



TEXAS TECH UNIVERSITY SYSTEM™

Contract Management Handbook

September 1, 2015

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SECTION I- INTRODUCTION

A. Purpose

As an agency of the State of Texas, the Texas Tech University System (“System”) is governed by the Board of Regents. System contracting policy is established pursuant to [Texas Education Code, § 51.9335](#) which grants authority to acquire Goods or Services to institutions of higher education. To exercise this authority, an Institution of higher education must also comply with [Texas Education Code § 51.9337](#) which requires the TTUS Board of Regents to establish certain standards, and in particular, “a Contract Management handbook that provides consistent contracting policies and practices and Contract review procedures, including a risk analysis procedure.” [\(§ 51.9337\(b\)\(3\)\)](#). As well, an Institution shall establish a Contract review checklist that must be reviewed and approved by the Office of General Counsel. [\(§ 51.9337 \(d\)\)](#).

Exhibit A *Contract Review Checklist*

Accordingly, TTUS has developed this System Contract Management Handbook (“Handbook”), the purpose of which is to comply with the above statutory requirements, and coordinate with *Regents’ Rules* and System component Institutions’ Operating Policies and Procedures. (Links follow and Definitions are found in Section I. G.)

Texas Tech University System:

<http://www.texastech.edu/about.php>

<http://www.texastech.edu/board-of-regents/regents-rules.php>

Texas Statutes

<http://www.statutes.legis.state.tx.us/>

Texas Tech University Operating Policies

<http://www.depts.ttu.edu/opmanual/>

Texas Tech University Health Sciences Center Operating Policies

<http://www.ttuhscc.edu/hsc/op/>

Angelo State University Operating Policies

<http://www.angelo.edu/opmanual/>

Texas Tech University Health Sciences Center at El Paso Operating Policies

<https://elpaso.ttuhscc.edu/opp/op.aspx>

Revision Date	Summary of Revisions

B. Order of Control

In the event there is a conflict with language of this Handbook, applicable federal or State Statutes and regulations shall prevail, followed by System *Regents' Rules*, and then Institutional Operating Policies and Procedures.

See [Regents' Rules Chapter 07](#) regarding Contracting policies and procedures and [Regents' Rules Chapter 08 Facilities](#).

C. Contract Management

Contract Management is the coordination and management of five core processes:

- Planning – Section IV;
- Procurement – Section IV F, V, VI, and VII;
- Contract formation/cost or revenue rate establishment and other terms and conditions – Section VIII;
- Contract Administration – Section IX; and
- Contract Closeout – Section X.

Contract Management for the Texas Tech University System is governed by Texas law, Texas Tech University System *Regents' Rules*, and Institutional Operating Policies and Procedures. Various types of Contracts may be subject to different statutory standards, practices, processes, and strategies for successful implementation.

A reference in this Handbook to a statute, *Regents' Rules*, or other controlling authority means as it is currently in effect or as it may be amended.

D. Contract Management Handbook

This Contract Management Handbook is intended to serve as a general guideline for the Contract Management process and to establish best practice recommendations for the System. In accordance with [Texas Government Code § 2261.256 \(b\)](#) this Handbook is also intended to be consistent with the State of Texas Comptroller's Contract Management Guide 01-Sept-2015 Version 1.14.

This Handbook does not apply to every type of Contract. Construction contracts are discussed in Section XI of this Handbook. The nature and level of risk associated with each step in the process varies depending on factors including: dollar amount, type of Contract, funding source, the Contractor, and other factors. The purpose of the Handbook is to provide consistency in the contracting process.

This Contract Management Handbook will assist System and Institutional personnel involved in Contract Management. It is not possible to address all issues that may arise during Contract Management. For complex or unusual Contracts personnel should seek specific assistance from the Office of General Counsel (and others depending on the circumstances) as early as possible in the Contract Management process.

While this Handbook was developed to establish consistent practices for the System, each Institution has different operating policies and procedures related to the specific needs of the Institutions. The exhibits in this Handbook describe policies and procedures applicable to a particular Institution.

In general, this Handbook:

1. Provides best practices for System Contract Management.
2. Describes the duties of a Contract Manager and Contract Administrator, including guidance to negotiate a Contract, award a Contract, and monitor Contractor and Subcontractor performance and compliance with Contract terms.
3. Supplements but does not replace existing statutory requirements, *Regents' Rules*, Institutional Operating Policies and Procedures. Each Institution is independently responsible for using sound business practices in accordance with applicable federal and State laws and regulations, and System policies and procedures.

