

**TEXAS DEPARTMENT OF LICENSING AND REGULATION**

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**CONTRACT MANAGEMENT HANDBOOK**

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**FINANCIAL SERVICES CONTRACTING AND PROCUREMENT**

January 14, 2019

# Contract Management Handbook

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# Introduction

## Purpose

The purpose of this Contract Management Handbook (Handbook) is to provide Contract Developers, Contract Managers, Project Managers, Program Staff, and other TDLR employees (Users) at the Texas Department of Licensing and Regulation (TDLR) with the requirements and best practices for consistent management of contracts for the procurement of goods or services through administration of the contract.

Financial Services, Contracting and Procurement Services (C&P Services) is responsible for all TDLR procurement and contract management functions and will regularly update this Handbook, based on changes in contracting laws, regulations, and policies. TDLR recognizes that changes to this Handbook may lag behind changes in contracting laws, regulations, and policies. Therefore, Users of this Handbook must keep current with and follow the Statewide Procurement and Contract Management Guide.<sup>1</sup>

Effective contract management prevents, minimizes and resolves problems and potential claims and disputes. Successful contract management requires the *active engagement* of a Contract Manager throughout the Procurement Cycle for all procurements. In formal procurements (defined below), the General Counsel must be engaged and consulted during each phase and step of the Procurement Cycle.<sup>2</sup>

Contract management affects TDLR’s core mission; and may negatively or positively impact services provided to licensees and taxpayers statewide. Therefore, TDLR employees must comply with these contract management procedures or policies. If an employee believes that anyone has requested or directed him or her to perform an action that is not in compliance with TDLR’s procurement or contract management procedures, or to omit an action required by the procedures, the employee must immediately report the request or directive to a Director, the General Counsel, the Deputy Executive Director or Executive Director.

## Contract Management Phases

Contract Management consists of five phases:

1. Planning - Identify objectives and contracting strategy for the procurement.
2. Procurement - Purchasing, renting, leasing or in any way acquiring goods or services; including:

- Prepare the Solicitation
- Advertise the Solicitation
- Evaluate Responses and Award

3. Contract Formation - Ensure the contract contains provisions that hold the contractor accountable to the specifications and all required terms and conditions consistent with the approved and mandatory or recommended provisions authorized by the Statewide Procurement Guide.



<sup>1</sup> Published by the Texas Comptroller of Public Accounts, Statewide Procurement Division.

<sup>2</sup> Procurement Services may seek General Counsel advice on any procurement or contract issue regardless of the solicitation method.

4. Contract Administration - Following award of a contract, the *management actions* that must be taken for oversight to have full compliance with all the terms and conditions in the contract.
5. Contract Closeout - Perform final review of the goods or services, confirm the receipt of all deliverables, and finalize payment.

This Handbook discusses each of the five phases to ensure consistency in the procurement of goods and services resulting in contracts that are performed satisfactorily with the responsibilities of both parties - TDLR and the contractor - satisfied and properly carried out through each of the five phases.

The nature and level of risk associated with each contract management phase vary depending on the type and dollar value of the contract. C&P Services is responsible for providing Program Staff appropriate training and oversight to mitigate these risks; and to monitor the management of each phase, so that procurements achieve *best value* for TDLR and for taxpayers.

Best value requires fully implemented contract management practices that coordinate and administer each of the five contract management phases. In addition to the five shapes, contract management also involves coordination of multi-disciplines and roles, including:

- Executive Management;
- Project Management;
- Planning;
- Program Staff
  - Subject Matter Experts and
  - Contract Administrators;
- C&P Services Staff; and
- General Counsel.

The Contract Manager or the leader of the Contract Management Team is responsible for assuring all necessary disciplines are actively engaged and their work, with respect to the contract, is coordinated to comply with this Handbook. Different types of contracts are subject to different statutory standards, practices, processes, and strategies for successful implementation. Except for mandatory requirements, the suggestions, comments, techniques, examples, and recommendations included in this Handbook are not appropriate for every contract type. Therefore, the proper legal standard, practice, process, and strategy applicable to each procurement must be made in consultation with General Counsel.

This Handbook:

- Discusses ethical standards; employee and contractor conflicts of interests; TDLR staff and contractor relationships; and reporting of ethics violations; defines roles and responsibilities of TDLR staff; provides an overview of each procurement phase; and concludes with a discussion of contract management and administration to contract close out procedures.
- Provides a Contract Management Best Practices Matrix that includes a summary of best practices designed to help the Contract Management Team determine where a contract management program currently stands in relation to generally accepted contract management best practices.
- Includes model recommended and mandatory contract provisions prepared by the Statewide Procurement Division.
- Addresses the contract change order and contract amendments that may be made to address unforeseen circumstances or events.

- Suggests time frames for the solicitation, evaluation, negotiation, and awarding of contracts.
- Establishes the procedure for attempting to determine why a single response was received in reply to a procurement solicitation.

This Handbook does not constitute specific legal advice on any issue that may arise. If you have questions, consult the Contract Manager or the General Counsel.

## Definitions

Words and terms used in this Handbook are defined in Appendix 1. If the event words or terms defined in this Handbook conflict with or differ from definitions established by statute, rules implementing statutes, or guidelines established by the Texas Comptroller of Public Accounts those words or phrases have the meaning assigned therein.

## Training for Program Staff and Contract Managers

TDLR certified Contract Managers must complete the Comptroller of Public Accounts (CPA) Ethics in Contracting course and keep current with continuing education requirements. Staff must be certified as a Contract Manager if contract management duties comprise 50% or more of the job, or if managing a contract more than \$5,000,00.<sup>3</sup> Program Staff performing contract management functions must complete the Contract Manager training provided by the CPA.

In addition, TDLR may designate and require additional staff complete the training and may include those with:

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

C&P Services will provide annual training to all TDLR staff engaged in competitive procurements of goods or services or administer and manage competitive procurement contracts. The training will cover topics related to:

- Fair and objective selection and negotiation with the most qualified contractor;
- Inclusion of provisions in a contract that hold the contractor accountable for results;
- Monitoring and enforcing a contract;
- Making payments consistent with the contract; and
- Compliance with the requirements in this Handbook

## Ethics and Standards of Conduct

The purpose of the TDLR Ethics and Standards of Conduct is to help TDLR staff maintain the highest standards of conduct in the performance of their duties. Contract management team members must be familiar and comply with TDLR's ethics policies.

TDLR's Personnel Manual discusses guidelines, policies, and other requirements for TDLR employees. Violation of these policies may result in disciplinary action including dismissal and, in some cases, referral to state law enforcement agencies.

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<sup>3</sup> Executive staff must complete the 45-minute Governing Bodies Webinar Training S.B. 1681 and complete and submit the acknowledgement form to the CPA.



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

## Conflict of Interest - Contract Management Team

Each member of the Contract Management Team must act in the best interest of the state and avoid all activity that could potentially impair the ability to carry out his or her duties with independence and objectivity. Failing to comply with these rules or to disclose a potential conflict of interest could result in disciplinary action or referral to law enforcement.

## State Employee Conflicts of Interest - Interest in Contract Prohibited

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

## State Employee Conflicts of Interest - Offer of Employment

As required by statute, state employees are prohibited from accepting employment from a person or entity for two years after a contract is signed or a procurement was terminated or withdrawn if the employee participated on behalf of TDLR in the procurement or contract negotiation involving that person or entity.

## Reporting Ethics Violations

TDLR staff has a duty to report any potential ethics or standard of conduct violation. Project Managers and Contract Managers have an obligation to remain vigilant for signs of potential violations of ethics, rules, policies, and standards of conduct. Project Managers and Contract Managers may use the following options for reporting and investigating known, alleged, or suspected fraud or other illegal activities in TDLR, including procurement.

### Report to Immediate Supervisor

TDLR employees may report any potential or known ethics or standard of conduct violation to their immediate supervisor. Contact may be verbal or written and may be made by anyone having knowledge. The supervisor must report all allegations to the Executive Director or Deputy Director, a Director, or the General Counsel for a preliminary review and determination as to the necessity for proceeding with an investigation of the reported fraud or illegal activity. Executive Management may consult with General Counsel, Human Resources and any other agency staff as appropriate for advice and assistance.

### Report to State Auditor's Office

A TDLR employee may report fraudulent or other illegal activities anonymously, or if reporting to the supervisor would be unproductive, to the State Auditor's Office by calling the Fraud, Waste, and Abuse Hotline at 1-800-TX-AUDIT or by completing the form located at: <https://sao.fraud.texas.gov/>.

## Contractor Conflicts of Interest

TDLR is prohibited from entering into employment, professional services, or consulting services contracts with former or retired employees before the first anniversary of the last date on which the individual was employed by TDLR.

All contracts must contain contract terms and conditions that relate to organizational conflicts of interest restrictions, and:

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

## TDLR Staff and Contractor Relationship

Members of the Contract Management Team must perform their responsibilities in a transparent and ethical manner and contractors must in turn ethically perform their contractual obligations. Maintaining cooperative relationships with contractors is important to successful contracting outcomes. However, TDLR staff must maintain an ethical arms-length business relationship with contractors. In doing so, TDLR must be recognized as the final authority and decision maker on all matters concerning the contract.

Resolving Ethical Dilemmas. An ethical dilemma may often be resolved by following this simple rule of thumb: If it feels wrong, it probably is wrong. When faced with an ethical dilemma, you should seek advice from a supervisor or the General Counsel.

Ethical behavior and integrity require values like fairness, honesty, and accountability.

## Applicability

This Handbook applies to all procurements:

- over \$25,000; or
- that require formal bidding, Statement of Work, Request for Proposals and Invitation to Bid, regardless of dollar amount (Formal Procurements).

Procurements that fall below \$25,000 and do not require formal procurement are procured on a purchase order following TDLR procurement procedures and the Statewide Procurement Guide.

This Handbook also applies to management of the following types of contracts:

(1) Professional Services Contracts including Consultant Contracts; (2) Interagency Contracts; (3) Sole source, proprietary, and emergency purchase contracts; (4) Purchase orders greater than \$25,000; (5) Statewide term contracts; (6) Cooperative or “piggy back” contracts; (7) Memoranda of Understanding; (8) Service agreements; (9) Revenue generating contracts; and (10) Other binding obligations of any kind.

## Contract Management Team Roles and Responsibilities

Effective contract management depends on each member of the Contract Management Team knowing and responsibly performing their role in a timely manner. The Contract Management Team may consist of Program Staff, Contract Manager,

Project manager, C&P Services staff, and General Counsel. The roles and responsibilities of the Contract Management Team members are outlined below.

## Program Staff

TDLR Program Staff plays a critical role in each phase of the contract lifecycle and may serve in and be responsible for more than one role. For example, TDLR Program Staff may assist in developing the statement of work, then provide technical assistance to the contractor and finally, assist with contract closeout.

Program staff must coordinate with the contract developer to:

- Gather requirements and provide end user support, work closely with the Contract Developer and Contract Manager, as needed;
- Assist with contract development, including statement of work, and other lifecycle phases;
- Ensure contract developer has easy access to information about the contract;
- Assist with contract amendments, waivers, and renewals;
- Request any changes to the statement of work, including changes to the service level agreement, requirements, or deliverables;
- Assist in the development of the contract administration plan, quality assurance plan and other contract monitoring documents;
- Serve as an operations liaison with contractor to ensure participation is consistent with program requirements;
- Submit monitoring reports to C&P Services with findings contract performance and information on risk or operational issues; and
- Participate in contract closeout procedures; including assessment of contractor performance and effectiveness of contract management process.

## Contract Manager

The Contract Manager is responsible for ensuring the contract requirements are satisfied; the goods and services are delivered in a timely manner; and TDLR's financial interests are protected. The Contract Manager must have a thorough understanding of all components of the solicitation and contract, acquired through active engagement in the contract development phase.

The Contract Manager must be experienced with the type and size of the procurement. The level of contract administration will not be the same for all contracts. The level of contract administration should be consistent with the complexity and level of risk of the contract, the contract term, and dollar value.

The primary responsibilities of the Contract Manager include; but are not limited to the following tasks:

- Participate with the development and review of contract documents;
- Serve as the primary point of contact for agency communication with the contractor;
- Manage state property used in contract performance (*e.g.*, computers, TDLR office space, telephones, identification badges);
- Implement a quality control and contract monitoring process;
- Monitor contractor's progress and performance to ensure goods or services conform to the requirements and keep timely records of findings;
- Submit monitoring reports to C&P Services with findings contract performance and information on risk or operational issues;
- Consult with General Counsel to address legal concerns and issues;

- Manage, approve, and document changes to the contract through the amendment change order process;
- Inspect and approve the products or services by: (1) submitting a written document accepting the deliverables; or (2) obtain documentation from the end users confirming inspection and approval have been completed;
- Verify accuracy of invoices and authorize payments based on contract terms;
- Monitor the contract budget to ensure funds are available through the term of the contract;
- Identify and resolve contractor disputes timely;
- Recommend appropriate remedies for performance deficiencies;
- Maintain records to comply with TDLR records retention schedule;
- Confirm all products or services have been delivered before contract expiration; and
- Perform contract closeout processes by ensuring the contract file contains all contract documentation, vendor performance reported to VPTS, and document lessons learned.

Contract Managers are not authorized to allow contractors to: (1) start work before the contract is fully executed; (2) change the scope or extend the term of the contract without complying with the amendment change order process; (3) authorize contractors to perform work outside the scope or statement of work; (4) allow contractors to recover costs incurred before the effective date of the contract; or (5) recover costs above the contract amount.

## Project Manager

A Project Manager from the Office of Innovation and Project Management may be assigned to complex or high-risk procurements to manage performance of the contract.

Project Managers may be required to:

- Manage the project following the methodology established by the Office of Innovation and Project Management;
- Lead the planning and development of project deliverables;
- Monitor progress and quality of project tasks and deliverables;
- Submit contract monitor report required by the contract administration plan;
- Identify and resolve project problems and conflicts, escalating to the Contract Manager when necessary;
- Communicate project status, issues, and risks to TDLR Management and Contract Manager; recommends corrective action when necessary; and
- Manage and coordinate project activities with project team members.

## C&P Services

C&P Services is responsible for all procurement and contract management functions. Contract managers work closely with contract developers, Program Staff, and General Counsel to plan procurements, draft solicitation documents, evaluate proposals, conduct negotiations, and recommend final contract award.

After contract execution, C&P Services transition from the procurement phase to its contract management and administration role working with Program Staff and the contractor to oversees all contract management activities through contract closeout.

Specifically, C&P Services is responsible for the following managerial functions, tasks, and responsibilities:

- Oversee TDLR contract management functions;
- Manage agency-wide contracts;

- Support agency staff managing or monitoring specialized contracts;
- Maintain procurement/contract records;
- Develop acquisition plans, contract administration plans, and quality assurance plans in consultation with General Counsel and Program Staff;
- Facilitate routing and approval of contracts and amendments;
- Develop procurement and contracting policies and procedures;
- Receive contract monitor reporting as defined by the contract administration plan;
- Review contract monitoring reports to identify potential issues or unanticipated risk and report such finding to executive management;
- Support Contract Governance Committee;
- Provide technical assistance to TDLR divisions and programs; and
- Provide procurement training and contracting management training.

## General Counsel

General Counsel is responsible for drafting contract documents for formal procurements and spot purchase procurements, under contract. General Counsel will assist in the development of solicitation documents, providing legal assistance, guidance, and review.

General Counsel is responsible for the following:

- Provide input on the proposed procurement method and approach;
- Develop contracts for complex purchases of services or purchases of \$25,000 or more;
- Assist in the development of solicitation documents;
- Review solicitation terms and conditions;
- Interpret and advise on applicable state contracting laws and regulations;
- Advise C&P Services, agency staff and management on contracting issues;
- Support or facilitate dispute resolutions, including mediation with contractors;
- Draft Notice of Deficiency and related documents required to remedy contract underperformance;
- Assist C&P Services with contract termination or suspension; and
- Review of any procurement related document.

# Planning the Procurement

The first step in the contract management process is planning. Planning is crucial to the successful outcome of any procurement or contract. Planning assists TDLR in determining the need for goods or services, preparing the specifications and budget, choosing the appropriate solicitation type, negotiating and drafting a contract, and evaluating the necessary level of contractor monitoring and oversight. Proper planning reduces *risk* in the procurement process.

During the planning phase, procurements are considered proposed and are only reclassified as agency approved once both of the following criteria are met:

- An Acquisition Plan is completed as outlined below.
- A purchase requisition completes the CAPPs Requisition Approval Process.



## Acquisition Plan

The Texas Comptroller of Public Accounts requires that all purchases over \$500 have an approved Acquisition Plan. TDLR’s Acquisition Plan template is available for downloading from Financial Services’ LrNet webpage. The Acquisition Plan is the planning document that identifies and contains the Needs Assessment for the goods or services. Section 1 of the Acquisition Plan is initially filled out by Program staff and then sent to C&P Services for review and modification as needed. Section 2 is completed by C&P Services. The Acquisition Plan is then considered ready to attach to a CAPPs requisition for official approval by TDLR (Executive Director or Deputy Executive Director), as outlined in the CAPPs Requisition Approval Process. Acquisition Plan Template, Appendix 2.

