment - TWC program staff has responsibility to protect TWC interests. Appropriate circumstances where it may be necessary to withhold contractor payment include, but are not limited to:

- Material contract breach by contractor;
- Invoice errors;
- Unsupported or undocumented costs;
- Remedy previous overpayments on same contract; and
- Non-conforming or unacceptable contractor performance.

Change Management

Throughout contract term it may become necessary to make contract changes that can be minor (such as address) or substantial (such as price and delivery). Couple basic ways to change contract are:

- Bilateral amendment where all contract parties agree modification is necessary because contract scope of work, term, or some other provision needs to be altered; or
- Unilaterally modify contract when terms and conditions in original contract set forth situations where TWC may exercise right to modify contract without contractor's consent.

TWC program staff must have effective written change management process. Failure to manage and control changes can result in unintentional modification to contract scope of work, schedule extension, increased cost, circumvent TWC management controls, and diminished contractor accountability.

Effective TWC change management process includes, but is not limited to:

- Formal, written approval of all changes prior to the change taking place. Do not verbally authorize the vendor to begin working on a change before formal process is fully analyzed, documented and approved in writing;
- Evaluate each change's impact on contract objective/standards/acceptance criteria, corresponding products/deliverables, and/or cost/schedule/possible increase in TWC overhead/work-in-progress/completed work;
- Develop plan for request and approval of allowance draws, if contract contains contingency allowance;
- Document all changes, no matter how small to avoid any informal undocumented change process; and
- Establish single TWC contact point to recommend or authorize any contract change and document as approved or disapproved. If contract change is approved, document change and impact to scope of work with contract amendment or purchase order change notice, whichever is applicable.

Contract Change and Contract Scope

Whether or not contract change is allowed, depends upon certain principles and State law requires competitive process in most situations. Specific competition method depends on type of goods or services needed. If competitive, resulting contract must be consistent with specifications usually

contained in solicitation document. Inconsistency can violate competitive process requirements.

Transparency in government procurement is key TWC responsibility. If TWC contract change is needed, it must be within scope, or range, of what was provided in solicitation. Any significant difference would be material or substantial change in services scope and not be allowed because it was not originally subject to fair competition. If such change is permitted it violates ideas of fair competition and equal playing field for all possible vendors. (i.e., if contract to buy 10 desks is amended to include 300 file cabinets, change is outside contract scope as vendors did not have opportunity to compete for sale of 300 file cabinets. Additional vendors may have competed had they known file cabinets were being solicited. Such a large file cabinet quantity could also have impact on which vendors competed. Other vendors may have been interested in bidding on file cabinets that were not interested in bidding on desks.)

In determining what constitutes scope changes to advertised specifications, significant question is whether or not changes are material or substantial. Material or substantial changes are not measured by number of changes made to original specifications, but by whether extent of changes would so substantially alter original specifications that not re-advertising revised specifications would deny procurement opportunity to someone who may have responded to revised specifications. If much is revised, then those changes are treated as new proposal and new solicitation is needed to ensure compliance with legislative solicitation statutes. Although limited, several legal decisions explain principles:

- Commissioners' Court awarded construction contract. After awarding contract, it was decided tile floor had to be excluded from original plans. Since advertised specifications formed contract award basis, Attorney General Opinion determined all bidders needed to be given opportunity to bid on new specifications. No material or substantial change in terms could be allowed without that opportunity.
- City advertised for competitive bids on treatment plant contract. When each of five bids submitted exceeded money available for project, City made over 35 changes to original plans; but City only presented these revisions to original low bidder, who submitted revised bid — much lower than original bid. In Attorney General Opinion it was determined these changes were substantial enough that revised plans constituted new specifications requiring new bids. Just because company is lowest bidder on one set of specifications does not mean it will be lowest bidder when specifications change.
- County received bids exceeding project funds budget. Initially only negotiating with lowest bidder for proposal to reduce scope, but later apparently realized error and proposal was rejected. When lowest bidder appealed his loss in trial Court, appellate Court upheld trial Court's judgment. Judgment emphasized competitive bidding process is designed to stimulate competition and compliance with statutory bidding requirements is mandatory.

As general rule, whether change is material or substantial is fact question. Fundamental principle is materially changing specifications after receipt of responses denies opportunity for others to participate in solicitation. Therefore, any contract amendments are required to be within scope and underlying competitive process of original contract. Important to remember application of above principles depends on particular fact situation and may not apply to request for proposal or request for offer

specifics. Before proceeding always contact TWC Procurement & HUB Services Director, who consults with TWC-OGC as needed.

Administrative Changes - These are changes are within contract scope and do not affect or alter rights of parties. These changes are typically executed by unilateral amendment. Examples of administrative changes include:

- Billing instructions or address;
- Typographical error corrections not affecting contract substance;
- Permitted specific contract language modifications; and/or
- Changes in TWC personnel assigned to contract.