4. Is not intended to be a Handbook on Contract law or constitute legal advice. Where legal principles are discussed, these are general principles only which may have exceptions. Always consult the Office of General Counsel for legal advice concerning Contracts.
5. Includes model Contract provisions, distinguishing between essential, recommended and optional Contract provisions.
6. Summarizes the requirements of the *Regents' Rules* for Contract approval.

Texas Tech University System reserves the right to interpret, change, modify, amend, or rescind this Handbook, in whole or in part, at any time.

E. Training

System or Institution officers and employees authorized to execute Contracts for the Institution or to exercise discretion in awarding Contracts, are required to receive training, including training in ethics, selection of appropriate Procurement methods, and information resources Procurement technologies. [Texas Education Code §51.9337\(b\)\(5\)](#) and [Texas Government Code § 2155.078 \(a\), \(a-1\) and \(b\)](#).

Training shall be done prior to an employee or official performing any duties assigned to a Contract Administrator or Contract Manager.

The Comptroller has established and administers a system of training, continuing education, and certification for Institutional Contract Management personnel. [Texas Government Code §§ 2262.053 and 2262.0535](#).

The training, continuing education, and certification required includes training on the selection of an appropriate Procurement method by project type and training conducted by the Department of Information Resources on Procurement of technology Goods or Services. The training also includes required ethics training. All Institutional purchasers and Contract Management personnel, including agencies exempted from the Procurement authority of the Comptroller, must receive the training and continuing education to the extent required by rule of the Comptroller's office. [Texas Government Code § 2155.078](#)

An Institution employee or official who is required to receive the training may not participate in purchases by the Institution unless the employee has received the required training, received equivalent training from a national association recognized by the Comptroller, or the purchase is reviewed and approved by an employee who has received the proper training and certification.

F. Definitions (See also Section XI for Construction definitions)

Institutions should utilize consistent terms in Operating Policies and Procedures, forms, and training materials.

Addendum: A written change, addition, alteration, correction, or revision to a Solicitation document or a Contract.

Amendment: An agreed addition to, deletion from, correction, or modification of a Contract signed by all authorized parties. An Amendment may include a renewal or extension of a Contract.

Assignment: An authorized legal transfer of contractual rights from one party to another party.

Auxiliary Enterprise: a business activity that is conducted at a State agency, providing a Service to the agency and is not paid for with appropriated money [Texas Government Code § 2252.061 \(1\)](#).

Best Value: Factors to be considered in determining best overall value for the System or the component Institution in accordance with [Texas Education Code §51.9335 \(b\)](#).

Bid: An Offer to Contract submitted in Response to an Invitation for Bid. The term Bid may also be referred to as a Response.

Bid Bond: An insurance agreement, accompanied by a monetary commitment, by which a third party accepts liability and guarantees that a Bidder will not withdraw a Bid during the Invitation for Bid process. A Bid Bond may also be required in a Request for Proposal process.

Bid Opening: The official process in which sealed Bids are opened, usually in the presence of one or more witnesses, at the time and place specified in the Invitation for Bid.

Bid Tabulation: A document used to record the Responses received from Bidders in the Invitation for Bid process.

Bidder: An individual or Contractor who submits a Response to an Invitation for Bid. The term includes anyone authorized to act on behalf of the individual or other entity that submits a Bid, such as agents, employees, and representatives. See also Respondent and Offeror.

Board: the governing body of the Texas Tech University System.

Change Order: A written alteration that is issued to modify or amend a Purchase Order.

Comptroller: The Texas Comptroller of Public Accounts.

Conflict of Interest: A Conflict of Interest refers to a situation in which an employee's financial, professional, or other personal considerations may directly or indirectly affect, or have the appearance of affecting, the employee's judgment in exercising any duty or responsibility, including the conduct or reporting of research, owed to the Institution. TTU OP 10.20; TTUHSC OP 10.05; TTUHSC El Paso OP 10.05; and ASU OP 06.22.