As the procurement progresses, the Acquisition Plan will be updated, and all remaining sections completed. C&P Services Staff is responsible for managing the Acquisition Plan and ensuring the information contained is up to date, capturing up-to-date procurement and contracting activities accurately.

## Procurement Planning Steps

Procurement planning may consist of the following eleven steps. The eleven steps consist of (1) general planning, (2) risk assessment, (3) risk management, (4) communication plan, (5) determining procurement method, (6) exempt purchases, (7) planning contract content, (8) technique, (9) solicitation research, (10) cost estimate, and (11) procurement lead time.

During the procurement planning phase consider each of the following:

### 1. General Planning

Planning starts at the division level. The Originating Division will assign Program Staff to the proposed procurement. Program staff will gather relevant facts supporting need, prepare a cost benefit analysis, and estimate costs of the procurement (Acquisition Plan). Program staff C&P Services should consult with C&P Services Staff early in the planning phase to ensure planning activities do not compromise a procurement. The earlier Program Staff engage C&P Services Staff, the better the procurement outcome.

Depending on the complexity of the procurement and the level of risk, C&P Services may assign C&P Services staff

to work collaboratively with Program Staff throughout general planning activities and seek assistance from General Counsel and other divisions.

Note: Program staff may provide information related to the marketplace or possible sourcing strategies gathered through fact-finding, but they cannot assign a vendor to whom they want to award or negotiate a statement of work or proposal with a vendor.

## 2. Risk Assessment

Risks are inherent in all stages of the procurement process. C&P Services working with the requesting division performs an initial risk assessment for the procurement itself to ensure the procurement goals are reached while providing a best value to the State. In addition, C&P Services will identify risk factors to focus monitoring resources on contractors with the highest risk of noncompliance with contract terms and on contracts that pose the greatest risk to TDLR. Risk factors are indicators that assess the risk of the contract or project objectives not being achieved.

Risk assessment is a dynamic process that should be updated to reflect the results of monitoring, reviews of payment vouchers, desk reviews, etc. For example, if the contractor has fallen significantly behind schedule in delivering goods or services, the risk assessment should be updated to indicate the elevated risk, which impacts how the contract is monitored in the future.

During contract negotiations but prior to execution, C&P Services will perform a preliminary risk assessment to make an initial determination about the level, type and amount of management, oversight and resources required to plan and implement the contract from beginning to end. (Contract Administration Plan). As the risk associated with a contract increases, the level and degree of contract manager participation and oversight should be increased.

## 3. Risk Management

Risk management follows risk assessment and includes identifying specific risks of a procurement or contract and seeks to minimize the risks to TDLR through contract terminology, insuring the risk, managing the risk at an appropriate level, or risk avoidance.

There is not an objective or mathematical formula that can be used to identify or quantify the risk imposed by a contract. Risk determination is based on both objective and subjective experience.

## 4. Communications Plan

C&P Services and the Contract Management Team is required to manage both internal and external communications. After identifying internal and external stakeholders (including executive management), C&P Services will provide guidance to communicate to all stakeholders regarding how communications will be delivered and acceptable content. C&P Services should focus on centralized communication throughout the contract term utilizing the contract manager or the contract monitor, particularly for any SOW communication. Contract management team members must sign a non-disclosure agreement if they participate in any pre-award activities. Communication responsibilities will be documented in the Acquisition Plan and Contract Administration Plan.

## 5. Determine the Procurement Method

Procurement Methods are numerous and are subject to varying rules and regulations, contracting programs and exempted methods allow for direct awards without competitive bidding. If the procurement of goods or services require a solicitation, the Contract Developer will consult with the Contract Management Team to determine the appropriate method of solicitation. The solicitation methods are:

1. Invitation for Bids (IFB) - The IFB uses the competitive sealed bid method. This method is used when requirements are clearly defined, negotiations are not necessary, and price is the major determining factor for selection.
2. Request for Information (RFI) - Requests for Information are used primarily as a planning tool. The RFI is an optional method that may be used to gather information when necessary to have the necessary information to prepare a complete and accurate solicitation document. RFIs are used to identify industry standards, best practices, potential performance measures, or to generally ascertain the level of vendor interest. A preliminary solicitation document which provides an initial description of the program objectives and SOW usually accompanies an RFI for review by vendors. The Contract Management Team may use, but not required to incorporate, information contained in a response to an RFI.
3. Request for Offer (RFO) - The RFO method is a direct purchase or lease method used after receiving a DIR exemption for procuring IT goods or services. The procuring entity evaluates written offers received in response to an open and competitive solicitation in accordance with the solicitation to result in best value. Under the RFO method, agencies must solicit, evaluate, select, negotiate as appropriate, and contract directly with one or more qualified vendors in accordance with the open and competitive solicitation.
4. Request for Proposal (RFP) – Used when competitive sealed bidding is not practicable or advantageous, such as when factors other than price are to be considered or when objective criteria cannot be defined. One of the key differences between an IFB and an RFP is that negotiations are allowed in an RFP. Discussions are allowed with proposers and best and final offers are solicited.
5. Request for Qualifications (RFQ) – Generally used to select a provider of Professional Services under the [Texas Government Code, Chapter 2254](#), Professional Services Procurement Act. Selection and award are based solely on demonstrated competence to perform the services; and for a fair and reasonable price. § 2254.003. Price is negotiated after the selection based on qualifications.
6. Request for Quote (Quotes) – A bid method used for purchases made through DIR Commodity Contracts over \$50,000. A RFQ is also the informal bid process for purchases costing \$5000.01 - \$25,000 for all non-IT purchases, as determined by C&P Services procedures, to obtain quotations from potential contractors for the purchase of goods or services. Quotes are obtained for small dollar transactions and governed by the purchase order terms and conditions.

General Counsel and C&P Services will develop standard solicitation templates to facilitate a consistent process and ensure that each solicitation document contains the required provisions.

## 6. Exempt Purchases

Some procurement transactions may be exempt from competitive procurement requirements. C&P Services in consultation with General Counsel makes the final determination whether a procurement is exempt from competitive procurement requirements.

Examples of exempt purchases include; but are not limited to:

### Emergency Purchases

An emergency purchase results from unforeseeable circumstances and may require an immediate response to avert an actual or potential public threat. If a situation arises in which compliance with normal procurement practice is impracticable or contrary to the public interest an Emergency Purchase may be warranted to prevent a hazard to life, health, safety, welfare, property or to avoid undue additional costs.

### Proprietary Purchases



A Proprietary Purchase (or sole source) is justified only when an equivalent good or service is not available or not suitable. A written justification must be provided by the originating division when a specification requirement limits consideration to one supplier, one good(s), or one service provider and the amount of the purchase exceeds the informal bid threshold (either in a one-time purchase or repetitive purchases of the same goods or services during a fiscal year). Price and personal preferences are not acceptable as determining factors. C&P Services may request additional quotes or bids for proprietary or sole source purchases.

The written justification must include:

- Explanation of why a unique SOW for a good or service is required;
- Details of the unique features of the goods or services;
- Statement whether same of similar goods or services acquired in preceding [3] years;
- Reason that competing goods or services are not satisfactory;
- Any other relevant information to support the sole source documentation; and

## Other Exempt Purchases

Certain goods or services are considered exempt from the competitive procurement rules, either by statute or if an exemption is in the best interest of the public. Bids or proposals are not required when procuring exempt goods or services but may be requested to confirm Best Value for TDLR and must have a valid business purpose.

## 7. Planning for Contract Content

Clearly identifying procurement objectives, assumptions, and constraints is an important step in contracting. This step may seem obvious, but when a contract fails, it often fails because the expectations were not met and there was not a true meeting of the minds. A clear understanding of the contracting objectives is essential to success. Typically, a contract will be part of a larger initiative or vision such as TDLR's strategic plan. The Contract Management Team must carefully consider how the objectives, assumptions, and constraints integrate into the larger initiative or vision. Identify potential integration risks so that a strategy for mitigating or managing those risks will be developed in the planning phase.

## 8. Technique

Defining the contract objectives, assumptions, and constraints may sound simple and straightforward, but this definition process can be complex. The Contract Developer may find that members on the Contract Management Team hold different views about the procurement's objectives.

Each procurement is different; therefore, the description of the objectives, assumptions and constraints will vary. A good way to measure the quality of the SOW is to ask whether the contract objectives, assumptions, and constraints make sense. Are the objectives, assumptions, and constraints described too broadly or too narrowly?

## 9. Solicitation Research

The Contract Management Team may seek input across divisions and other agencies who have developed solicitations, drafted contracts, and engaged in contractor oversight like the solicitation that is being planned.

Recommended methods of research include:

- Use the internet to search for similar solicitation documents, contracts, and oversight documents;

- Review websites of potential contractors for useful information;
- Check with trade associations, and professional organizations to identify industry standards;
- Publish a Request for Information (RFI).

While researching, the Contract Management Team or C&P Services may contact potential contractors to discuss the need for goods or services. This is an acceptable practice if:

- the Contract Management Team or C&P Services obtain information from more than one vendor;
- documents the contacts in the purchasing file; and
- advises the vendor up front that TDLR’s interest at this point is strictly for informational or research purposes and that any formal requests for pricing or other information will be made through the solicitation process.

*Recommended Vendor Script:*

*This meeting is for informational purposes only. TDLR has not made a commitment to obtain any of the items under discussion, and this meeting should not be considered an offer, acceptance, commitment or as authorization to incur any cost for which reimbursement would be required or sought.*

1. *TDLR follows all Texas state contracting statutes, rules and policies of the Texas Comptroller of Public Accounts.*
2. *This is no guarantee of business.*
3. *You are welcome to discuss capabilities and demonstration of other work – but we cannot discuss or talk about specific needs or allow this meeting to become a requirement gathering session.*

## 10. Cost Estimates

An estimated procurement cost is required for all purchases and is intended to provide an idea of the range of goods or services to be included in the SOW.

Best Practice: Assign staff to Contract Management Team with knowledge in subject area to assist with cost estimate.

Best Practice: Certified Contract Developers should be requesting and receiving quotes, but if vendors are contacted by non-certified staff, *be sure* to say you are obtaining price estimates for information purposes only and the estimate is not a formal solicitation or procurement.

Best Practice: When getting price estimates check with your contract developer prior to contacting a vendor to ensure any information shared does not result in an unfair competitive advantage, which could cause procurement delay or cancellation.

## 11. Procurement Lead Time

To execute a contract before the anticipated need for the goods or services, the Contract Management Team, led by the Contract Developer, should use the following lead times as an initial guide when establishing a Procurement Schedule and include each step in the solicitation planning process.

<b>TASK</b>	<b>SUGGESTED LEAD TIME FROM CONTRACT START DATE</b>
Begin Preparation of Solicitation Documents– Program staff works	180 days
Solicitation Documents Completed	150 days
Advertise and Issue Solicitation	145 days
Receipt of Responses	115 days
Evaluation of Responses	60 days
Contract Negotiation (if allowed) and Formation	50 days
Contract Execution – All signatures are obtained	15-50 days
Performance Begins (effective date)	0 days

Lead times are recommendations only and may vary depending on the specific requirements, the complexity of the contract, and the workload of C&P Services and program staff. Less complex procurements may be accomplished in less time, while more complex procurements may require more time.

If the procurement is complex, requires exemptions or approval by other state agencies, or requires a proposer submit significant documentation and/or complex pricing, additional time for the solicitation should be given.

- Evaluation of the bids or proposals may take more or less time, depending on the size of the Contract Management Team and the complexity of the evaluation. The evaluation period could also increase if oral presentations, discussions or best and final offers are planned.
- Contract negotiation and formation timeframes may vary depending on the complexity of the procurement.
- Depending on the approval and signature requirements the contract execution lead time may need adjusting.

## Procurement Phase

### Preparing the Solicitation

After the Contract Management Team determines which solicitation method is appropriate, the solicitation documents are prepared.

The Contract Management Team involved in preparing a solicitation, any Program Staff reviewing the solicitation, and any other person who is involved in the procurement process must sign and return a *Disclosure of Potential Conflicts Statement*.<sup>4</sup>



### Specifications

A specification document should include the following:

1. Table of Contents
2. Introduction
3. Background Information
4. Schedule of Events
5. Definitions
6. Solicitation Requirements
7. Solicitation Procedures
8. HUB Subcontracting Requirements and Small and Disadvantaged Business Requirements
9. Statement of Work
10. Evaluation and Award Process
11. Contractor Questionnaire
12. Terms and Conditions and a Sample Contract
13. Preferences
14. Execution of Offer
15. Affirmations and Conflict of Interest
16. Pricing Submittal Form
17. Exhibits

The specifications for a Request for Proposal Process or a Request of Qualification process will be much more comprehensive than the specifications for an Invitation to Bid or a Request for Quote.

### Organize the Statement of Work

The Statement of Work (“SOW”) is very important as it forms the basic framework for the resulting contract. The SOW is a detailed description of the conceptual requirements for the procurement of goods or services. The SOW is included in the specifications. The success or failure of a contract can usually be linked to the adequacy of the planning, analysis, and thoroughness of the SOW. Time spent planning, analyzing, and drafting the SOW will improve the quality of the goods or services provided. If it’s not in the SOW, it’s not under contract.

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<sup>4</sup> Get correct name of the disclosure.

It is important that the SOW:

1. Secure the best economic advantage using Best Value;
2. Be clearly defined;
3. Be contractually sound;
4. Be unbiased and non-prejudiced toward potential proposers;
5. Encourage innovative solutions to the requirements described, if appropriate; and
6. Allow for free and open competition to the maximum extent reasonably possible.

Divide the SOW by organizing each of the general contracting objectives into logical parts. Contracts are often divided into phases, such as:

1. Planning;
2. Development;
3. Implementation and Operation;
4. Installation;
5. Testing;
6. Operation; and
7. Maintenance.

The phases should support the subject matter and purpose of the contract. Phases can be further divided into small components of work (segments) and Deliverables can be defined within each segment.

## Characteristics of Effective Specifications

A specification is a description of the requirements for a good or service that the requesting division seeks to procure and is also a description of what a vendor must submit to be considered for an award. Specifications should be:

1. **Simple:** Avoid unnecessary detail but be complete enough to ensure that requirements will satisfy the intended purpose.
2. **Clear:** Use consistent terminology that is understandable to Program Staff and to potential Contractors. Use correct spelling and appropriate sentence structure to eliminate confusion. Avoid legalese type language and jargon whenever possible.
3. **Accurate:** Provide accurate units of measure compatible with industry standards and that are specific to the goods or services being requested.
4. **Competitive:** Draft specifications that encourage competition and provide opportunities for cost savings. Avoid additional requirements that could reduce or discourage vendors.
5. **Flexible:** Avoid inflexible specifications that prevent acceptance of a Response that could offer greater value.

## Specification Types

Two of the most common specification types are: Performance Based Specifications and Design Specifications.

## Performance Based Specifications

Performance based specifications focus on outcomes or results rather than process, and the required goods or services rather than how the goods or services are produced. Performance based specifications allow vendors to bring their own expertise, creativity, and resources to the procurement process without restricting them to predetermined methods or detailed processes. Performance based specifications are fashioned so that vendors are allowed maximum flexibility when satisfying the requirements of a solicitation.

## Design Specifications

Design specifications focus on resources and outline exactly how the Contractor must perform the services or how the goods are made. Design specifications limit flexibility. Design specifications are appropriate for the purchase of low cost, low risk goods or services as determined by the Contract Management Team.

## Elements of a Deliverable

Deliverables defined in a solicitation may include the following elements:

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

The SOW should provide a clear and thorough description of the goods or services to be provided. If appropriate, provide the environment where the goods or services will be used. In certain types of procurements, it may be important to describe the business processes and operating policies and procedures. If the existing business process will change because of the procurement, then also describe what the business process will be after the procurement objectives are completed. If the procurement requires the vendor to recommend new business processes, this information must be included in the solicitation.

## Contract Term

The maximum contract term must be established prior to solicitation and must be included in the solicitation document. All Contracts must have an effective date and an expiration date. Options for renewals must be clearly defined as to the number and length of each potential renewal. Automatic renewals are not allowed. Failure to timely renew will result in termination of the contract and loss of the goods or services under contract.

## Historically Underutilized Business (HUB) Requirements

TDLR is required to make a good faith effort to utilize HUBs in contracts. This obligation can be achieved through contracting directly with HUBs or indirectly through subcontracting opportunities in accordance with [Texas Government Code, Chapter 2161, Subchapter F](#) and [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B](#).

The Contract Management Team must determine whether subcontracting opportunities are probable under a contract with an expected value of \$100,000 or more over the life of the contract (including any renewals), [Texas](#)

[Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B, Rule § 20.14 \(a\).](#)

For solicitations and contracts with an estimated value greater than \$100,000, in which the Contract Management Team determined there are subcontracting opportunities, HUB subcontracting forms must be submitted or the response will be considered non-responsive. [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B, Rule § 20.14 \(b\).](#)

## Payment Types

The method of payment has a direct impact on how the SOW is written and how a contract is managed. The Contract Management Team must measure or verify that the work is complete and how much and how often TDLR will pay the contractor.