Substantive Changes - Contractual changes affect rights of both parties. Such changes generally require bilateral amendments (agreement by both parties). Examples of substantive changes include:

- Contract price;
- Delivery schedule;
- Items quantity;
- Deliverables nature (i.e., specifications);
- Key personnel; and/or
- Any terms and conditions.

Constructive Changes - If contractor perceives TWC ordered work beyond contract scope, contractor may claim contract was “constructively” changed and contractor may be entitled to additional compensation for changes. Generally constructive changes require a bilateral amendment.

Constructive changes may occur when TWC personnel:

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

Dispute Resolution

Dispute resolution is covered by statute under TGC Chapter 2260 and includes some of contract claims against State. Goal of any dispute resolution process is resolve all problems before they escalate to next level. Imperative that TWC staff respond promptly (at minimum, within 24hrs) to all contractor inquiries avoiding problem escalation to next level and ensure TWC does not exacerbate potential problems.

Initial steps to take are:

1. **Identify problem** - many potential problems can be resolved by providing clarification or information to contractor;
2. **Research facts** – TWC must obtain all information regarding potential problem from all

relevant sources, including project manager and contractor;

3. **Evaluation** – TWC must review all facts in conjunction with contract requirements plus terms and conditions before determining appropriate course of action;
4. **Proper dispute resolution** – Core skill of successful contract management is identify problems early in performance period, then effectively communicate and formalize process in writing by cure notice procedure or less formal procedure is essential. Contract termination is failure by BOTH parties to contract. Termination is last resort and rarely needs to be done.

Termination

When contract is terminated, parties are relieved from further unperformed obligations in accordance with agreed terms and conditions. Contract may be terminated under distinct processes:

Termination for Convenience and Termination for Default.

Termination for Convenience - Termination for convenience, also known as no-fault termination, allows TWC to terminate any contract by sole discretion at any time, in whole or in part; if determined such termination is in TWC's best interest.

- TWC must provide contractor with 30-day advance written notice specifying whether TWC is terminating all or part of contract. Notice of termination must give termination date. If contract is being selectively terminated, TWC must specify which contract part(s) are being terminated.
- Termination notice must be issued which includes wording similar to:
“Pursuant to Section __, Termination, this contract is hereby terminated effective [date]. [Contractor name] is directed to immediately stop all work, terminate subcontracts, and place no further orders.
In accordance with this Notice of Termination, you must:
 - a. *Keep adequate records of compliance with this notice, including extent of completion on termination date.*
 - b. *Immediately notify all subcontractors and suppliers, if any, of this Notice of Termination.*
 - c. *Notify TWC [Contract Administrator name], of any and all matters that may be adversely affected by this Termination; and*
 - d. *Take any other action required by TWC to expedite this Termination.”*
- Contractor is generally paid for allowable costs incurred up to termination date. TWC will not be liable for contractor payment related to terminated portion of work or any work performed or costs incurred after termination effective date.
- On receipt of any contractor invoice for work performed before Notice of Termination, TWC must thoroughly review invoice to ensure no excessive costs are included.

Termination for Default - Contract may be terminated for default when TWC concludes contractor fails to perform, make progress, or in any way breaches contract. TWC is not required to terminate contract even though circumstances permit such action. TWC may determine it is in best interest to pursue other alternatives. Examples of such alternatives include extend delivery or completion date, allow contractor to continue work or work with contractor's surety to complete outstanding work. If

terminated for default, contractor is liable for TWC’s actual damages and costs incurred unless contract states otherwise.

Termination for default should be used as last resort and not as punishment. Purpose of termination for default is essentially to protect TWC interests while obtaining necessary goods or services from another source. Factors to consider before making termination for default decision include:

- 1) Has TWC done everything within reason to assist contractor in curing any default?
- 2) Contract provisions and applicable regulations;
- 3) Specific contractual failure(s) and explanation provided for failures;
- 4) Need urgency for contracted goods or services. TWC may need to weigh respective benefits and/or disadvantages of allowing delinquent contractor to continue performance or re-soliciting new contractor.
- 5) Availability of goods or services from other sources and time required to obtain them (compared to additional time current contractor needs to complete work).
- 6) Funds and/or resources available to re-purchase in event such costs cannot be recovered from delinquent contractor. Under termination for default, TWC is within its rights to demand re-procurement costs from defaulting contractor. Nevertheless, defaulting contractor may not be financially capable to finance re-purchase, or such demand may result in protracted legal action.

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

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

*Severe weather, although beyond contractor’s control, will not generally constitute an excusable delay if it is not considered “unusually severe weather” (i.e., Amarillo snow storm in February would not be considered unusual, while it would be considered unusual in Austin. On other hand, Amarillo snow storm in June would indeed be unusual).