Construction Project: Major Construction Project (total project budget \$2,000,000 or more) and minor Construction Project (total project budget less than \$2,000,000). [See Regents' Rules Chapter 08.](#)

Consultant: An individual or firm that provides Consulting Services to an Institution and does not involve the traditional relationship of employer and employee. [Texas Government Code § 2254.021.](#)

Consulting Services: The Services of studying and advising an Institution per [Texas Government Code § 2254.021](#) Consulting Services must be approved by the TTU System Board of Regents per [Regents' Rules Chapter 07](#). See also Handbook Section VI (L)

Contract: A legally binding written agreement executed between the System or an Institution and a third party in which the parties agree to perform in accordance with the obligations therein. Contracts include, but are not limited to: letter agreements, co-operative agreements, memorandums of understanding (MOU), Interagency Contracts, Interlocal Contracts, easements, licenses, leases, and Purchase Orders. [Regents' Rules Chapter 07.](#)

Contract Administration: Following the award of a Contract, the department level actions to oversee full compliance with all of the terms and conditions contained within a Contract.

Contract Administrator: The Contract Administrator is the department level individual responsible for adherence to all provisions contained within a Contract and for managing the performance of a Contract.

Contract Close-out: The process conducted at the completion of the Contract during which the Contract Administrator confirms and documents compliance with the terms and conditions of the Contract, final Deliverables are received, and outstanding payments are made.

Contract Management: The complete contracting process from Planning through Contract Administration and concluding with Contract Close-out.

Contract Manager: An individual who is: 1) employed by an Institution in the Purchasing Office or Contracting Office and 2) is responsible for coordinating the processes required for effective Contract Management. For

Construction Project Contracts, the Contract Manager will be an individual within the Institution charged with the duty to oversee the Construction Project. The Contract Manager will provide guidance to Contract Administrators.

Contract Review Team: A team comprised of such members as the Contract Manager, the Contract Administrator, and as needed, cross-functional members such as: subject matter experts, information technology, risk management, legal, and price/cost analysts. The size and the members of the team are dependent on the nature and complexity of the Procurement.

Contracting Office: The office designated by the System or component Institution to review Contracts for Procurement compliance, and where appropriate, seek additional review and approval of the Office of General Counsel for compliance with Statutes, *Regents Rules*, and Operating Policies and Procedures. See also Purchasing Office.

Contractor: An individual or legal entity that has a Contract to provide Goods or Services to the System or any component Institution. For the purposes of this Handbook, Contractor is used interchangeably with the term “Vendor”.

Cooperative Agreement: A cooperative arrangement in which several government agencies agree to aggregate demand in order to Contract for Best Value. The Procurement cooperative conducts the Procurement process and provides general Contract oversight. An Institution is allowed to utilize the competitively procured Contracts in accordance with [Texas Education Code § 51.9335](#) and any Institutional Operating Policies and Procedures.

Deliverable: A unit or increment of work required by the Contract, including such items as Goods, Services, reports, or documentation.

Electronic State Business Daily (ESBD): The electronic marketplace maintained by the Texas Comptroller’s Office where State of Texas Solicitation opportunities over \$25,000 are posted.

Emergency Procurement: Emergencies occur as the result of unforeseeable circumstances and may require an immediate response to avert an actual or potential public threat. If a situation arises in which compliance with normal Procurement practice is impracticable or contrary to the public interest, an Emergency Procurement may be warranted to prevent a *hazard to life, health, safety, welfare, or property or to avoid undue additional cost to the Institution*.

Exempt Purchase: Certain Goods or Services that are exempt from the competitive Procurement rules, either by Statute or if the exemption is in the best interest of the public.

Goods: Supplies, materials, or equipment as defined in [Texas Government Code § 2155.001](#). Goods do not include Services or real property.

Handbook: This System Contract Management Handbook.

Historically Underutilized Business (HUB): A for-profit entity with its principal place of business in the State of Texas that is at least 51% owned by a Black American, Hispanic American, woman, Asian Pacific American, Native American or disabled veteran as defined in [Texas Government Code § 2161.001](#). See also [Texas Comptroller HUB website](#).

Independent Contractor: An individual or legal entity who enters into a Contract to perform work for an Institution according to his or her own processes and methods. The Contractor is not subject to another’s control except for what is specified in a mutually binding agreement.

Institution(s): The Texas Tech University System (TTUS) and its components including: Texas Tech University (TTU), Texas Tech University Health Sciences Center (TTUHSC), Angelo State University (ASU), Texas Tech University Health Sciences Center at El Paso (TTUHSC El Paso) and any future components that may be added to the System through statutory enactment.