As with specification types, there are also various payment types. Payments should be consistent with the type of goods or services delivered. Payments should be structured to fairly compensate the contractor and encourage timely and complete delivery of the goods or services. As a rule, payment should be approximately equal to the value of the delivered goods or the completed services.

1. Cost Reimbursement- reimbursement of allowable costs in accordance with the approved budget. May be associated with grants. Example: Contracts for Services.
2. Cost Plus Incentives – Contractor’s costs plus a percentage of cost or cost plus a fixed fee. This type of payment is usually discouraged as there is no incentive for the Contractor to minimize the cost to the Institution. Example: Construction Projects.
3. Fee for Service – A specific fee for a unit of Service. Payments are made for each unit of Service completed. Example: Providing Flu shots.
4. Firm Fixed Price –A firm fixed price at the time the contract is awarded. Contractor carries all risk as the payment does not change, regardless of how much it costs the Contractor to provide the goods or services. Example: procurement of furniture
5. Firm Fixed Price with Escalator – Similar to the Firm Fixed Price except that it includes a provision for price escalation. Escalators are usually based on the Consumer Price Index.
6. Progress – Payment is based on pre-established Deliverables. The Deliverables must be measurable. Example: A search firm agreement.
7. Time and Material – Payment is based on the number of hours worked for a specific SOW. Example: Services of an electrician.

## Other Payment Provisions

- i. Travel - the reimbursement of travel expenses should generally be limited to the rates allowed by the General Services Administration (GSA) or the State of Texas unless otherwise agreed to in writing.
- ii. Payment Discounts - Institutions should encourage Responses to include payment discounts such those for prompt payments, centralized receiving, or limited weekly deliveries.

In addition, the contract management team may obtain cost savings by requiring electronic invoicing and payment. These incentives or requirements must be defined in the SOW.

## Define TDLR's Program Staff Role

Clearly define the role TDLR staff will play in the work to be performed and any specific contributions, resources, or tasks the staff will provide.

Detail any background data or work already accomplished that the anticipated contract will build on and make it available during the solicitation phase of the procurement. Specify whether the vendor should rely on the accuracy of any such background data or work or whether the data or work is provided for information purposes only.

If provided for informational purposes only, state whether the vendor is responsible for verifying the accuracy of the information to the extent necessary to perform the contract.

Define the roles of the Contract Management Team who will administer the contract and monitor the contractor's progress.

## Quantity

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

## Quality

The solicitation document must identify the level of quality required for acceptable performance.

## Established Standards

If established standards (international, national, State, local) are available, they can be used to assist in defining the contract performance requirements.

Examples of national and international standards include American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM) and International Organization for Standardization (ISO).

Using established standards provides consistency in measuring acceptability, quality or accuracy of the performance of one or more parties to the contract. If an industry standard is used, specifically identify the standard.

## Warranties

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

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

*Best practice* is to include clear standards for the contractual performance or an express warranty describing the objective expectation of performance rather than relying on an implied warranty.

Generally, it is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty. However, a mere affirmation of the value of the goods or a statement of the seller's opinion or commendation of the goods or services does not create a warranty.



## Contractor Qualifications

The SOW should specify the minimum qualifications required of the vendor. At a minimum, the SOW should require that the vendor have a specified level of experience, certification, or training in the type of goods or services to be delivered as determined by the Contract Management Team.

## Insurance Requirements

The Contract Management Team must evaluate risks associated with each solicitation and include any insurance or bond requirements in the specifications or SOW to mitigate or eliminate the risks.

## Evaluation Criteria

The solicitation document must inform vendors how a solicitation response will be evaluated. The evaluation criteria must reflect the essential qualities or performance requirements necessary to achieve the objectives of the contract.

The criteria should allow the Contract Management Team to fairly evaluate the responses. Evaluation criteria may include factors such as the:

- written response,
- oral presentations,
- documented past performance of the Respondents,
- reciprocal preference, and
- references relevant to the contract.

Specific portions of the required response should directly relate to the evaluation criteria. To ensure fairness in evaluation, the evaluation criteria are to reflect only those requirements specified in the solicitation document.

The language within the solicitation will determine the scope of the evaluation criteria and the flexibility the Contract Management Team will have when evaluating proposals. So, the evaluation criteria should not be unduly restrictive. Vendors must have notice in the solicitation of all requirements.

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

## Best Value Considerations

Best Value considerations must be included in the specifications.

The lowest cost is not necessarily the Best Value for all procurements. For example, a good or service of higher quality, such as a longer life span, may be a better value and investment for TDLR, even if the initial cost is more. The Contract Management Team should:

- think strategically when considering procurement needs, and
- consider long term needs.

Best Value may include:

1. Installation costs;
2. The long-term cost to TDLR of acquiring the goods or services;
3. The quality and reliability of the goods or services;
4. Delivery terms;
5. Contractor's past performance and experience;
6. The reputation of the Contractor and of the Contractor's goods or services;
7. The extent to which the goods or services meet the TDLR's needs;
8. The Contractor's past relationship with TDLR;
9. The impact on TDLR to reach HUB goals and procure goods or services from persons with disabilities;
10. The cost of employee training;
11. The effect of the procurement on strategic initiatives and long-term planning;
12. The Contractor's anticipated economic impact to the region;
13. Other factors relevant to determining the Best Value for TDLR; and
14. Any relevant factor that a private business entity would consider in selecting a Contractor.

## Proposal Submission Requirements

The specifications must include a listing of all the required information that vendors must submit with their response to assist in submitting a complete response.

Additionally, recommended or required response formats must be specified in this section, such as order of information, page number limitations, and electronic format. If hard copy responses are permitted, the Contract Management Team may want to specify the size of paper, number of copies, etc.

## Monitoring

The methods used to monitor contractor performance must be clearly stated in the solicitation to give contractors notice if requirements include producing time-consuming reports or maintaining stringent testing requirements outside normal industry parameters. The Contract Management Team may develop and include a monitoring strategy in the solicitation. The amount of monitoring should be balanced and adequate to meet the need, but limited in type, scope and frequency sufficient to achieve the desired result without unnecessarily increasing costs. Overly restrictive oversight can interfere with the contractor's ability to accomplish the work and may unnecessarily and inadvertently increase the cost of the work.

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

## Reporting

Status reporting describes information that a contractor must provide to evidence the performance of a contract. Status reporting must be defined in the SOW and should include content, frequency, and audience for each report. A status report describes the level of completion of the work and/or the cost of the contract. Percent complete is often used to describe status. For the report to be useful, a baseline should be established for timelines and budgeting.

If deliverables are specified, include the format of the deliverable and the quantity required. For example, if a

deliverable is a final project report, state how many copies of the report are needed and specify the format of the report. Provide details of all items that must be included in the report. These requirements are usually addressed in the SOW within the solicitation.

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

## Inspection and Testing

The SOW must provide any requirements for inspection and testing and the Contract Management Team must describe provisions for inspection and testing of goods or services purchased under the contract.

Tests may be performed on samples submitted from regular shipments.

All external costs of inspection and testing should be borne by the contractor. In the event inspected and tested goods or services fail to meet or exceed all conditions and requirements of the contract, the goods or services should be rejected in whole or in part and must be replaced at the contractor's expense.

Latent defects can result in cancellation of a contract. "Latent defects" are those that are not known by or expressly disclosed to TDLR or not discoverable by a reasonably prudent inspection.

## Final Acceptance

The SOW must clearly define how TDLR will determine that a contract has been satisfactorily completed. The SOW sets a standard for acceptance of the goods or services and establishes a procedure to accept or reject the goods or services based on specific factors. A formal acceptance process for each requirement in a contract allows the contract manager and a contractor to monitor contract performance.

## Additional Issues to Consider

Below are additional issues the Contract Management Team should consider when preparing the SOW. The Contract Management Team should consider the effect on costs when including these items:

- Licenses or permits required;
- Use of TDLR equipment;
- Storage space for Contractor materials or supplies;
- Intellectual property or copyright issues;
- Subcontractor requirements; and
- Conflict of interests and other organizational restrictions.

## Advertising Solicitation and Communicating Content with Eligible Vendors

When marketing or posting solicitations, consideration must be given to the type of procurement method used. The Contract Management Team should refer to the appropriate statute to ensure the proper advertising or posting procedures are followed.

Typical methods for communicating or advertising procurement solicitation include posing to the: (1) Centralized Master Bidders List, (2) Electronic State Business Daily, (3) Texas Register, (4) TDLR's website, (5) Pre-solicitation Conferences, (6) Communication with Respondents, (7) Written Questions, (8) Ineligible Barred Vendors, (9)

Solicitation Submission and Opening, (10) Professional Services, (11) Mixed Services, and (12) Architectural, Engineering, or Land Surveying Services. A brief discussion of each follows:

### Centralized Master Bidders List (CMBL)

The CMBL is an electronic mail list administered by the Comptroller which is a database of contractors registered by commodity codes that have provided information for the primary contact, commodity codes, and the goods or services they provide. The Contract Management Team may use the list to solicit bids or proposals from contractors registered on the CMBL.

### Electronic State Business Daily (ESBD)

The Electronic State Business Daily (ESBD) is an internet-based resource used for posting procurement opportunities. It is also administered by the Comptroller. The Contract Management Team can use the ESBD to solicit procurements to vendors on the CMBL. The ESBD is available on the internet at <http://esbd.cpa.state.tx.us/>.

### Texas Register

The Texas Register is used to advertise various types of procurements as required by statute; such as [major consulting contracts](#). The [Texas Register](#) is administered by the Secretary of State's Office.

### Required Posting of Certain Contracts

For each contract for the procurement of goods or services from a private contractor, TDLR must post on its website:

1. Each contract TDLR enters into until the contract expires or is completed, including contracts entered without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor;
2. For contracts that are not competitively bid or are entered into without compliance with competitive bidding procedures, the statutory or other authority under which the contract was awarded and executed; and
3. For Contracts that were the subject of competitive procurement, the Request for Proposal or Invitation for Bid until the contract expires or is completed.

These requirements will not apply to a memorandum of understanding, interagency contract, interlocal contract, or a contract for which there is not a cost.

### Pre-solicitation Conferences

The Contract Management Team may conduct mandatory or non-mandatory pre-solicitation conferences. Careful thought should be given to the use of a mandatory conference because it may limit competition. Conferences should be mandatory only if an on-site visit is required to have a full understanding of the procurement or if the solicitation is so complex that the Contract Management Team believes attendance is critical for potential respondents to fully understand the procurement.

Pre-solicitation conferences provide a forum for the Contract Management Team to respond to questions regarding a solicitation. The benefits from conducting pre-solicitation conferences include:

1. The conferences allow potential respondents to address specific questions or concerns with the

solicitation. If any issues are identified at the conference, the Contract Manager will publish an Addendum to the solicitation.

2. The conferences provide an opportunity to explain the solicitation process and detail the submittal requirements.
3. Conferences are important when there is a need for on-site visits by respondents prior to submitting their response. In some cases, it may be sufficient to take digital pictures of the sites and provide this information in a slide presentation at the conference in lieu of the conference attendees traveling to the various sites. A copy of the slide presentation can be provided to the conference attendees and be posted online.
4. Conferences provide a forum for the Contract Management Team to provide additional information, schematics, plans, reports, or other data that is not easily transferable or distributed.
5. Subcontracting relationships may develop through the contacts established at the conferences.
6. Respondents attending will all receive the same information.

The solicitation document must indicate the date, time, and location of the pre-solicitation conference. Attendance at conferences must be documented through a sign-in sheet. Sign in sheets are especially important if the conference is mandatory since the Contract Manager can use the sign-in sheet to document vendor attendance at the conference.

The contract manager will conduct the conference, in coordination with the Contract Management Team.

It may not be possible to answer all questions at the conference. In these circumstances, the answers may be provided as an addendum. The Contract Manager should record minutes of the pre-solicitation conference.

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

Below is a typical agenda for a pre-solicitation conference:

1. Opening - Contract manager introduces Contract Management Team and explains their roles in the procurement process.
2. Introduction - Attendees introduce themselves and identify the company they are representing.
3. Solicitation Overview/Review - This is the focus of the conference. The key components of the solicitation document are to be addressed, but it is not necessary or recommended to read the entire document.
4. Questions and Answers – Questions may be written and the responses recorded for posting through an addendum. If questions are taken orally, the oral questions should be recorded as well as the responses.
5. Closing Summary – Summarize the changes that were agreed to be made through the issuance of an addendum. Review any unanswered questions to be addressed later. Remind attendees that no oral changes are binding; the changes must be in the form of a written and published addendum.

## Communication with Respondents

All communication with potential respondents comes through the Contract Manager or other designated procurement or program staff as stated in the solicitation document. The solicitation document must identify a single point of

contact within Procurement Services and describe all applicable forms of communication such as telephone, email, etc.

Should a potential respondent contact other TDLR personnel, they must politely decline to discuss the procurement and advise the respondent to contact the appropriate person. While the contract manager or other designated personnel may not be able to answer all of the technical questions posed by potential respondents, they will post the information online and distribute it to all registered potential respondents.

A respondent that contacts someone other than the authorized Contract Manager or other designated procurement personnel regarding a solicitation may be disqualified.

## Written Questions

The solicitation document may invite respondents to submit written questions concerning a solicitation. This option may be in addition to or in lieu of a pre-solicitation conference.

The date and time for submission of written questions must be specified in the solicitation document, if applicable. Written questions may be submitted by mail, email, or hand delivery.

The questions and answers will be posted as an Addendum and posted.

## Barring Vendors from Participating in TDLR Contracts

Under [Texas Government Code § 2155.077](#), the Comptroller may bar a vendor from participating in State Contracts based on but not limited to:

1. Substandard performance under a contract with the State or a State agency.
2. If there are material misrepresentations by a vendor in a Bid or Proposal to a State agency or during the course of performing a contract with a State agency.
3. A contractor may be barred due to fraud or breach of a contract with a State agency.
4. If the contractor has received unfavorable performance reviews under [Texas Government Code, § 2155.089](#) or repeated unfavorable classifications under [Texas Government Code, § 2262.055](#).
5. If more than two contracts between the contractor and the State have been terminated for unsatisfactory contractor performance during the preceding three years.

If a vendor is barred from participating in State Contracts, the Comptroller must determine the period of Vendor Debarment. The period for Vendor Debarment must be commensurate with the seriousness of the vendor's action and the damage to the State's interests.

## Solicitation Submission and Opening

The solicitation documents must state the date, time, and location of the public opening, if applicable. Respondent's proposals may be evaluated on a variety of factors in addition to price. At the sole discretion of procurement services as indicated in the solicitation documentation, procurement services may choose to not conduct a public reading of the names or pricing tabulations prior to award of contract(s). The solicitation document must provide information to the vendors that the responses cannot and will not be provided prior to award of contract(s).

## Professional Services

TDLR is prohibited from using competitive bidding to purchase or award a contract for Professional Services. [Texas Government Code § 2254.003](#). The selection of a contractor or award of a contract for “Professional Services” must be based on two criteria:

1. The demonstrated competence and qualifications to perform the services; and
2. A fair and reasonable price.

Services provided by professionals that fall outside their scope of practice may be governed by other procurement requirements. For instance, consulting services provided by a certified public accountant would not be exempt as a professional service. To contract for accounting services, TDLR would follow the consulting services contract requirements.

The professional fees under the contract:

1. Must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations; and
2. May not exceed any maximum provided by law.

## Mixed Services

When a contract involves both consulting services and one or more other services, TDLR must comply with the consulting services requirements when the *primary* objective of the contract is the purchase of consulting services. For instance, if a vendor proposes to analyze TDLR’s information systems needs and develop and implement an automated information system, the primary objective of the contract is not the analysis provided. It is the delivery of a data information system. This contract is not a consulting services contract; therefore, the requirements for consulting services contracts do not apply.

## Architectural, Engineering, or Land Surveying Services

When procuring professional architectural, engineering, or land surveying Services, TDLR must follow special procedures. [Texas Government Code § 2254.004](#).

TDLR must:

1. Select the most highly qualified provider of those services on the sole basis of demonstrated competence and qualification without initially considering price; and then;
2. Attempt to negotiate with that chosen provider a contract at a fair and reasonable price.

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

1. Formally end negotiations with that provider;
2. Select the next most highly qualified provider; and
3. Attempt to negotiate a contract with a fair and reasonable price.

## Evaluation and Contract Award

The Evaluation Team must conduct evaluations in a fair and impartial manner consistent with Texas law governing procurement, purchasing, and contracts.

The purpose of an evaluation process is to identify solicitation responses that are responsive and to have sufficient and accurate information to make a sound decision about the vendor's ability to provide quality and timely goods and services within the statement or scope of work.