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

Termination for Default Notifications

Before terminating contractor for default, cure notice must be sent to contractor. Cure notice is letter to contractor giving them time period, usually 10 days, to correct or “cure” deficiency or violation.

Cure Notice - Format for cure notice may be as follows:

“[contractor name] is notified that TWC considers [specify failures] condition that is endangering

contract performance. Therefore, unless this condition is cured within 10 days from date of this letter, TWC may terminate for default under terms and conditions of contract's Termination clause."

Or, another format for cure notice is:

"Since [contractor name] has failed to perform on above-referenced contract within time required by its terms, TWC may terminate contract under default provisions. Pending 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 opportunity to present, in writing, any facts bearing on the questions to TWC [TWC point of contact] within 10 days from date of this notice. Your failure to present any reasons within this time may be considered admission that none exist.

Any assistance given to you on this contract or any acceptance by TWC of delinquent goods or services will be solely for purpose of mitigating damages, and it is not TWC's intention to condone any delinquency or to waive any of TWC's contractual rights."

Termination Notice - If contractor fails to cure situation or provide satisfactory explanation as requested, TWC may terminate contract. TWC Termination Notice must contain the following:

- 1) Contract number, if any, and contract date;
- 2) Termination effective date;
- 3) Reference clause under which contract is being terminated;
- 4) Concise, accurate statement of facts justifying termination; and
- 5) Statement that goods or services being terminated may be re-procured and contractor will be held liable for any additional TWC costs incurred due to re-purchase. Before including this statement, review TWC contract to determine whether right is available under contract.

Contract Administration File

It is critical to keep one complete master contract administration file as it provides basis for settling claims and disputes should any administrative or court actions arise. Throughout contract life, TWC contract administration file must contain following things:

- Copy of current contract and all modifications;
- Copy of all specifications, drawings or manuals incorporated into contract by reference;
- Reference list or list of prior contracts with this specific vendor (if list offers valuable historical data);
- Solicitation, contractor's response, evaluation determination, and award notice documents;
- List of contractor submittal requirements;
- List of TWC-furnished property or services;
- List of all information furnished to contractor;
- Copy of pre-award conference summary, if conducted;
- Schedule of compliance review, internal correspondence, if applicable;
- Copy of all general contract-related correspondence;
- Originals of all contractor data or report submittals;
- Copy of all routine reports required by contract such as sales reports, pricing schedules, approval requests, and inspection reports;
- Copy of all notices to proceed, to stop work, to correct deficiencies, or change orders;
- Copy of all letters of approval pertaining to such matters as materials, contractor's quality control program, prospective employees, and work schedules;
- Records/minutes of all meetings, both internal and external including sign-in sheets and/or agendas;
- Copy of all contractor invoices, information relative to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments; and
- Copy of all backup documentation for contractor payment or progress payment; and copies of any audits.

TWC must maintain contract originals on file in central repository allowing TWC contract managers to reference past or current contracts for useful information relating to current project.

Contract Close-Out

Contract close-out process is usually simple, but detailed administrative procedure. TWC purpose is verify both contract parties fulfilled their contractual obligations and there are no pending responsibilities. In addition, contract close-out is time to assess contract success and determine any lessons learned for future contracts.

TWC contract is complete when all goods or services have been received and accepted; all reports have been delivered and accepted; all administrative actions have been accomplished; all TWC-furnished equipment and material have been returned; and final payment has been made to contractor. Before initiating close-out process, TWC determines contractor has satisfactorily performed all

required contractual obligations. TWC contract is ready for close out when:

- All deliverables, including reports have been delivered and accepted by TWC. TWC contract managers must compare actual performance against performance measures, goals and objectives to determine whether all required work has been completed;
- Final payment has been made;
- All monitoring issues have been resolved;
- All property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under contract;
- Final acceptance from TWC (or contractor) Project Manager has been received, if applicable;
- Contractor is aware of and in compliance with records retention requirements and plan has been developed for contract file maintenance; and
- Any deficiencies found during closeout process are documented and communicated to all stakeholders.

Grant Close-Out

Grants have specific contractual close out requirements found in UGMS published by Texas Governor's Office. In addition to, final reports and invoicing requirements there must be retention and access requirements for grant-related records. TWC closes out grant award after determination that all applicable administrative actions and all required grant work has been completed. Awarding agency must provide any necessary additional information on grant closeouts.

Grant close-out period must be no less than 45 days nor later than 90 days after grant expiration or termination. TWC grantee must submit all financial, performance, and other grant required reports. Upon grantee written request, federal/State agencies may extend close-out timeframe. Grant close-out reports may include, but are not limited to:

- Final Performance or progress report;
- Final Financial Report;
- Final payment request; and
- Property inventory report.