Institutional: References to “Institutional” also pertain or refer to each Institution.

Interagency Contract: A Contract between one or more agencies of the State of Texas as defined by [Texas Government Code § 771.002](#).

Interlocal Contract: A Contract between one or more agencies of the State of Texas and local government as defined by [Texas Government Code § 791.003](#).

Invitation for Bids (IFB): A Procurement process used when the requirements are clearly defined, Negotiations are not necessary, and price is the major determining factor for selection.

Liquidated Damages: A specified Contract provision which entitles an Institution to demand a set monetary amount determined to be reasonable estimate of damages an Institution will incur due to Contractor’s failure to meet Contract requirements.

Major Consulting Services Contract: A Consulting Services Contract for which is reasonably foreseeable that the value of the Contract will exceed \$25,000, and modifications that increase the consideration. [Texas Government Code § 2254.021](#); [Regents’ Rules, 07.12.4](#).

Minor Consulting Services Contract: a Consulting Services Contract that is not a Major Consulting Services Contract. [Regents’ Rules, 07.12.4](#).

Negotiation(s): conferring, discussing, or bargaining to reach a mutual agreement between two or more parties.

Offer: A Response to an Invitation for Bid (IFB), Request for Proposals (RFP), or a Request for Qualification (RFQ) and intended to be used as a basis to negotiate a Contract award. See also Bid, Proposal, and Qualification.

Offeror: An individual or legal entity submitting an Offer to an, Invitation to Bid, a Request for Proposal, or a Request for Qualification. The term includes anyone authorized to act on behalf of the individual or legal entity that submits an Offer, such as agents, employees, and representatives. See also Respondent, Bidder, and Proposer.

Office of General Counsel: the TTUS Office of General Counsel.

Opening Date: The date and time, after submission of Proposals, when sealed Proposal Responses are opened.

Operating Policies and Procedures: the manuals maintained by each component Institution to standardize and provide a consistent and coherent method of defining Institutional policies.

Originating Department: The System or Institutional department from which a Solicitation or Procurement is originated.

Person: an individual or a business entity. Texas [Government Code § 572.002\(7\)](#).

Payment Bond: A bond solely for the protection and use of Payment Bond beneficiaries who have a direct contractual relationship with the prime Contractor or a Subcontractor to supply labor or material.

Performance Bond: An instrument executed, subsequent to award, by a successful Proposer or Bidder that protects an Institution from loss due to the Contractor’s inability to complete the Contract as agreed.

Procurement (Procure): Purchasing, renting, leasing, or otherwise acquiring any Goods and Services, including all functions that pertain to the acquisition through Contract Close-out.

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; land surveying; medicine; optometry; professional engineering; real estate

appraising or professional nursing. Services provided by professionals outside the scope of their profession (e.g., Consulting Services provided by accounting firms) are not considered Professional Services.

Project: See Construction Project.

Proposal: A Response to a Request for Proposals (RFP) and intended to be used as a basis to negotiate a Contract award. See also Offer.

Proposal Opening: The public opening of Proposals, in which the names of the Respondents to a Solicitation are publicly read and recorded. No prices are divulged at a Proposal Opening as these types of Solicitations are subject to Negotiations.

Proposer: An individual or legal entity submitting a Proposal in response to a Request for Proposal. The term includes anyone authorized to act on behalf of the individual or legal entity that submits a Proposal, such as agents, employees, and representatives. See also Respondent and Offeror.

Proprietary Purchase: A Good or Service produced or marketed by a Contractor having the exclusive right to manufacture or sell it. See [Texas Government Code § 2155.067](#) and Texas Comptrollers Procurement Manual for more information.

Public Works Contract: A Contract for constructing, altering, or repairing a public building or carrying out or completing any public work. A governmental entity, including a public Institution of higher education, is authorized by State of Texas law to make a Public Works Contract.

Purchase Order: A legal document issued to a Contractor which formalizes the terms and conditions of any purchase of Goods or Services.

Purchasing Office: The office designated by the Institution to purchase Goods or Services and oversee compliance with federal, State, and Institutional Procurement Operating Policies and Procedures. For purposes of this Handbook, the phrase “Purchasing Office” also encompasses “Contracting Office.”

Purchasing Office Personnel: Includes the chief Procurement officer, the Contract Manager and other employees who report to those positions and are involved in Contract Management.