As previously discussed in the Procurement Phase, the Request for Proposal and Request for Qualifications solicitation documents will include a general description of the evaluation process, the predetermined evaluation criteria, and the relative weights to be assigned to each evaluation criterion.

The responses will be evaluated on written criteria in addition to cost. In the RFP process, the Evaluation Team will determine the best overall value to TDLR. In the RFQ process, the Evaluation Team will determine the best qualified response(s) in accordance with the specifications.

In an Invitation for Bid process, the Evaluation Team will evaluate if the bidder is (1) responsive in accordance with the requirements and (2) if a response complies with the specifications. A contract will be awarded to the bidder who meets the specifications and provides the lowest overall cost to TDLR.

## Evaluation Team

**Composition and Role.** An Evaluation Team will be comprised of three to five members. The team members should fully understand the requirements of the solicitation, be able to critically read and evaluate responses, and to document their independent judgments concisely and clearly in accordance with the evaluation criteria.

**Size of Team.** The recommended size of an Evaluation Team is three to five members. However, some projects may require additional members or additional teams due to the nature of the procurement. To avoid potential bias, an Evaluation Team should not be less than three members.

**Team Training.** Before evaluating responses, the Contract Manager will meet with the Evaluation Team and outline the team's duties and responsibilities, specifically including the critical nature of confidentiality to the integrity of the evaluation process. Each Evaluation Team member must sign and provide a Non-Disclosure and Conflict of Interest Form to Procurement Services prior to any activity as a team member.

The Contract Manager will review all evaluation criteria with the team members and explain how the evaluation process will be conducted. Each Response must be evaluated individually against the requirements of the solicitation document. Each solicitation document response is considered independently of all others.

## Scoring Matrix

A Scoring Matrix is used by the Evaluation Team members to score individual responses based on the specifications and evaluation criteria defined in the solicitation document. A Scoring Matrix must be completed prior to the evaluation. The Contract Manager must provide instructions and guidance for completing the Scoring Matrix.

## Responsive Submissions

After all Responses are opened and recorded, Procurement Services makes an initial administrative review to determine if the responses submitted are compliant. At a minimum, this review must include confirmation of the following:



- signed affirmation and Conflict of Interest disclosure,
- HUB subcontracting plan,
- bonds and evidence of insurability,
- any other required documentation in accordance with the specifications, and
- that the minimum qualifications are met.

Consultation with General Counsel is sometimes necessary to determine a Proposal's responsiveness.

Only those responses deemed responsive and in compliance with the mandatory requirements of the solicitation will be sent to the Contract Management Team.

## Rejection of Responses

If TDLR receives less than three responses to a solicitation, TDLR may elect to:

- a) accept the responses,
- b) extend the opening, or
- c) reject the responses and reissue the solicitation.

The Contract Management Team must include language in the solicitation document which defines TDLR's rights in this situation. Proper documentation must be retained to fully support all actions leading to rejection of the response.

If TDLR elects the reissue the solicitation, the specifications should be reviewed for any unduly restrictive or burdensome requirements.

## Proposal and Qualification Evaluations

After responses have been reviewed and found responsive, the Contract Management Team must be provided with the qualified Responses. When possible, evaluations should be conducted in the same room at the same time. This will facilitate communication between the team members and provide a controlled environment for the evaluations. If not feasible, the evaluation can be conducted via electronic communications with key team members available to answer questions. All written and oral evaluation questions should be presented to the Contract Management Team leader to seek answers to such questions.

Once evaluations are complete, the team leader will collect the evaluation Scoring Matrix from each team member. The Contract Management Team leader will review the Scoring Matrix and verify the accuracy of calculations for input into the final evaluation summary.

If it is apparent that one or more team members' evaluations differ significantly from the majority, the team leader should verify with all team members that the criteria were clear, and that information was not overlooked or misunderstood. If after this discussion, a team member feels that he/she did not understand the criteria, the requirement, or missed information that was included in the Response, the evaluator, at his or her own discretion, may revise their evaluation score.

Under no circumstances must any team member attempt to pressure other members to influence evaluation scores.

## References, Background, and Credit Checks

Procurement Services may verify references included in the response and conduct any other reference, credit check, or background check deemed appropriate. Procurement Services may also use the Comptroller's Vendor Performance System (CVPS) in evaluating a vendor's past performance.<sup>5</sup>

All reference, credit, or background checks must be documented in writing. Best Practice requires Procurement Services staff performing the reference, credit, or background check use a consistent *script* to provide a fair process to all respondents.

Sometimes it is difficult to obtain information from the references provided, either because the references have a policy of not providing reference information or because they cannot be reached in a timely manner. The Contract Management Team may consider using the following statement in the solicitation document in lieu of checking references for all Respondents:

*TDLR reserves the right to check references, credit, or background information prior to award.  
Any negative information received may be grounds for disqualification of the Response.*

By using this clause, TDLR is not required to check references, credit, or background information but may choose to do so. Whether or not to verify information as part of the evaluation criteria is at the discretion of the Contract Management Team.

## Oral Presentations and Discussions

Oral presentations or discussions with respondents are conducted at the discretion of the Contract Management Team, and if used the solicitation document must provide a summary of the presentation.

Oral presentations and discussions provide an opportunity for respondents to highlight the strengths and unique aspects of their response and to provide answers to questions the Evaluation Team may have regarding the response. Demonstrations of product functionality are recommended when appropriate, such as information technology procurements or solution-based procurements.

Oral presentations and demonstrations can be scheduled for all respondents or limited to the top ranked respondents in the competitive range of the evaluation process as determined by Procurement Services. The competitive range must consist of those responses determined to be reasonably considered for award selection.

Oral presentations and demonstrations must be fair to all parties. The time allowed, and the format should be consistent for all presenters. Use a prepared script to help ensure consistency.

## Best and Final Offers

Procurement Services may request Best and Final Offer(s) (BAFO(s)) from the respondents in the Request for Proposal process. The BAFO serves as an official revision of the RFP Response. A provision for the BAFO process should be included in the solicitation document.

Revisions of responses are normally accomplished by formally requesting BAFOs after the initial evaluation process or at the conclusion of oral presentations and discussions with a deadline set for receipt of BAFOs and including instructions as to exactly what is to be submitted in response to the BAFO. After consideration of all BAFO responses,

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<sup>5</sup> [http://www.window.state.tx.us/procurement/prog/vendor\\_performance/](http://www.window.state.tx.us/procurement/prog/vendor_performance/)

the Evaluation Team may recommend the best value respondents with which to start negotiations.

## Negotiations

In every contract, there are usually terms or conditions that each party may be willing to negotiate. The first step in the negotiation process is determining the best value responses. Then, the Contract Management Team must identify the terms and conditions that are essential, desirable, or subject to negotiation.

The Contract Management Team may negotiate terms and conditions in some solicitations and not in others. For example, the Invitation for Bid method does not allow negotiations unless only one (1) Bidder submitted a bid, while the RFP method does allow negotiations.

Other competitive processes generally contemplate and allow a certain amount of negotiation. Whether or not the solicitation process permits negotiations will be determined by Procurement Services and General Counsel.

*Practice Note:* A request for a Respondent to clarify an Offer is not the same as negotiating about specifications or terms and conditions so long as the request to clarify does not provide one respondent an advantage over another.

*Beware:* Technical leveling or technical transfusion techniques are prohibited.

- Technical leveling is helping a respondent to bring their response up to the level of other responses through successive rounds of discussion, usually by pointing out response weaknesses.
- Technical transfusion is the disclosing of technical information or approaches from one response to other competitors in the course of discussion:
  - Prohibited disclosures include:
    - disclosing competing respondents' cost or prices (even if the disclosure is made without identifying the other respondent by name); and
    - advising a respondent of its cost or price standing relative to other respondents.<sup>6</sup>

*Care must be taken* to avoid inadvertently changing the specifications resulting in an advantage to one or more respondents.

## Negotiation Strategies

Negotiation strategy must be tailored to the facts and circumstances of the solicitation. In the event of unsuccessful negotiations, the Contract Management Team may continue negotiations with the next Best Value Contractor until the best interest of TDLR is achieved which may result in either an award or termination of negotiations.

Like other parts of the contract management process, planning is essential to conducting a successful negotiation. Members of a Contract Management Team should determine which business terms and conditions are essential and those that may be negotiated. The General Counsel will identify the terms and conditions that are essential to the contract or are mandated by law, regulation or best practice. These are the terms or conditions upon which the Contract Management Team is unable to negotiate or compromise.

*Do not* provide the list of essential or other prioritized issues to the respondent because the list will offer a negotiating advantage to respondent. Before meeting with the respondent, review any objections to the contract terms and

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<sup>6</sup> [See Texas Government Code § 552.153 \(b\)\(2\)\(C\)](#)

conditions. The objection should explain why the respondent is objecting to each term or condition.

Be prepared to explain why a term or condition is essential or objectionable and *place the burden on the respondent* to identify an alternative solution that meets TDLR's needs. Do not feel pressured to agree or disagree to a single term or condition without considering the impact of all negotiated terms and conditions within the context of a final agreement. When all negotiated terms and conditions are completed, consider any resulting new risks, costs, or benefits.

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

1. What does TDLR want, specifically? (Can it be obtained without undue risks?)
2. What will the term or condition, specifically, do for TDLR? (Examining this aspect may provide common ground to explore options that meet the needs of both parties.)
3. How will the Contract Management Team know, specifically, when TDLR has received what it wants?

If the parties cannot reach an agreement, the Contract Management Team should start negotiations with the next respondent.

*PRACTICE NOTE:* Once the Contract Management Team starts to negotiate with the next best value respondent, it cannot return to negotiate with any of the respondents with which negotiations failed.

## Award

The Contract Management Team must recommend award of a contract for goods or services that provides the Best Value to TDLR, in compliance with the specifications and scope or statement of work.

When authorized, Procurement Services may issue a Purchase Order to serve as the agreement between the parties. The terms and conditions of the Purchase Order will state that it governs over a response, a quote and any other document provided to or by a respondent.

After award of a contract, Procurement Services must notify all respondents.

## Contract Formation

The purpose of this chapter is to provide general guidelines regarding contract formation.<sup>7</sup> There are many variations and exceptions to these general instructions. Consult the General Counsel for any questions about applicable statutes, regulations, and operating policies and procedures.

### Approach to Contract Formation

The purpose of a written contract is to document the agreement of two or more parties to prevent misunderstanding and conflict. If properly formed, a contract creates a legal, binding, and enforceable set of obligations for the contracting parties. Without a clearly formed contract, conflicts may arise well into the contract period.

Therefore, it is important that the parties document clear terms and address potential issues as completely as possible. The person who drafts the contract must understand the subject matter and concerns of the parties well enough to anticipate potential areas of disagreement and specifically address them in the contract.

Once signed, it may be difficult to amend unclear terms or add terms to address issues since all parties must agree to any changes.

### Elements of a Contract

The basic and essential elements necessary to form a binding contract are:

#### Offer

The present intent and willingness to enter into a bargain. A party must show the following to prove that an offer was made,

- The offeror intended to make an offer,
- The terms of the offer were clear and definite, and
- The offeror communicated the essential terms of the offer to the offeree;

#### Acceptance

Once there is a valid offer, there must then be acceptance of that offer. A valid acceptance must show the following:

- The acceptance was made before the offer lapsed or was revoked by the offeror,
- The manner which the acceptance was made strictly complied with the terms of the offer,
- The acceptance was communicated to the offeror, and
- The form of the acceptance was clear and definite.



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<sup>7</sup> This is not a comprehensive discussion of the nuances of contract formation. Rather this is a general discussion about the subject enabling staff to recognize the need to seek General Counsel advice.

## Mutual Assent

Also known as a “meeting of the minds” - requires “a mutual understanding and assent to the expression of the parties' agreement.” The parties must agree to the same thing, in the same sense, and at the same time; their agreement must be based on “an objective standard, considering what the parties did and said, not their subjective states of mind.”

## Communication

Ensures that each of the parties has consented to the terms of the contract.

## Execution and Delivery

Evidence of intent that the document become mutual and binding on the parties.

## Consideration

Also known as “mutuality of obligation” -- is a present (not past or future) bargained-for exchange of promises. It can consist of a benefit to the promisor or a loss or detriment to the promisee.

*NOTE:* a contract is **not** formed if the underlying purpose of the agreement is illegal or if a party is legally incompetent, which would negate elements of formation.

## Drafting the Contract

Contracts typically include standard terms and conditions, often referred to as ‘boilerplate’ or ‘standard’ terms and conditions. This chapter provides reference to standard terms and conditions.

Appropriate terms included in a contract will fully describe the actual agreement of the parties. Some provisions that are typically included in Contracts include, but are not limited to:

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

*Best Practices.* Use (Boilerplate) templates drafted and approved by the General Counsel. If language in the boilerplate appear inappropriate for your solicitation, talk to the General Counsel before making changes.

## Planning for the Contract

Just like other contract management processes, the Contract Management Team must plan for drafting contracts allowing adequate time to prepare and review the final contract. A best practice is to include a draft of the standard TDLR contract in the solicitation document. This allows the respondent to make an offer with knowledge of the proposed contractual terms and conditions.

Some recommended planning steps are:

- Collect and review similar contracts. Do not automatically adopt terms and conditions from another contract without a thorough and independent review of how the terms and conditions relate to the current procurement. Studying risks, contracting objectives, assumptions, and constraints in other contracts may be helpful.
- Prepare an outline containing headings for the major terms and conditions. This makes it easier to group related terms and conditions. An outline will also illustrate gaps in the structure of the contract.

## Form of the Contract

An agreement can be in the form of a contract, with recitals, negotiated terms and signature blocks, but Purchase Orders are also considered contracts. Each of these forms has advantages and disadvantages. Determining which format is appropriate should be based on an assessment of the risks involved.

## Formal Contract

A formal contract offers the greatest opportunity to avoid conflicting provisions, because all the terms and conditions are negotiated, contained in one document and both parties sign the document. Contract Management is sometimes easier when all the provisions regarding the duties, obligations and responsibilities of each party can be logically organized and easily found. On the other hand, formal Contracts require more time to plan, prepare, and review.

## Purchase Order

A Purchase Order uses a layered approach, i.e., the Purchase Order usually relies on several documents that in combination, constitute a contract. Applying the formation rules in a simple manner, a contractor delivers an offer, in a form of a quote or a solicitation response, and TDLR indicates acceptance of the offer by issuing a Purchase Order with standard terms and conditions attached. Together these various documents comprise the offer and acceptance and evidence of the basis of an agreement.

There is potential for conflicting or additional terms among the various documents. When used properly, a Purchase Order is quick and efficient, but TDLR standard terms and conditions need to clarify which document governs in the event of conflicting language. When using a Purchase Order as evidence of a contract, Procurement Services will use its terms, rather than accepting terms a contractor proposes.

## Contract Terms

There are certain terms and conditions that are essential and many that must be included in all Contracts. Please consult General Counsel regarding questions related to the applicability of contract terms and developing standard terms and conditions.

## Binding Signatures

A threshold issue in government contracting is whether an agency has statutory authority to contract. Do not presume or rely on the implied authority of an officer or agency to contract. Only persons having actual authority to act on behalf of TDLR can bind the agency in a contract. The powers of all state officers are set by law. All persons dealing with TDLR must know the limits of their authority and determine if the contemplated contract is within their statutory authority.

Occupations Code 51.103(c) says:

[t]he executive director may delegate any power or duty assigned to the executive director unless prohibited by statute or rule.

Consistent with Section 51.103(c), the Executive Director executed Delegation Memos authorizing the execution of certain contracts by the Deputy Executive Director and other members of staff. C&P Services will confirm that each contract is signed by an authorized signatory.



## Contract Administration

### Contract Administration Plan

A Contract Administration Plan (CAP) is required for any procurements involving complex purchases if the contract-related sections of the Acquisition Plan may not be adequate to define contract management activities and expectations. The CAP is meant to be a first line resource for the Contract Management Team. The CAP is initiated during the Planning phase and then modified after award. During the Contract Management Phase, the Contract Manager will update the CAP in consultation with the Contract Management Team. Contract Administration Plan, Appendix 3.



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

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

The primary tasks of contract administration include:

- Verifying contractor performance for purposes of payment;
- Determining if there needs to be any changes in the scope of work, or length of contract, or costs
- Identifying any material breaches of the contract by assessing the difference between contractor's actual performance and contract requirements;
- Contract management, and dispute resolution;
- Determining if corrective action is necessary and taking action, if required; and
- Developing a completion plan for contractor exit requirements, including acceptance of the goods/services, final payment, and contract close-out.

### Planning

The goal of contract administration is to ensure the contract is satisfactorily performed by contractor and the responsibilities of the contract parties are properly discharged. Effective contract administration helps to minimize (or eliminate) problems, disputes and claims. Effective contract administration begins before the solicitation is issued with the development of a clear and concise SOW. The SOW is the roadmap for contract administration.

Procedures for contract administration should be described in the solicitation. At the same time, the Contract Management Team should appoint, coordinate and schedule resources for the contract administration team that will assist the contract manager with performance of contract administration procedures.

To properly plan for contract administration, the contract manager and C&P Services must thoroughly understand all of the components of the solicitation and the contract. Examples include:

- Proposed contract outcomes and related performance measures.
- Scheduling for deliverables, if applicable.
- Links between the payment schedule and significant deliverables.
- Total contract cost, including any indirect cost allocation for the goods/services to be provided under the SOW.
- Identification and management of potential contract risks.
- When, where, and how the contract is to be performed, including delivery of goods/services.
- TDLR's right to inspect and accept or reject the goods/services, as well as any conditions related to acceptance or rejection.
- Effective date, completion date, contract term extension options, and other dates applicable to contract performance.
- Contractor's contact information for correspondence, payment and notice (including address, email, telephone and fax and other contact information).

## Statement of Work

Contract administration begins with the development of a clear and concise SOW. The SOW is the roadmap for contract administration. The goal of contract administration is to ensure the contract is satisfactorily performed by contractor and the responsibilities of the contract parties are properly discharged. Effective contract administration helps to minimize (or eliminate) problems, disputes and claims.

## Communication

Communication is a critical factor in successful contract administration. It is essential for the Contract Administration Team to (1) understand the provisions of the contract, (2) communicate contractual obligations to all parties involved, and (3) closely monitor contract performance over the entire term of the contract. The contract manager's role includes ensuring, to the extent possible, that the contract requirements are satisfied, that the goods/services are delivered in a timely manner, and that the financial interests of the Contract Management TTDLR are protected.

## Familiarity with Contracting Principles

Contract managers must be aware of and understand general contracting principles because those principles impact the Contract Management Team's responsibilities in administering the contract.

## Risk Management

To help manage contract risk for contracts, the Contract Management Team should complete a preliminary risk assessment to (1) document the Contract Management Team's initial perception of the level of risk, (2) identify specific risks, (3) determine the level, type and amount of management oversight and resources needed to plan and implement the contract from beginning to end, and (4) identify and assign experienced staff to assist with the contract management process.

As the risk associated with a particular contract increases, the level and degree of executive management sponsorship, participation and oversight should be increased by a corresponding level.

## Assessment of Contract Risk

Risks are inherent in all the stages of the contract. Limited resources (time and money) necessitate the use of contractual risk assessment tools because there is not sufficient time to oversee all aspects of every contract. An effective risk assessment model will help focus contract monitoring resources on contractors with the highest risk of noncompliance.

The contract risk assessment is a dynamic process that should be updated regularly to reflect the actual results of the contract monitoring program. For example, if a contractor has fallen significantly behind schedule in delivering goods/services, the risk assessment should be updated to indicate that elevated risk. The elevated risk should be incorporated into the contract monitoring program. Likewise, if a contractor is well ahead of schedule in delivering goods/services, the risk assessment and the contract monitoring program should be updated to indicate that lower level of risk.

## Risk Factors, Weights and Rating

Risk factors are indicators that assess the risk to TDLR if the contract or project objectives are not achieved. General risk factors may include:

- Contractor's past performance (and past performance of similar contractors);
- Contractor's turnover in key personnel;
- Dollar value of the contract;
- Information obtained from contract monitoring, such as the variance between contractor's expected and actual performance;
- Significant problems with contractor's invoices;
- Length of time since the last site visit, if applicable; and
- Contractor's experience performing the specific work.

Once the risk factors are identified, assign weights to each factor. Weights indicate how significant each factor is in identifying contractors who should be monitored. However, weights can also be designed to ensure statutory or policy requirements.

Next, rate each contractor on the risk factors. Consider using a three-point scale, where 3 is high risk, 2 is medium risk and 1 is low risk. Contract Management Teams should define their own past performance risk factors and weights.

Risk analysis may be used to identify contractors with the highest risk level that should be monitored more closely. Risk analysis may also be used to identify specific areas of risk within a contract that should be monitored.

## Performance Monitoring

Performance monitoring is a key function of proper contract administration that helps the Contract Management Team (1) confirm that contractor is performing all of its duties and obligations in accordance with the terms of the contract, and (2) identify and address any developing problems or issues. Performance monitoring tools should be specified in the solicitation and included in the contract. Reporting and testing are examples of contract monitoring tools. The Contract Management Team may not be able to enforce reporting or testing requirements that are not adequately documented in the contract.

## Determining What to Monitor

When determining what aspects of a contract or of contractor's performance to monitor, the Contract Management Team should consider the following questions:

- How will the Contract Management Team know TDLR is receiving the goods/services it paid for?
- How will the Contract Management Team know that contractor is complying with contract requirements?
- How will the Contract Management Team know contractor's performance under the contract is complete and the contract may be closed?

Review the contract terms, including contractor compliance requirements. Design the monitoring program to focus on contract requirements that are most important to the Contract Management Team. Generally, this means monitoring contractor's progress on the SOW, including deliverables.

Contract Management Team should consider the impact the contract payment methodology will have on the monitoring program. Under a firm fixed-price contract, the Contract Management Team should ensure that:

- The invoiced quantity of goods/services equals actual quantity received;
- The invoiced quantity and price are the same as the contract quantity and price; and
- The goods/services meet or exceed contract specifications.

## Monitoring Tools

The Contract Management Team should establish expectations so that Contract Management Team and contractor personnel understand (1) the contract requirements that will be monitored, and (2) the evaluation criteria for each contract requirement.

Monitoring tools include desk reviews, and expenditure document reviews, as well as independent monitoring by a third party. The departments' contract manager will be in charge of monitoring the contract.

## Desk Review

The contract manager/C&P Services will perform - desk reviews which include a review of reports submitted by contractor to the Contract Management Team. A desk review should include:

- Comparison of contractor's actual performance against contract requirements to confirm contractor is performing in accordance with the contract requirements.
- Comparison of contractor's actual expenditures to the Contract Management Team-approved budget to confirm contractor is complying with the approved budget.
- Comparison of the current reporting period to prior reporting periods to identify any unexplained trends and determine whether contractor is performing work significantly different during this reporting period than during the prior reporting period.
- Comparison of contractor's reports to reports from other contractors performing similar work.
- Comparison of relationships between key components of the reports such as:
  - Cost per unit of goods/services against percentage of fees charged to the contract;

- Change in variable costs for each unit of goods/services; and Reported salaries against the contract staffing plan.
- Comparison of the report to known elements of contractor's operating environment to determine, for example, if a weather emergency in contractor's geographic area increased the cost of supplies or caused a temporary reduction in units of goods/services provided.

## Expenditure Document Review

An expenditure document review includes analysis of contractor invoices (including fees for goods/services and expenses) to determine:

- if the fee rates and expenditure items are permitted under the terms of the contract, and
- if the supporting documentation (including cost reports, third party receipts for expenses, and detailed client information) adequately support the invoice.

*If contractor consistently provides improper invoices or supporting documentation is insufficient to support the invoices, consider implementing additional monitoring.*

## Use of Contract Monitoring Findings

The Contract Management Team should use monitoring tools that include appropriate steps that can be used to monitor contract findings. Monitoring reviews, audits, and investigations should be routinely used to:

- Ensure contractor takes corrective action;
- Identify common problem areas for training opportunities; and
- Improve future procurements.

Follow up helps bring contractor back into compliance with contract requirements. Follow up is essential since problems will not correct themselves through identification and reporting alone.

Contract monitoring findings should also be used to improve the contract requirements for future procurements. Unnecessary constraints or inadequate specifications should be noted for incorporation into future solicitations.

## Status Reports

If the Contract Management Team chooses to require status reports, then status reports which describe the progress of the work may be created. The content of the status report should be consistent with and track the organizational structure of the SOW (i.e. phases, segments, deliverables and products). A status report should describe status of completed work and pending work. The current status should be compared to the contract schedule. Only work that has been verified as completed and accepted should be categorized as complete. If there are any unresolved issues, those issues should be included in the status report and a resolution should be requested. If the SOW has been amended in accordance with the terms of the contract, status reports should track the original contract schedule *unless* the amendment included a revised contract schedule.

If the contract does not require contractor to provide periodic status reports, the Contract Management Team should routinely confirm that sufficient progress on the work is being made by contractor. Confirmation of work status may be accomplished by requesting a status update from contractor.

## Activity Reports

Activity reports describe all activity on the project. Project activity is not the same as a work status. A project may have a great deal of activity without making substantive progress. Note that activity reporting may also be a core feature of managing certain contracts. For example, contractor payments for outsourcing contracts may be based on the number of completed transactions. In that situation, activity reporting would be critical to contract administration of Contract Management Team payments under the contract. The contract administration team will determine when Activity Reports are needed and include the requirements in the solicitation.

## Invoices and Payments

### Invoices

Invoices submitted by a contractor must comply with the contract rate schedule. Invoices should be reviewed by the contract manager to ensure that contractor's invoices correspond with contractor's progress on the work. Contractor's progress should be measurable because cost incurred, or invoices submitted, in and of themselves, are insufficient indicators of contractor's progress.

Prior to payment, invoices must be approved by C&P Services familiar with the work and the current status of the work. If the contract manager believes that the invoice exceeds contractor's progress, the contract manager should request and receive contractor's explanation prior to approval of the invoice for payment. *Payment should be withheld pending the Contract Management Team's approval of contractor's progress.*

The C&P Services after consultation with General Counsel should give contractor written notice of invoice deficiencies not later than 21 days after receipt as required by the Texas Prompt Payment Act, Section 2251.042(a), Government Code.

### Payments

Payments must be made in accordance with Applicable Laws, including the Texas Prompt Payment Act, Chapter 2251, Texas Government Code. The Texas Prompt Payment Act requires that correct invoices be paid within 30 days after the date the correct invoice was received or services were performed and goods received, whichever is later. Under some circumstances, the Contract Management Team may be obligated to pay contractor interest on late payments.

## Change Management Process

During the term of the contract it may be necessary to amend the contract. Possible modifications include changes to notice addresses, pricing or delivery schedule. C&P Services in consultation with General Counsel will determine if the agreement needs to be amended. Only a person with delegated signature authority can amend an agreement or contract.

There are two types of amendments. A bilateral amendment requires the agreement of all parties to amend the contract. A unilateral amendment requires only the agreement of one party to amend the contract. Terms and conditions in the original contract may specify when a bilateral (agreement of all parties) or a unilateral (agreement of one party) amendment is required. If the contract is silent, then bilateral amendment (agreement of all parties) is required.

The Contract Management Team should implement an effective change management process. Failure to manage and control contract changes can result in *unintentional* modification of the SOW, extension of the schedule, increase in contract cost, circumvention of management controls or decrease of contractor accountability.

## Impact of Substantial Changes to Solicited Scope of Work

The contract resulting from a solicitation should be consistent with the specifications and requirements of that solicitation. Contract Management Team can make changes to the terms of the contract in the negotiation process as long as the resulting contract is consistent with the specifications and requirements of the solicitation. Contracts that are not consistent with the related solicitation may violate competitive procurement principles, and Applicable Laws.

If a contract change is needed, the change should also be consistent with the specifications and requirements set out in the original solicitation. A significant difference between the revised SOW and the solicited SOW would be a material or substantial change to the scope of the solicitation and may not be allowed because the revised scope was not originally subjected to fair competition.

To permit such a change would go against the ideas of competition and a fair playing field for all vendors. Transparency in government procurement is a key government responsibility. As a result, Applicable Laws require that Contract Management Teams conduct a competitive procurement process before making substantial contract changes. The specific method of competition may vary based on the type of goods/services needed. Change orders should not be implemented without first consulting with General Counsel.

By way of example, if a contract to buy 10 desks is amended to include 300 file cabinets, the change is outside the scope of the original contract solicitation because vendors did not previously have an opportunity to compete for the sale of 300 file cabinets. Additional vendors may have competed had they known that file cabinets were being solicited. The large volume of file cabinets (as compared to desks) may also have had an impact upon which vendors submitted offers and competed for the opportunity. Vendors not interested in the smaller solicitation may have been interested in the larger solicitation.

In determining whether a proposed amendment constitutes a significant change in scope of the original solicitation, the primary issue is generally whether the proposed change is a material and/or substantial change.

Material or substantial changes are not measured by the number of changes made to the original specifications. Rather, material or substantial changes are measured by whether the proposed changes would so substantially alter the original solicitation specifications that, if the Contract Management Team does not re-advertise the revised specifications, a procurement opportunity would be denied to a vendor who may have been able to respond, or who may have been interested in responding, to the revised specifications. If the proposed changes are material or substantial, then the proposed changes will be treated as a new procurement and a new solicitation is needed to ensure compliance with Applicable Laws related to competitive procurement.

## Dispute Resolution Process

Appropriate dispute resolution is an essential contract management skill. Early identification of issues, effective communication with contractor, and providing contractor with written notice of issues raised by the Contract Management Team (including a formal request to cure or a less formal written process) is crucial. To avoid escalation of contract issues and to ensure the Contract Management Team does not alienate contractor representatives, it is imperative that Contract Management Team personnel respond promptly to all contractor inquiries. Initial steps to be taken are: identify the contested issue, research the facts, and evaluate the issue and the facts. The contract manager must alert the Purchasing and Business Contracts offices whenever a possible dispute occurs or is expected to occur. The Contract Management Team should review all the factual information and the contract requirements. After discussing with all decision makers, the Contract Management Team should determine an appropriate course of action.

## Termination

Contract termination prior to completion of the contract should be the last resort and should be rare. When the contract

terms permit termination, the parties are no longer obligated to continue performance of their duties and obligations under the contract. Depending on the specific contract terms, parties may terminate without cause or, with cause, or for force majeure. If the contract permits the Contract Management Team may recommend to the Deputy Executive Director termination of the contract with or without cause.

## Notice

When terminating, the Contract Management Team must comply with the contract terms which will most likely require the Contract Management Team to provide contractor written notice specifying the date of termination. The termination notice should be provided to contractor in accordance with the contract terms. A termination notice may include wording similar to the following:

*Pursuant to Section \_\_\_\_\_ [Insert Section number for TDLR's right to terminate without cause], which permits Contract Management Team to terminate without cause, this contract is hereby terminated effective [date]. Contractor must immediately stop all work, terminate subcontracts, and place no further orders.*

*In accordance with this Notice of Termination, Contractor must:*

- 1. Retain adequate records of Contractor's compliance with this notice, including the extent of completion of the work on the date of termination.*
- 2. Immediately notify all subcontractors and suppliers, if any, of this notice of termination.*
- 3. Notify the Contract Management Team Contract Administrator [name], of any and all matters that may be adversely affected by this termination; and*
- 4. Take any other action required by the Contract Management Team to expedite this termination.]*

Contractor will generally be paid for fees and allowable costs incurred up to the termination date. TDLR should not be responsible for payments to contractor related to work performed or costs incurred after the termination date.

The Contract Management Team is not required to recommend terminating a contract even though the circumstances permit termination. The Contract Management Team may determine that it is in TDLR's best interest to pursue an alternate resolution.

Termination for cause should be used only to protect the interests of the Contract Management Team and only as a last resort. If a contract is terminated for failure to perform, contractor may be liable for damages. However, the contract may limit the damages TDLR may recover. When terminating for cause, the Contract Management Team must comply with applicable contract terms. In most situations, the contract will require the Contract Management Team to provide contractor written notice: (1) specifying contractor's default that authorizes the Contract Management Team to terminate the contract, and (2) indicating that if contractor does not cure the default within the cure period specified by the contract, TDLR's intent to terminate the contract. This notice is sometimes referred to as a cure notice. Any notice of termination should be approved by the Deputy Executive Director. If contractor fails to cure the default or provide a satisfactory explanation as requested, the contract may be terminated. The Notice of Termination should contain the following:

- Contract number;
- Contract date;
- Effective date of termination;
- Reference to the contract Section under which the contract is being terminated;



- Statement of the facts justifying the termination; and
- Statement indicating that TDLR may pursue all remedies available under Applicable Laws.

TDLR may not be able to terminate a contract for cause when contractor's failure to perform is the result of force majeure or other excusable causes. To qualify as an excusable cause, the cause must be beyond the control of and without the fault or negligence of contractor. Consult with the General Counsel.

## Contract Closeout

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

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



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

Detailed documentation of contract closeout is critical. The contract closeout process includes:

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

**Reimbursement of allowable expenses:** When applicable, the contractor must be reimbursed for all allowable expenses incurred or services provided under the contract up to the termination date. However, TDLR is only obligated to pay for goods or services that meet applicable contract standards. Under termination for cause, TDLR may not be liable for the contractor’s costs on undelivered work and is entitled to repayment of any advance or progress payments.

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

# Appendix 1

## Definitions

## Appendix 1 Definitions

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

**Advertise:** A public announcement of the intention to purchase goods or services.

**Amend or Amended:** Status change to an RFP, ITB, RFI, RFQ or contract that indicates a modification to that document.

**Amendment:** Written addition or change to a contract, including modifications, renewals and extensions approved by change orders.