Qualification: A Response to a Request for Qualifications (RFQ) and intended to be used as a basis to qualify a Contractor.

Quote: A document setting forth an Offer to sell Goods or Services at a certain price under specified conditions.

Regents’ Rules: Rules established by the TTU System Board of Regents that govern all component Institutions. <http://www.texastech.edu/board-of-regents/regents-rules.php>

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

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

Request for Proposal (RFP): A Solicitation requesting submittal of a Proposal or Offer in response to the required Specifications and usually includes some form of a cost Proposal or Offer. The RFP process allows for Negotiations between a Proposer or Offeror and the issuing Institution.

Request for Qualifications (RFQ): A Solicitation document requesting submittal of Qualifications in response to the scope of Services required.

Request for Quote (Quote): A Solicitation document requesting pricing on informal purchases as determined by each Institution's chief Procurement officer.

Response: A submission to the System or an Institution from a potential Contractor in response to a Solicitation.

Responsible: A Respondent who is fully capable to meet all of the financial and technical requirements of a Solicitation and any subsequent Contract.

Responsive: The Respondent has complied with all material aspects of the Solicitation, including submission of all required documents in accordance with the Specifications.

Respondent: An individual or legal entity submitting a Response to a Solicitation.

Scope of Work (or "SOW"): A detailed, written description of the conceptual requirements contained within the Specifications.

Scoring Matrix: A chart used to document the evaluation criteria of a Response.

Service(s): The furnishing of labor, time, and effort by a Contractor or Auxiliary Enterprise, including for a Construction Project, which may involve to a lesser degree, the delivery or supply of Goods.

Solicitation: A method or process used to obtain Responses for the purpose of gathering information or entering into a Contract.

Solicitation Conference: A meeting chaired by the Purchasing Office or Contracting Office which is designed to help potential Respondents understand the requirements of a Solicitation. May also be known as a Pre-Bid Conference, Pre-Solicitation Conference, or Pre-Proposal Conference.

Specification(s): Description of the requirements for Goods or Services including the Scope of Work, to be fulfilled by a Contractor.

State: The State of Texas.

Statute: a law enacted by a legislature.

Subcontractor: An individual or business entity retained by a Contractor to perform part of a Contractor's duties under a Contract.

System: The Texas Tech University System and its component Institutions.

TPASS Contract: Contract that is competitively procured and awarded by the Texas Comptroller's Office.

Vendor: An individual or business or governmental entity that has a Contract to provide Goods or Services to the State of Texas. Used interchangeably with the term "Contractor."

Vendor Debarment: The status of any Vendor who is debarred from conducting business with an Institution by either the Texas Comptroller or the federal government. Debarment protects the State from risks associated with awarding Contracts to Vendors who have exhibited an inability or unwillingness to fulfill contractual requirements or who have displayed improper conduct. Debarment may include a Vendor's successors-in-interest. Debarment does not relieve the Vendor from responsibility for fulfilling existing obligations. State of Texas Procurement Manual.

Vendor Performance Form: A form prepared by the Contract Administrator that reports satisfactory and unsatisfactory performance by a Contractor.

The *National Institute of Governmental Purchasing: Public Procurement Dictionary of Terms* (April 2012) was used as a reference for certain definitions used in this Handbook.

G. Institutional Procurement and Contracting Operating Policies

Each Institution shall develop and maintain Operating Policies and Procedures to guide Procurement and Contract Management processes. The following provides a reference to applicable operating policies for each Institution.

Texas Tech University

[72.01 Equipment Purchases Requiring Building and/or Building System Modification](#)

[72.02 Contracting Procedures](#)

[72.03 Conflicts of Interest Relating to Purchasing, Payments, and Contracts](#)

[72.04 Contract Administration](#)

[72.07 Leasing Land, Space, and Facilities](#)

[72.08 Use of Consultant Services](#)

[72.09 Purchase of Goods and Services](#)

[72.12 Historically Underutilized Businesses](#)

[72.15 Purchasing/Leasing Motor Vehicles](#)

[72.17 Procurement of Independent Contractors](#)

[72.18 Lease Purchase of Equipment and Other Commodities](#)

[72.20 Professional Services](#)

[72.24 Auxiliary Enterprise Contractors](#)

Texas Tech University Health Sciences Center

[54.01 Contracting Authority and Policy](#)

[54.02 Contracting Procedures](#)

[54.04 Professional Services - Contracting](#)

[72.01 Purchasing Supplies, Equipment and Services](#)

[72.02 Guidelines for Proprietary Purchasing](#)

[72.04 Equipment Purchased for Sponsored Federal Projects](#)

[72.06 Leasing of Space and Facilities](#)

[72.07 Lease Purchase of Equipment and Other Commodities](#)

[72.08 Independent Academic Services](#)

[72.11 Purchasing/Leasing Motor Vehicles](#)

[72.13 Historically Underutilized Businesses](#)

Angelo State University

[OP 30.01 Contracting Policy and Procedures](#)
[OP 30.02 Contracting Authorities and Policies](#)
[OP 30.03 Contract Administration](#)
[OP 30.04 Auxiliary Enterprise Contractors](#)
[OP 30.05 Use of Private Consultants](#)
[OP 30.06 Professional Services](#)
[OP 54.02 Historically Underutilized Businesses](#)
[OP 54.04 Purchase of Goods and Services](#)

Texas Tech University Health Sciences Center at El Paso

[OP 72.01 Purchasing Supplies, Equipment and Services](#)
[OP 72.02 Guidelines for Proprietary Purchasing](#)
[OP 72.04 Equipment Purchased for Sponsored Federal Projects](#)
[OP 72.07 Lease Purchase of Equipment and Other Commodities](#)
[OP 72.08 Independent Academic Services](#)
[OP 72.11 Purchasing/Leasing Motor Vehicles](#)
[OP 72.13 Historically Underutilized Businesses](#)
[OP 72.17 Purchasing of Pharmaceuticals](#)

A. General

It is important that the people of Texas have complete confidence in the integrity of public servants. This need is especially critical in the area of State-supported higher education. The responsibility for educating and training the future leaders of the State and nation carries with it the duty to adhere to the highest ethical standards and principles. [Texas Education Code §51.9337\(b\)](#) requires the Board of Regents to establish a code of ethics for Institutional officers and employees, including provisions governing authority to execute Contracts or exercise discretion in awarding Contracts. For further information, refer to *Regents' Rules Chapter 02 and Chapter 03* and each Institution's Operating Policies and Procedures (listed below).

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

For federal awards, the Institution must disclose in writing any potential Conflict of Interest to the federal awarding agency or pass-through entity in accordance with the awarding agency's policy. [§ 200.112 of 2 CFR, Part 200](#) – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

With these principles in mind and in accordance with State and federal law, the following policies and procedures are to be adhered to by all System and Institutional employees, officials, Contractors, and potential Contractors.

B. Conflicts – Rules and Policies.

System Institutions shall have policies governing conflicts of interest, conflicts of commitment, and outside activities ensuring that the primary responsibility of officers and employees is to accomplish the duties and responsibilities assigned to that position. [Texas Education Code § 51.9337\(c\)\(2\)](#).

Following are link to Regents' Rules and Institutional Operating Policies and Procedures related to conflict policies and ethical standards:

Texas Tech University System

[*Regents' Rules*](#)

Texas Tech University and TTU System

[*Operating Policy 10.11 Ethics Policy*](#)

[*Operating Policy 10.20 Conflict of Interest and Commitment Policy*](#)

[*Operating Policy 32.07 Other Employment, Faculty Consulting, and Public Offices*](#)

[*Operating Policy 70.31 Employee Conduct, Discipline, and Terminations*](#)

[*Operating Policy 72.03 Conflicts of Interest Relating to Purchasing, Payments, and Contracts*](#)

Texas Tech University Health Sciences Center

[Operating Policy 10.05](#) *Conflict of Interest and Commitment Policy*

[Operating Policy 52.06](#) *Standards of Conduct and Ethics Guide*

[Operating Policy 73.09](#) *Financial Conflicts of Interest in Research*

Angelo State University

[Operating Policy 02.09](#) *Conflict of Interest and Commitment*

[Operating Policy 06.05](#) *Conduct of University Faculty*

[Operating Policy 06.22](#) *Conflict of Interest*

[Operating Policy 52.02](#) *Ethics Standards and Conduct Policy*

[Operating Policy 56.02](#) *Misconduct in Research*

[Operating Policy 56.08](#) *Disclosure of Significant Financial Interests that may Represent Conflicts of Interests*

Texas Tech University Health Sciences Center at El Paso

[Operating Policy 10.05](#) *Conflict of Interest and Commitment Policy*

[Operating Policy 52.06](#) *Standards of Conduct and Ethics Guide*

[Operating Policy 73.09](#) *Financial Conflicts of Interest in Research*

C. Ethics Training

See I. Introduction, part D - Training and part E – Certification.