**Best Value:** Factors to be considered in determining best value include: (1) the purchase price; (2) the reputation of the vendor and of the vendor's goods or services; (3) the quality of the vendor's goods or services; (4) the extent to which the goods or services meet TDLR needs; (5) the vendor's past relationship with TDLR; (6) the impact on the ability of the vendor to comply with laws and rules relating to historically underutilized businesses and to the procurement of goods and services from persons with disabilities; and (7) the total long-term cost to TDLR of acquiring the vendor's goods or services.

**Bid:** An offer to contract with the state, submitted in response to an invitation to bid (ITB).

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

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

**Business Entity:** An entity (other than a governmental entity or state agency) through which business is conducted regardless of whether the entity is a for-profit or nonprofit entity.

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

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

**Consulting Service:** Practice of studying or advising a state agency under a contract that does not involve the traditional employer/employee relationship (ref. *Texas Government Code*, [§2254.021](#) Definitions).

**Contract:** An agreement (including a purchase order) where a contractor provides goods or services to an Institution and TDLR pays for good or services in accordance with the established price, terms and conditions.

**Contract Administration:** Following the execution of the contract, the division level actions to oversee full compliance with all the terms and conditions contained within the contract.

**Contract Developer:** The C&P Services level individual responsible for ensuring the solicitation documents are complete, allow for competition, and follow all applicable statutes, rules, and procedures.

**Contract Management:** The entire contracting process from planning through contract administration, including contract close-out.

**Contract Manager (or Administrator):** The division-level individual responsible for monitoring all provisions, terms and conditions in the contract and managing all aspects of the contract. The Contract Manager acts as the evaluation team lead in formal solicitations.

**Contractor (or Vendor):** A business entity or individual that has a contract to provide goods or services (or submitted a bid or proposal) to TDLR.

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

**Electronic State Business Daily (ESBD):** The electronic marketplace where State of Texas bid opportunities are posted (ref. Texas Government Code, [§2155.083](#) State Business Daily; Notice Regarding Procurements). Pursuant to Texas Government Code, [§2155.083\(n\)](#),

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

**Evaluation Team:** Comprised of individuals who are stakeholders in the goods or services being procured and/or individuals who have the necessary technical or program expertise. Team will include C&P Services who guides the team and is a non-voting member.

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

**Goods:** Supplies, material, or equipment, including a transportable article of trade or commerce that can be bartered or sold. Goods do not include construction services or real property.

**Historically Underutilized Business (HUB):** A minority-owned, woman-owned or certain disabled veteran-owned businesses as defined by [Texas Government Code, Title 10, Subtitle D, Chapter 2161](#). (<http://www.window.state.tx.us/procurement/prog/hub/>).

**Invitation to Bid (ITB):** Also referred to as a Best Value Invitation to Bid. Best value procurement process used when the requirements are clearly defined, negotiations are not necessary, and price is the primary determining factor for selection (delivery time and references can also be used).

**Negotiations:** A consensual bargaining process in which the parties attempt to reach agreement on terms and conditions or disputed or potentially disputed matter. In a contractual sense, negotiation means the “dealings conducted between two or more parties for the purpose of reaching an understanding.”

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

**Performance Bond:** A surety bond that provides assurance of a contractor's performance of a certain contract. The amount for the performance bond is based on the value of the contract.

**Pre-proposal Conference:** A meeting chaired by C&P Services designed to help potential bidders, proposers, and respondents understand the requirements of a solicitation. Also known as a pre-bid conference.

**Professional Services:** Services directly related to professional practices as defined by the Professional Services Procurement Act ([Texas Government Code, §2254.002](#)). These include services within the scope of the practice of: accounting; architecture; optometry; medicine; land surveying; and professional engineering. Services provided by professionals outside the scope of their profession (for example, management consulting services provided by accounting firms) are not considered professional services. *Contracted services provided by professionals that fall outside their scope of practice are governed by the Best Value Statutes applicable to the purchase of goods or services.*

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

**Proposer:** An entity submitting a proposal in response to a solicitation. The term includes anyone acting on behalf of the individual or other entity that submits a proposal, such as agents, employees and representatives.

**Proprietary Purchase:** Purchase of goods or services that exceed the authorized direct procurement dollar threshold (\$5,000) from a single vendor, without soliciting competitive offers or proposals. The term includes proprietary and sole source purchases.

**Renewal:** Extension of the term of an existing contract for additional time in accordance with the terms and conditions of the original or amended contract.

**Request for Information (RFI):** A general invitation to contractors requesting information for a potential future competitive solicitation. The RFI is not a competitive solicitation and a contract may not be awarded as the result of an RFI. An RFI is typically used as a research and information gathering tool for preparation of a competitive solicitation.

**Request for Proposal (RFP):** A solicitation requesting submittal of a proposal in response to the required specifications and SOW and usually includes some form of a cost proposal. The RFP process allows for negotiations between a vendor and TDLR.

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

**SOW/Statement of Work (SOW):** An accurate, complete, and detailed description of the work to be performed by the contractor. The information provided in the SOW will depend upon the complexity of the contract.

**Service:** The furnishing of skilled or unskilled labor by a contractor which may not include the delivery of a tangible product. In some cases, services and goods may be combined (such as film processing). In these instances, determine whether labor or goods is the primary factor. In the case

of film processing, the labor to process the film is the primary factor, therefore film processing is considered a service.

**Sole Source:** (see Proprietary Purchase)

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

**Solicitation Documents:** Documents that have been publicly posted on the internet for a specific formal solicitation and provide potential respondents with information about the procurement (ITB/RFP document, pre-proposal sign-in sheet, addenda, etc.)

**Vendor (or Contractor):** A business entity or individual that submitted a bid or proposal or has a contract to provide goods or services to TDLR.

## Appendix 2 Acquisition Plan



Appendix 2  
ACQUISITION PLAN

[Solicitation Name]

Document Version:

Revision Date:

Requested Contract Start Date
Projected Award & Start Date:
Projected Contract Completion Date
Projected Contract Closeout Date

<b>Contract Developer</b>		
[Name]	[Email]	[Telephone]
<b>Contract Manager</b>		
[Name]	[Email]	[Telephone]
<b>Contract Monitor</b>		
[Name]	[Email]	[Telephone]
<b>End User Division Director</b>		
[Name]	[Email]	[Telephone]
<b>General Counsel</b>		
[Name]	[Email]	[Telephone]
<b>IT Representative</b>		
[Name]	[Email]	[Telephone]
<b>Financial Services Representative</b>		
[Name]	[Email]	[Telephone]

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## 1. Overview

### Needs Assessment

(Describe the business reason(s) for initiating the purchase, specifically stating the business problem)

### History

(Briefly describe relevant procurement or contract history. Identify similar projects that have been initiated to solicit and contract similar goods and/or services within the last four years)

### Contract Goals and Objectives

(Describe the business goals and objectives of the contract. Does this purchase help achieve a goal in TDLR’s Strategic Plan? If so, please note which goal and how.)

### Solicitation/Contract Scope of Work

(Describe the scope of the procurement. The scope defines contract limits and identifies the products and or services delivered under the contract. The scope establishes the boundaries of the contract and should describe products and/or services that are outside of the contract scope. e.g. are training services included or excluded on software purchases)

<b>Contract Includes:</b>
Training for 10 employees (example)

<b>Contract Excludes:</b>
Implementation costs (example)

### Critical Success Factors

(Describe the factors or characteristics that are deemed critical to the success of the contract/purchase, such that, in their absence the contract will fail)

Critical Success Factors:

### Assumptions

Assumptions:

### Constraints

Constraints:
Cost must be >\$50,000

### Potential Risks

(Identify potential risks related to the procurement/contract. Consider all major contract risks, including information security risks.)

Risk	Description	Remediation/Response

### Insurance and Bonds

(Check the box if proof of insurance or bond is to be provided, and then designate minimum amount of coverage. When considering whether to require insurance or bonds, ensure that dollar values are consistent with risk of nonperformance and reduce requirements if it is prudent to do so, per Section 17.10, Art IX, GAA)

Required	Type of Insurance and/or Bond to Be Provided	Minimum Amount of Coverage
<input type="checkbox"/>	Commercial Gen Liability	
<input type="checkbox"/>	EO/Professional Liability	
<input type="checkbox"/>	Workers Comp/Employer Liability	
<input type="checkbox"/>	Umbrella/Excess Insurance	
<input type="checkbox"/>	Auto Insurance Liability	
<input type="checkbox"/>	Crime/Employee Dishonesty	
<input type="checkbox"/>	Cyber Liability	
<input type="checkbox"/>	Performance Bond	
<input type="checkbox"/>	Other Insurance/Bond: <a href="#">Click or tap here to enter text.</a>	

## 2. Procurement Overview

### Type of Purchase

<input type="checkbox"/> IT - Software or Hardware	<input type="checkbox"/> IT Services
<input type="checkbox"/> IT – Mixed	<input type="checkbox"/>
<input type="checkbox"/> Other - Goods	<input type="checkbox"/> Other - Services
<input type="checkbox"/> Other - Mixed	<input type="checkbox"/>

### Requests for Information

Please check any of the statements below that may apply:

- A Request for Information (RFI) was performed as part of preplanning activities.  
Date or ID Number: [Click or tap here to enter text.](#)
- A Request for Information (RFI) is needed.

### Market Research Approach and Outcome

(Describe the approach used to accomplish market research, including why a particular approach was used.)

(ALSO describe the extent and results of the market research. Identify the effects of the market research in formulating and defining the procurement strategy.)

### Cost Estimation

Estimated Cost: [Click or tap here to enter text.](#)

Please select the source used to estimate cost:

- Informational quotes
- Previous agency purchase(s)
- RFI
- Other market research
- None

Please note the relevant quote or identification numbers/title here for future reference:


### Procurement Approach

**Option 1 – Existing State Contracts**

Please choose from drop-down list

DIR- Cooperative Contracts
----------------------------

Note: If the contract falls in scope of any mandatory contract program, and exemption will be required. All listed state contracts are mandatory except TxMAS.

**Option 2 – Delegated Authority**

<input type="checkbox"/> Informal Bids	<input type="checkbox"/> Invitation for Bids
<input type="checkbox"/> Request for Offers (IT)	<input type="checkbox"/> Request for Proposals
<input type="checkbox"/> Not-Competitive (<\$5,000)	<input type="checkbox"/> Request for Qualifications
<input type="checkbox"/> Other: <a href="#">Click or tap here to enter text.</a>	

**Option 3 – SPD-Exempted by statute**

[Click or tap here to enter text.](#)

**Justification of Procurement Approach:**

(Describe why the selected procurement method is in the best interest of the state and why existing staff cannot provide the desired goods and/or services.)

(Describe how sources for competition will be identified. If competition is not a consideration or achievable, provide a basis and justification for that decision.)

### Approvals, Exceptions, and Exemptions

(Requirements related to interagency approvals, program exceptions and exemptions are identified here.)

- CAT approval for contract ≥\$5 million
- QAT approval of MIRP contract >\$1 million

- SPD Review/Delegation Letter
- DIR approval of SOW with value >\$50,000
- DIR Exemption from use of DIR Cooperative Contracts
- DIR Exemption from use of DIR Telecommunication Services
- DIR/LBB approval not to use DCS services
- Governor Finding of Fact
- SAO delegation to obtain audit services
- OAG approval to retain outside counsel
- Other: [Click or tap here to enter text.](#)

### Evaluation and Award

(Describe the evaluation approach, including evaluation factors and overall use for vendor selection. Provide a table for weighted requirements.)

### Internal Calendar of Events

Activity	Assignment (If Applicable)	Planned Start Date	Estimated Completion
Budget (approval/questions)			
Kickoff Meeting			
Draft Solicitation			
DIR Coop Exemption			
Agency Approval for Solicitation Issuance			
SPD & CAT Review			
Solicitation Issued			
Pre-bid/Offer/Proposal Conference			
Due Date for Written Questions			
Date of Issuance of Agency's Written Answers			
Due Date for Responses			
Internal Post Award Meeting			
Vendor Selection (eval or bid tabulation)			
Negotiation and Contract Formation			
Contract Award			
DIR DCS or CTS Program Exemptions			
Transition Meeting between CD & CM			
Post Award Meeting with Contractor			
Project Start			
Project Completion			
Contract End Date			

## 3. Specifications/Deliverables

### Requirements

(Break requirements up into functional categories in order to explore granular detail of each requirement. Add topics and rows as appropriate.)

1.0 <Topic 1>
1.1
1.2
1.3

2.0 <Topic 2>
2.1
2.2
2.3

3.0 <Topic 3>
3.1
3.2
3.3

Performance Standards and Measurements

(Describe the approach for how performance standards and measurements will be defined specifically in terms of the procurement scope, assumptions, constraints, and strategy.)

Service Standards and Measurements

(Describe the approach for how service standards and measurements will be defined specifically in terms of the procurement scope, assumptions, constraints, and strategy.)

**4. Contract Development & Management**

Contract Administration Team

Role	Resource Name
Contract Developer	
Contract Manager	
Contract Monitor	
Project Manager (if applicable)	
Legal Counsel	

Roles and Responsibilities Detail

(Describe the roles and responsibilities, or include/reference RACI if applicable)

Contract Structure

(Contract Developer or Legal Counsel describes contracting approach here. Will it consist of a Boilerplate or custom formal contract? PO with T&C's? Is this a project where many contracts will be executed, and a new template may be needed? Any special attachments needed?)



## Special Terms and Conditions

(Define any special terms and conditions to be included in the contract that will influence the risk factor.)

## Invoice Management

(Describe the payment conditions (terms and schedule) that will fulfill the contract. Describe how invoices will be managed)

## Change Control

(Describe how contract changes will be managed)

## Documenting Files

(Provide the documenting techniques that will be used for the contract.)

## Contract Closeout

(List all the contract closeout activities. To ensure a contract is completed every duty should be marked when complete.)

- All goods or services have been received and accepted.
- All reports have been delivered and accepted.
- All administrative actions have been completed
- All agency furnished equipment and materials have been returned
- All property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract.
- Final acceptance from the contract monitor or project manager has been received.
- Final payment has been made to the contractor
- Contractor's performance reported to the VPTS.

## Appendix 3

# Standard Sample Contract with Exhibits

Appendix 3

**CONTRACT**

**[INSERT DESCRIPTOR OF GOODS OR SERVICES] SERVICES AGREEMENT**

**BETWEEN**

**TEXAS DEPARTMENT OF LICENSING & REGULATION**

**AND**

**[Selected Vendor/Contractor]**

Contract No. \_\_\_\_\_

This agreement (“Contract”) is entered into by the Texas Department of Licensing and Regulation (“TDLR”), an agency of the State of Texas, and [Selected Vendor/Contractor] (“Vendor/Contractor”), located at [address information].

**I. Recitals**

**Whereas**, on [date], TDLR issued a Request for Proposals (“RFP”) to qualified, independent firms and individuals to provide Examination Services to TDLR as set forth in the RFP;

**Whereas**, Vendor/Contractor submitted a proposal dated [date] in response to TDLR’s RFP (“Proposal”);

**Whereas**, Vendor/Contractor was selected as the Selected Vendor/Contractor.

The parties hereby agree as follows:

**II. Services and Standards of Performance**

Vendor/Contractor shall provide to TDLR all of the services and deliverables described in and in the manner required by all of the following documents:

This \_\_\_ ( ) page document;

Exhibit A: TDLR’s RFP, with attachments;

Exhibit B: Contract Provisions;

Exhibit C: Agreed Workplan;

Exhibit D: Vendor/Contractor’s Proposal; and

Exhibit E: HUB Subcontract Plan.

All of the above are attached to and incorporated as part of this Contract for all purposes. All terms and conditions of TDLR’s RFP shall apply.

In the case of conflicts between this \_\_\_ ( ) page document and any of the above exhibits, the following shall control in this order of priority:

- This \_\_\_ ( ) page document;
- Exhibit A: TDLR's RFP, with attachments;
- Exhibit B: Contract Provisions;
- Exhibit C: Agreed Workplan;
- Exhibit D: Vendor/Contractor's Proposal; and
- Exhibit E: HUB Subcontract Plan.

Vendor/Contractor represents and warrants that it has the requisite qualifications, experience, personnel and other resources to provide all of the required [type of goods or services] services to TDLR in the manner required by this Contract.

### **III. Personnel**

Vendor/Contractor shall act as an independent contractor in providing services under this Contract. Vendor/Contractor's employees shall not be construed as employees of TDLR in providing services under this Contract. Vendor/Contractor shall assign to this Contract only those persons as employees who are approved by TDLR's project manager specified in the RFP. Vendor/Contractor shall assign only qualified personnel to this Contract. As of the date of TDLR's execution of this Contract, TDLR's project manager has authorized the personnel listed in Exhibit B of this Contract to provide services under this Contract. Vendor/Contractor shall not be reimbursed for any changes in staff or employees or their classifications, as approved by TDLR's project manager, unless previously approved by TDLR in accordance with the Change Management provision of the RFP. Vendor/Contractor represents and warrants that none of its employees, including, but not limited to, those authorized to provide services under this Contract, are present or former employees of TDLR. Vendor/Contractor shall provide to TDLR prior written notice of any proposed change in personnel involved in providing services under this Contract. The actual change in personnel shall occur only after Vendor/Contractor has received TDLR's prior written approval. The foregoing conditions relating to changes in personnel shall apply regardless of the reason for such proposed change in personnel.

### **IV. Evaluation and Written Acceptance**

Prior to authorizing any invoices for payment under Paragraph VI of this Contract, TDLR shall evaluate Vendor/Contractor's performance against the Standards of Performance and with all other requirements of this Contract. Prior to authorizing any such payments, TDLR shall evaluate and specifically reserves the right to provide written notice of TDLR's acceptance of Vendor/Contractor's services under the procedures described in this Contract.

## V. Payments

Vendor/Contractor shall submit all statements for services and expenses incurred to TDLR every thirty (30) days, as set out in the Agreed Workplan, for approval prior to payment. In submitting these statements, Vendor/Contractor acknowledges and by execution of this Contract certifies to the following: that invoices have been carefully reviewed for detailed description of the Services performed; that the Services have been performed in compliance with the Contract; that the amount of the invoice and all previous invoices together does not exceed the contractual cap of the Contract, Vendor/Contractor's Cost Proposal, or negotiated fees; that the charges and expenses shown on the invoices are reasonable and necessary; that travel expenses are compliant with State of Texas travel guidelines and rates; and that all appropriate and required supporting documentation is attached. TDLR may, in its sole discretion, require additional documentation to support payment and Vendor/Contractor shall respond to any such requests within five (5) days of receipt. All payments hereunder shall be subject to the Texas Prompt Payment Act.

In any event, total payments by TDLR to Vendor/Contractor under this Contract shall not exceed [To be added before Contract signature] and no/100 Dollars (**XXXXXXXX**) **inclusive of all Vendor/Contractor's fees and expenses whatsoever. No other amounts shall be paid.**

## VI. Term and Termination

This Contract shall become effective on the date signed by TDLR, after having first been signed by Vendor/Contractor, and shall terminate on August 31, [insert year], unless otherwise sooner terminated as provided in this Contract. Further, TDLR reserves the right, in its sole judgment and discretion, to renew this Contract for three (3) additional one (1) year terms, upon reasonable written notice to Vendor/Contractor. Notwithstanding the termination or expiration of this Contract, the provisions of this Contract regarding confidentiality, indemnification, dispute resolution, right-to-audit, and records shall survive the termination or expiration dates of this Contract. Further, Vendor/Contractor's obligation to provide legislative testimony and support under this Contract to TDLR shall survive the termination or expiration of this Contract.

In addition to the Contract termination provisions included in the RFP, TDLR may, in its sole discretion, terminate this Contract for cause or convenience upon thirty (30) days written notice to Vendor/Contractor, with no further liability to any party whatsoever to TDLR upon such effective date of termination. Such notice may be provided by facsimile or certified mail; return receipt requested and is effective upon Vendor/Contractor's receipt.

## VII. Insurance

Vendor/Contractor represents and warrants that it will, within five (5) business days of executing this Contract, provide TDLR with current certificates of insurance with the following insurance coverages for Vendor/Contractor and Vendor/Contractor's employees:

Standard Workers Compensation Insurance covering all personnel who will provide services under this Contract; to include at a minimum:

Employers Liability: Each Accident \$1,000,000  
Disease- Each Employee \$1,000,000  
Disease-Policy Limit \$1,000,000

Commercial General Liability Insurance \$500,000 minimum each occurrence;  
\$2,000,000 minimum aggregate limit;

Bodily Injury and Property Damage  
Each occurrence limit: \$1,000,000  
Aggregate limit: \$2,000,000  
Medical Expense each person: \$5,000  
Personal Injury and Advertising Liability: \$1,000,000  
Products /Completed Operations Aggregate Limit: \$2,000,000  
Damage to Premises Rented to You: \$50,000

Errors and Omissions Insurance: \$250,000 minimum each occurrence limit;  
\$500,000 minimum aggregate limit.

Vendor/Contractor represents and warrants that all of the above coverages are with companies licensed in the State of Texas, with “A” rating from Best, and authorized to provide the corresponding coverages. Vendor/Contractor also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least thirty (30) days prior written notice to TDLR. Vendor/Contractor represents and warrants that it shall maintain all of the above insurance coverages during the term of this Contract.

### **XIII. Representations, Warranties, and General Provisions**

**8.1 Eligibility.** Under Section 2155.004 of the Texas Government Code, Vendor/Contractor represents and warrants that Vendor/Contractor is not ineligible to receive this Contract and acknowledges that this Contract may be terminated, and payment withheld if this representation and warranty is inaccurate.

**8.2 HUBs.** Vendor/Contractor represents and warrants that it shall comply with the Historically Underutilized Business requirements of this Contract.

**8.3 Applicable Law; Venue.** This Contract shall be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit brought for any breach of this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

**8.4 Partially Completed Work.** No later than the first calendar day after the termination of this Contract, or at TDLR’s request, Vendor/Contractor shall deliver to TDLR all completed, or partially completed, work and any and all documentation or other products and results of these services. Failure to timely deliver such work or any and all documentation or other products and results of the services shall be considered a material breach of this Contract. Vendor/Contractor shall not make or retain any copies of the work or any and all documentation or other products and results of the services without the prior written consent of TDLR.

**8.5 Federal, State, and Local Requirements.** Vendor/Contractor shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Vendor/Contractor is responsible for both Federal and State Unemployment insurance coverage and standard Worker's Compensation Insurance coverage. Vendor/Contractor shall comply with all Federal and State tax laws and withholding requirements. TDLR shall not be liable to Vendor/Contractor or its employees for any Unemployment or Workers' Compensation coverage, or Federal or State withholding requirements. Vendor/Contractor shall indemnify TDLR and pay to TDLR all costs, penalties, or losses resulting from Vendor/Contractor's omission or breach of this Section.

**8.6 Immigration.** Vendor/Contractor represents and warrants that it shall comply with the requirements of the Immigration Reform and Control Act of 1986 regarding employment verification and retention of verification forms for any individuals hired on or after November 6, 1986, who will perform any labor or services under this Contract.

## IX. Funding

TDLR's performance of its obligations under this Contract is contingent upon and subject to the availability of and actual receipt by TDLR of sufficient and adequate funds from the sources contemplated by this Contract. This Contract is subject to immediate cancellation or termination, without penalty to TDLR or the State of Texas, subject to the availability and receipt of these funds. In addition, TDLR is a state agency whose authority and appropriations are subject to the actions of the Texas Legislature. If TDLR becomes subject to a legislative change, revocation of statutory authority or lack of funds that would render the services to be provided under this Contract impossible or unnecessary, TDLR may terminate this Agreement without penalty to TDLR or the State of Texas. In the event of a termination or cancellation under this Section, TDLR shall not be required to give notice and shall not be liable for any damages or losses caused or associated with such termination or cancellation.

## X. Signatories

The undersigned signatories represent and warrant that they have full authority to enter into this Contract on behalf of the respective parties.

**Texas Department of Licensing and Regulation**

**[Selected Vendor/Contractor]**

By: \_\_\_\_\_

Brian E. Francis  
Executive Director

By: \_\_\_\_\_

Name:  
Title:

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## Exhibit A

### Request for Proposals

Incorporated herein for all purposes



## Exhibit B

### Contract Provisions

Incorporated herein for all purposes

## EXHIBIT B

### CONTRACT PROVISIONS

#### 1. Confidential Information, Public Information, and Data Security

**1.1 Contractor Information.** TDLR may need to collect selected information from Contractor such as name, e-mail addresses, taxpayer identification number, references, insurance coverage, and capacity to deliver. The purpose of collecting these items is to facilitate performance of and payment for services provided under this Contract. While some items may be subject to disclosure under the Texas Public Information Act, TDLR will not sell this information to private entities.

**1.2 Protected Health Information.** The Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy regulations implemented standards for how information that identifies a patient can be used and disclosed. The Texas Medical Records Privacy Act (TMRPA) applies to any person who engages in the practice of assembling, collecting, analyzing, using, evaluating, storing or transmitting Protected Health Information (PHI). Contractor certifies that it is in and will remain in compliance with both HIPAA and TMRPA.

**1.3 Public Information Act.** Information, documentation, and other material in connection with this Contract or any resulting contract may be subject to public disclosure pursuant to Chapter 552 of the Texas Government Code (the "Public Information Act"). In accordance with Section 2252.907 of the Texas Government Code, Contractor is required to make any information created or exchanged with the State pursuant to the contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the State.

**1.4 Data Security.** Contractor may, from time to time during the performance of the Contract, have access to TDLR data. Contractor shall use their best efforts to preserve the safety, security, and the integrity of the data in accordance with the instruction of TDLR. If a Contractor fails to comply with TDLR's security requirements, then TDLR may immediately terminate its contract.

**1.5 Confidential Data Protection.** Data provided under this contract is confidential and protected under Texas law. Contractor must protect confidential data by encrypting the data at rest, in transit and where available, in use. Within 12 hours of discovery, Contractor must report unapproved access of the data to TDLR's Information Security Officer, General Counsel, and the Enforcement Division Contractor Administrator. If Contractor reasonably believes the data breach or illegal access resulted from criminal actions, Contractor must immediately report the event to the agency and to law enforcement.

**1.6 Data Destruction.** In the event hardware used by Contractor to store TDLR data is permanently taken out of service or repurposed for any reason, Contractor will use one of the following to permanently render TDLR's data unreadable to third parties. The three methods for eliminating electronic data are limited to and include physical destruction, degaussing and overwriting.

Physical Destruction - involves destroying the electronic data storage device. This can range from deforming the device so that it can no longer be used or disintegrating the device into very small pieces.

Degaussing - involves exposing the data storage device to a very high magnetic field. This alters both the magnetic and physical properties of the device, making it impossible to retrieve any data contained.

Overwriting - is a process in which the data on a storage device is overwritten bit for bit with useless information (typically "1" characters or "0" characters). This makes retrieval of the original data stored on the storage device impossible as it no longer exists.

In the event hardware used by Contractor is permanently taken out of service or repurposed, Contractor shall notify TDLR of the method of destruction. This requirement shall survive the term of this agreement and is applicable as long as Contractor uses or has in service any hardware used to store data transferred to Contractor under this agreement.

## 2. Contractor's Role and Responsibilities

**2.1 Independent Contractor.** The Contract shall not render the Contractor an employee, officer, or agent of TDLR for any purpose. The Contractor is and shall remain an independent contractor in relation to TDLR. TDLR shall not be responsible for withholding taxes from payments made under the Contract. The Contractor shall have no claim against TDLR for vacation pay, sick leave, retirement benefits, social security, worker's compensation, health or disability benefits, itemized travel reimbursement, unemployment insurance benefits, or employee benefits of any kind.

**2.2 Time Limits.** Time is of the essence in the performance of this Contract. Contractor shall strictly comply with all of the deadlines and requirements set out in Exhibit A to this Contract and set out by TDLR during Contractor's performance under this Contract.

**2.3 Insurance.** Contractor represents and warrants that it will obtain and maintain for the term of the Contract all insurance coverage required to ensure proper fulfillment of the Contract and its liabilities thereunder. Contractor shall maintain the minimum insurance required by law for any of its motor vehicles used to fulfill its duties under the Contract.

**2.4 Media Releases or Pronouncements.** Contractor, its employees, representatives or agents may not participate in any media event or issue any media release, advertisement, publication, editorial, article, or public pronouncement as it pertains to this Contract or the services or project to which this Contract relates, or that mentions TDLR without the prior written approval of TDLR.

**2.5 Disaster Recovery Plan.** Upon request of TDLR, Contractor shall provide to TDLR the descriptions of its business continuity and disaster recovery plans.

**2.6 Limitation on Authority; No Other Obligations.** Contractor shall have no authority to act for or on behalf of TDLR or the State of Texas except as expressly provided for in this Contract; no other authority, power or use is granted or implied. Contractor may

not incur any debts, obligations, expenses, or liabilities of any kind on behalf of TDLR or the State of Texas.

**2.7 No Other Benefits.** Contractor shall have no exclusive rights or benefits other than those set forth herein.

**2.8 Assignments.** Contractor may not assign this Contract, in whole or in part, and may not assign any right or delegate the performance of any duties required under it.

**2.9 Applicable Law.** Contractor must comply with all laws, regulations, requirements and guidelines applicable to a Contractor providing services to the State of Texas and to a Contractor providing professional or similar services to TDLR, as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract.

### **3. Audits and Records Retention**

**3.1 State Auditor's Right to Audit.** The state auditor may conduct an audit or investigation of any entity receiving funds from the state directly under a contract or indirectly through a subcontract under a contract. The acceptance of funds directly under the contract or indirectly through a subcontract under the contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, an entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit.

**3.2 Retention of Records.** The Contractor shall retain all financial records, supporting documents, and any other records relating to the performance called for in the Contract, for a period of seven (7) years after the expiration of the Contract, or until the TDLR or State Auditor's Office is satisfied that all audit and litigation matters are resolved, whichever period is longer.

### **4. Indemnification, Liability, Venue, and Dispute Resolution**

**4.1 Indemnification.** CONTRACTOR SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND TDLR, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES ARISING OUT OF, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONTRACTOR OR ITS AGENTS, EMPLOYEES, SUBCONTRACTORS, ORDER FULFILLERS, OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THE CONTRACT AND ANY PURCHASE ORDERS ISSUED UNDER THE CONTRACT. THE DEFENSE SHALL BE COORDINATED BY CONTRACTOR WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CONTRACTOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE TEXAS ATTORNEY GENERAL. CONTRACTOR AND TDLR AGREE TO FURNISH TIMELY WRITTEN

NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

**4.2 Patent, Trademark, Copyright and Other Infringement Claims.** Contractor shall indemnify, save and hold harmless TDLR and the State of Texas from and against claims of violation or infringements of patent, trademark, copyright, trade secret or other proprietary rights arising from services provided by Contractor to TDLR. TDLR shall notify Contractor of any such claim within a reasonable time of TDLR's receiving notice of any such claim. Contractor shall pay all reasonable costs of TDLR's counsel. If Contractor is notified of any such claim Contractor shall notify TDLR within five (5) working days of receiving notice. If TDLR determines that a conflict exists between its interests and those of Contractor or if TDLR is required by applicable law to select separate counsel, TDLR shall be permitted to select separate counsel and the reasonable costs of TDLR's counsel shall be paid by Contractor. No settlement of any claim shall be made by Contractor without TDLR's prior written approval. Contractor shall reimburse TDLR and the State of Texas for any claims, damages, losses, costs, expenses, judgments or any other amounts, including, but not limited to, attorneys' fees and court costs, arising from any such claim. Contractor represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

**4.3 No Liability Upon Termination.** If this Contract is terminated for any reason, TDLR and the State of Texas shall not be liable to Contractor for any damages, claims, losses, or any other amounts arising from or related to any such termination.

**4.4 No Waiver.** This Contract shall not constitute or be construed as a waiver of, and TDLR does not waive, any of the privileges, rights, defenses, remedies, or immunities available to TDLR. The failure to enforce or any delay in the enforcement of any privileges, rights, defenses, remedies, or immunities available to TDLR under this Contract or under applicable law shall not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel.

**4.5 No Waiver of Sovereign Immunity.** The Parties expressly agree that no provision of the Contract is in any way intended to constitute a waiver by TDLR or the State of Texas of any immunities from suit or from liability that TDLR or the state may have by operation of law.

**4.6 Force Majeure.** Neither party shall be responsible for performance under the Contract should it be prevented from performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributable to the fault or negligence of TDLR or the Contractor.

In the event of an occurrence under this Section, Contractor will be excused from any further performance of the requirements so affected for as long as such circumstances prevail, and the Contractor continues to use commercially reasonable efforts to recommence performance to whatever extent possible without delay. Contractor shall immediately notify TDLR by telephone (to be confirmed in writing within five (5) calendar days of such occurrence) and describe at a reasonable level of detail the circumstances causing the non-performance or delay in performance.

**4.7 Governing Law and Venue.** The Contract shall be governed by and construed in accordance with the laws of the State of Texas, without regard to the conflicts of law

provisions. The venue of any suit arising under the contract is fixed in any court of competent jurisdiction of Travis County, Texas, unless the specific venue is otherwise identified in a statute which directly names or otherwise identifies its applicability to TDLR.

**4.8 Dispute Resolution.** The dispute resolution process provided for in Chapter 2260 of the Texas Government Code must be used to attempt to resolve any dispute arising under the contract.

## 5. Notices

**5.1** Any written notices required under this Contract will be by either hand delivery to Contractor's address specified on page 1 of the Contract or to TDLR's General Counsel, 920 Colorado Street, Austin, Texas 78701. Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this Section by written notification to the other party.

## 6. Representations and Warranties

**6.1** Contractor shall promptly notify the TDLR if any representations and warranties provided in this Contract are no longer true and correct. The Contractor acknowledges that all its representations and warranties contained in any part of its Proposal and this Contract are material and have been relied upon by the TDLR in selecting the Contractor for the award of the Contract. Further, the Contractor warrants and represents that all of its statements and representations made to the TDLR prior to being awarded the Contract, and those made during the negotiation of this Contract, are material, true and correct. TDLR shall not be responsible for monitoring Contractor's compliance with any laws or regulations. If Contractor performs any work knowing or having reason to know that it is contrary to laws or regulations, Contractor shall bear all claims, costs, losses and damages caused by, arising out of or resulting there from.

**6.2 No Conflicts of Interest.** Contractor represents and warrants that the services or other performance under the contract will not constitute an actual or potential conflict of interest or reasonably create an appearance of impropriety.

**6.3 Felony Criminal Convictions.** Contractor represents and warrants that Contractor has not and Contractor's employees have not been convicted of a felony criminal offense, or that, if such a conviction has occurred, Contractor has fully advised TDLR as to the facts and circumstances surrounding the conviction.

**6.4 Financial Participation Prohibited.** Under Section 2155.004(b) of the Texas Government Code, Contractor certifies that the individual or business entity named in this contract is not ineligible to receive the specified contract and acknowledges that the contract may be terminated and payment withheld if this certification is inaccurate.

**6.5 Child Support Obligations.** Under Section 231.006 of the Family Code, Contractor certifies that the individual or business entity named in this contract is not ineligible to receive the specified payment and acknowledges that this contract may be terminated, and payment may be withheld if this certification is inaccurate.

**6.6 Debts and Delinquencies Affirmation.** Contractor agrees that any payments due under the contract shall be applied towards any debt or delinquency that is owed to the State of Texas.

**6.7 Liability for Taxes.** Contractor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, state, or local income, sales or excise taxes of Contractor. TDLR shall not be liable for any such taxes resulting from this Contract.

**6.8 Contractor Performance.** In accordance with Texas Government Code §§2155.074 and 2155.75, Contractor performance may be used as a factor in the award or continuance of this contract.

**6.9 No Suit or Proceeding.** Contractor certifies to the best of their knowledge and belief, that there are no suits or proceedings pending or threatened against or affecting them, which if determined adversely to them will have a material adverse effect on their ability to fulfill their obligations under the contract.

**6.10 Terminated Contracts.** Contractor certifies that it has not had a contract terminated or been denied the renewal of any contract for non-compliance with policies or regulations of any state or federally funded program within the past five (5) years nor is it currently prohibited from contracting with a governmental agency. If Contractor does have such a terminated contract, Contractor shall identify the contract and provide an explanation for the termination.

**6.11 Deceptive Trade Practices; Unfair Business Practices.** Contractor represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Texas Business and Commerce Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit and that Contractor has not been found to be liable for such practices in such proceedings. Contractor certifies that it has no officers who have served as officers of other entities who have been the subject of allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit, and that such officers have not been found to be liable for such practices in such proceedings.

**6.12 Antitrust.** To the extent applicable, the undersigned affirms under penalty of perjury of the laws of the State of Texas that (1) in connection with this Contract, neither I nor any representative of the Contractor has violated any provision of the Texas Free Enterprise and Antitrust Act, Tex. Bus. & Comm. Code Chapter 15; (2) in connection with this Contract, neither I nor any representative of the Contractor have violated any federal antitrust law; and (3) neither I nor any representative of the Contractor have directly or indirectly communicated any of the contents of this Contract to a competitor of the Contractor or any other company, corporation, firm, partnership or individual engaged in the same line of business as the Contractor.

**6.13 Prior Disaster Relief Contract Violation.** Under Sections 2155.006 and 2261.053 of the Texas Government Code, the Contractor certifies that the individual or business entity named in this Contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated, and payment withheld if this certification is inaccurate.



**6.14 Executive Head of a State Agency Affirmation.** In accordance with Section 669.003 of the Texas Government Code, relating to contracting with the executive head of a state agency, Contractor certifies that it is not (1) the executive head of TDLR, (2) a person who at any time during the four years before the date of the contract was the executive head of TDLR, or (3) a person who employs a current or former executive head of TDLR.

**6.15 Disclosure of Prior State Employment.** In accordance with Section 2254.033 of the Texas Government Code, relating to consulting services, Contractor certifies that it does not employ an individual who has been employed by TDLR or another agency at any time during the two years preceding the submission of the Contract or, in the alternative, Contractor has disclosed in its Contract the following: (i) the nature of the previous employment with TDLR or the other agency; (ii) the date the employment was terminated; and (iii) the annual rate of compensation for the employment at the time of its termination.

**6.16 Former Agency Employees.** In accordance with Section 2252.901 of the Texas Government Code, Contractor represents and warrants that none of its employees including, but not limited to, those authorized to provide services under the contract, were former employees of TDLR during the twelve (12) month period immediately prior to the date of execution of the contract.

**6.17 Dealings with Public Servants.** Contractor has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this Contract.

**6.18 Compliance with Laws; Dealing with Public Servants.** Contractor must comply with all applicable laws at all times, including, without limitation, the following: (i) Texas Penal Code §36.02, which prohibits bribery; (ii) Texas Penal Code §36.09, which prohibits the offering or conferring of benefits to public servants; (iii) Gov't Code §2155.003, which prohibits any employee TDLR from having an interest in, or in any manner being connected with, a contract or bid for a purchase of goods or services by an agency of the state, or accept from any person to whom a contract has been awarded anything of value or a promise, obligation, or contract for future reward or compensation.

**6.19 Prohibited Use of Appropriated or other Funds Under Control of State Agency; Lobbying.** Contractor represents and warrants that TDLR's payments to Contractor and Contractor's receipt of appropriated or other funds under any of this or any resulting agreement are not prohibited by §556.005 or §556.008, Texas Government Code.

**6.20 Prohibition on Lobbying.** The Contractor shall comply with the provisions of the Lobbying Disclosure Act, 2 U.S.C. §1601 *et seq.* Contractor certifies that it shall not and has not used federally appropriated funds to pay any person or organization for influencing or attempting to influence any officer or employee of any federal agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant, or any other award covered by 31 U.S.C. §1352. It also certifies that the Contractor shall disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal award by completing and submitting Standard Form LLL.



**6.21 Entities that Boycott Israel.** Contractor represents and warrants that, pursuant to Section 2270.002 of the Texas Government Code, Contractor does not boycott Israel and will not boycott Israel during the term of the contract.

**6.22 Buy Texas.** In accordance with Section 2155.4441 of the Texas Government Code and to the extent applicable, Contractor agrees that during the performance of a contract for services it shall purchase products and materials produced in Texas when they are available at a price and time comparable to products and materials produced outside this state.

**6.23 Foreign Terrorist Organizations.** Section 2252.152 of the Texas Government Code prohibits Agency from awarding a contract to any person who does business with Iran, Sudan, or a foreign terrorist organization as defined in Section 2252.151 of the Texas Government Code. Contractor certifies that it not ineligible to receive the contract.

**6.24 Suspension and Debarment.** Contractor certifies that it and its principals are not suspended or debarred from doing business with the state or federal government as listed on the *State of Texas Debarred Contractor List* maintained by the Texas Comptroller of Public Accounts and the *System for Award Management (SAM)* maintained by the General Services Administration.

**6.25 E-Verify Program.** Contractor certifies that it utilizes and will continue to utilize the U.S. Department of Homeland Security’s E-Verify system to determine the eligibility of: (1) all persons employed to perform duties within Texas, during the term of the contract; and (2) all persons, including subcontractors, assigned by Contractor to perform work pursuant the contract within the United States of America.

**6.26 Civil Rights Act.** Contractor represents and warrants that it shall comply with the Civil Rights Act. Contractor agrees that no person shall, on the grounds of race, color, religion, sex, national origin, age, disability, political affiliation, or religious belief, be excluded from the participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment in the administration of, or in connection with, any program or activity funded in whole or in part with funds available under this Contract. The Contractor shall comply with Executive Order 11246, "Equal Employment Opportunity," as amended by Executive Order 11375, "Amending Executive Order 11246 relating to Equal Employment Opportunity," and as supplemented by regulations at 41 C.F.R. Part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity Department of Labor."

**6.27 Americans with Disabilities Act.** Contractor represents and warrants that it shall comply with the requirements of the Americans with Disabilities Act (ADA).

## 7. Funding

**7.1** TDLR’s performance of its obligations under this Contract is contingent upon and subject to the availability of and actual receipt by TDLR of sufficient and adequate funds from the sources contemplated by this Contract. This Contract is subject to immediate cancellation or termination, without penalty to TDLR or the State of Texas, subject to the availability and receipt of these funds. In addition, TDLR is a state agency whose authority and appropriations are subject to the actions of the Texas Legislature. If TDLR becomes subject to a legislative change, revocation of statutory authority or lack of funds that would render the services to be provided under this Contract impossible or unnecessary, TDLR may

terminate this Agreement without penalty to TDLR or the State of Texas. In the event of a termination or cancellation under this Section, TDLR shall not be required to give notice and shall not be liable for any damages or losses caused or associated with such termination or cancellation.

## **8. Merger, Amendments, and Severability**

**8.1 Merger.** This Contract contains the entire agreement between Contractor and TDLR relating to the rights granted and the obligations assumed in it. Any oral representations or modifications concerning this Contract shall be of no force or effect unless contained in a subsequent writing, signed by both parties.

**8.2 Amendments.** TDLR reserves the right, in its sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for TDLR's or Contractor's compliance with all applicable state and federal laws, regulations, requirements and guidelines.

Other terms of this Contract may be amended only upon written agreement between TDLR and Contractor. This Contract may not be amended so as to make it conflict with the laws of the State of Texas and any modification of privileges, rights, defenses, remedies, or immunities available to TDLR must reference this section, must be signed by TDLR to be effective, and such modification shall not constitute waiver of any subsequent privileges, rights, defenses, remedies, or immunities under this contract or under applicable law.

**8.3 Severability.** If any provision of the Contract is construed to be illegal or invalid, such construction will not affect the legality or validity of any of its other provisions. The illegal or invalid provision will be deemed severable and stricken from the Contract as if it had never been incorporated herein, but all other provisions will continue in full force and effect.

## **9. False Statements; Breach of Representations**

By signature to this Contract, Contractor makes all the representations, warranties, guarantees, certifications and affirmations included in this Contract. If Contractor signs this Contract with a false statement or it is subsequently determined that Contractor has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, Contractor shall be in default under this Contract and TDLR may terminate or void this Contract for cause and pursue other remedies available to TDLR under this Contract and applicable law.

## Exhibit C

### Agreed Workplan

Incorporated herein for all purposes

## Exhibit D

### Vendor/Contractor's Proposal

Incorporated herein for all purposes

## Exhibit E

### HUB Subcontract Plan

Incorporated herein for all purposes

# Appendix 4

## Contract Administration Plan

Appendix 4  
Sample

**CONTRACT ADMINISTRATION PLAN**

**ENGHOUSE INTERACTIVE SOFTWARE MAINTENANCE**

**Team Members**

<b>Executive Sponsor</b>		
[Name]	[Email]	[Telephone]

<b>Project Manager</b>		
[Name]	[Email]	[Telephone]

<b>Program Manager</b>		
[Name]	[Email]	[Telephone]

<b>Contract Developer</b>		
[Name]	[Email]	[Telephone]

<b>Contract Manager</b>		
[Name]	[Email]	[Telephone]

<b>IT</b>		
[Name]	[Email]	[Telephone]

<b>General Counsel</b>		
[Name]	[Email]	[Telephone]

**Purchase Orders**

<b>Purchase Order #</b>	<b>Contract Term</b>	<b>Value</b>
18-0355	8/11/17 – 8/31/18	\$111,772.71

## Contract Purpose

Continue providing the same level of customer service to people calling TDLR using existing contact center software.

## Contract Duration

The contract was executed **1/27/2018** with an initial term beginning **8/11/2017** continuing through **8/31/2018**. The Texas Department of Licensing and Regulation (TDLR) may renew the contract for one-year periods by August 31 of each subsequent year. The contract may not be extended, but the services may be re-procured under a new contract.

- TDLR entered into a contract **1/27/18**.
- TDLR intends to transition to a new contact center before the end of the current support contract.
- In the event the agency's intention is to re-procure the services contained in the contract, the Contract Manager will notify the vendor within 30 days of contract expiration.

## Justification of Procurement method

TDLR must utilize the Department of Information Resource commodity contracts for the purchase of software, hardware and technology services. Per DIR Threshold and SOW guide, procurement of software maintenance services does not require Request for Pricing.

## Needs Assessment

A group of subject matter experts from Customer Service, Financial Services, Information Technology and General Counsel Divisions identified agency needs and resources in order continue to provide customer service to licensees, businesses, and the general public. The group determined that staff can perform these services most efficiently and effectively by continuing with supporting the current contact center software until a new contact center is procured and deployed, therefore contracting with a vendor to continue software support services provides a best value to the state of Texas.

## Contract Goals and Objectives

TDLR's Contact Center software is brought up to date. Normal support activities resume, such as patching and performing backups. Contact Center Software remains functional and stable for the duration of the contract. Vendor and agency staff work collaboratively to monitor and resolve any performance issues that arise.

## Scope of Work

### A. VENDOR RESPONSIBILITIES

Vendor will:



- Provide Software Version Updates and Service Pack Upgrades
- Provide Hot Fixes. A hotfix may come individually or within a Service Pack release.
- Provide Administrative Services: Adds, Moves, and Changes. an Enghouse Interactive representative assists the customer with administrative tasks such as adding a queue, changing a user, moving an extension, and so on. Note: This service only applies to telephone support—charges apply if a support technician remotely performs any tasks.
- Provide Priority Queue Delivery. moves to the front of the queue (front of the “line”) when calling in or submitting a support request.
- Provide 4 hours of web-based training on its products each quarter to keep TDLR up-to-date with any new services.
- Provide access to the Enghouse Interactive MySupport Web Portal for online access to documentation, support case management, knowledgebase and training enrollment options.

## B. TDLR RESPONSIBILITIES

Performing Agency will:

- Monitor system performance and report issues as described in the Enghouse Interactive Support User Guide.
- Agree upon a communication schedule for opened tickets with vendor support and follow-up if communication plan is not followed.
- Monitor Service Level Standards for reported problems and identify when to escalate unresolved issues as documented in the table included under Service Level Standard section of the Support User Guide
- Escalate issues when necessary as described in the Technical Support Escalation section of the Support User Guide.

## Contract Monitoring

Customer Service will submit a contract monitoring report at minimum once a quarter. This report will include all reported issues, current status, resolution (if applicable), whether the vendor adhered to the Service Level Standard, and whether escalation was required.

*(Embed examples? Include distribution path? How do we plan on communicating status and performance? Other types of monitoring that may apply? Reporting methods and frequency?)*

## Contract Exclusions

- 8am-5pm email support excludes weekends and holidays.
- Contract excludes labor costs associated with minor and major upgrades
- Upgrades and enhancements do not include hardware, labor, and travel costs. The Sales Representative will quote these costs separately.
- Enghouse may withdraw customer support from any site that is more than 18 months behind the current software release.

## Critical Success Factors

TDLR’s contact center must be proactively monitored and supported until the new contact center solution is deployed. In order to accomplish this goal, Customer Service must proactively manage the contract with the existing vendor and perform TDLR’s engagement responsibilities as well as hold the vendor accountable for performance under the contract.

To that end, regular, continued communication with technical support must occur when issues are unresolved, and when appropriate, issues should be escalated to both Enghouse management, and relevant TDLR staff.

## Assumptions

Customer Service will follow up with all unresolved issues until a mutually agreed resolution is reached. Customer Service will engage Contracting & Procurement Services and Network Services for vendor management support when performance of the system’s core functions is degraded or unstable or the vendor is non-compliant with terms of the support agreement as defined in the Support User Guide.

## Constraints

Limited internal staff resources

## Potential Risks

Risk	Control Measures and Contingency Plans

## Special Terms and Conditions

None.

## Cost and Payment

Payment is required in advance. Enghouse will consider the support active upon notification from ConvergeOne of receipt of TDLR’s purchase order. In addition, TDLR is reinstating lapsed support coverage, and is subject to the following requirements:

### SWA reinstatement:

- Any customer who has let SWA expire and wishes to reinstate will be subject to a 25% reinstatement fee in addition to the list price of SWA charges.
- Additionally, any customer requesting SWA reinstatement may be subject to a past SWA charge of up to 2 years of the list price of SWA charges.

- A customer requesting reinstatement will also be required to bring their version to the current release of the software before full support can be given. Please see “End of Life & Obsolescence Policy” below for further details

## Contract Administration Team Roles and Responsibilities

Who is responsible for which activities? Include High-level business processes or SOP's for how to engage team members and when?

## Performance Measurement

What constitutes acceptable performance?

## Documentation

Who keeps what. What should be passed on to C&P for retention in master contract file?

## Vendor Contacts

## Change Log