D. Standards of Conduct of Officers and Employees

As State officers or employees, each Institutional officer or employee is expected to comply with all federal, State, and local laws and is subject to disciplinary action for a violation of those laws. [Texas Education Code §51.9337 \(c\)\(1\)](#) and ethical standards and policies. A violation by an officer or employee may subject the individual to disciplinary action and any applicable civil or criminal penalty if the violation constitutes a violation of another Statute or rule.

In accordance with [Texas Government Code Chapter 572, part C](#), Standards of Conduct and Conflict of Interest Provisions, [§ 572.051](#), a State officer or employee shall not:

- 1) Accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;
- 2) Accept employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the officer's or employee's position;
- 3) Accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;
- 4) Make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the Institution's interest; or

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

E. Disclosure of Potential Conflicts by Institution Officials and Employees; Prohibited Contracts

- 1) Institutional Procurement of Goods or Services is subject to [Texas Government Code, Chapter 2261](#) - State Contracting Standards and Oversight, and applies to related Contracts and Contract Management activities.

Institutional employees and officials involved in Procurement or in Contract Management for the Institution must disclose to the Institution, as required by State law, Regents' Rules or Institution Operating Policies and Procedures or other applicable policies, any potential Conflict of Interest that is known by the employee or official with respect to any Contract or purchase of Goods or Services from a Contractor by the Institution. [Texas Government Code § 2261.252 \(a\)](#) – Disclosure of Potential Conflicts of Interest; Certain Contracts Prohibited.

- 2) The Institution shall evaluate any disclosed potential Conflict of Interest when contracting for Goods or Services. Under [§ 2261.252\(b\)](#), if any of the following Institution employees or officials or certain family members has a financial interest in a private Vendor, the Institution as a State agency is unable to enter into a Contract for the Purchase of Goods or Services with the Person:
 - (a) a member of the agency's governing body (i.e. TTUS Board of Regents);
 - (b) the governing official (i.e., the TTUS Chancellor), executive director i.e., the Institution Presidents), general counsel (i.e. Vice Chancellor and General Counsel), chief Procurement officer, or Procurement director of the agency (i.e., Institution); or
 - (c) a family member related to an employee or official described by (1) or (2) within the second degree by affinity or consanguinity.

There is a financial interest under [Texas Government Code § 2261.252 \(c\)](#), if the employee or official:

- (a) owns or controls, directly or indirectly, an ownership interest of at least one percent in the Person, including the right to share in profits, proceeds, or capital gains; or
- (b) could reasonably foresee that a Contract with the Person could result in a financial benefit to the employee or official.

Reference Exhibit B – *Disclosure of Potential Conflicts by Institution Officials or Employees*

Reference Exhibit C – *Conflict of Interest Form for Purchasing Office or Contracting Office Personnel*

F. Conflict of Interest: Disclosure, Representations and Warranties by Potential Contractors and Respondents; Employment of Current and Former Institution Employees

- 1) To avoid conflicts of interest, Institutions shall request all potential Contractors and Respondents to disclose, in their Response to Solicitations and during the term of any resulting Contract, any actual or potential conflicts of interest in their proposed provision of Goods or Services or other performance under any Contracts resulting from the Solicitations.

Potential Contractors and Respondents shall submit a disclosure certificate of interested parties on the form prescribed by the Texas Ethics Commission, and Institutions shall acknowledge receipt of the certificate, both of which shall be accomplished through the website available at: https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm

An Institution shall not enter into a Contract that requires Regents' approval prior to execution or has a value of at least \$1 million without the requisite disclosures by potential Contractors or Bidders. [Texas Government Code § 2252.908](#). This requirement does not apply to the following Contracts:

- a) where the governing body has properly delegated authority to execute the Contract and the governing body does not participate in selecting the Contractor ([Texas Ethics Commission, Chapter 46](#));
 - b) a sponsored research Contract of an Institution; an Interagency Contract of an Institution; or a Contract related to health and human services if the value cannot be determined at time of execution and any qualified Contractor is eligible for the Contract ([Texas Government Code §2252.908 \(c\)](#)).
2. In Responses, potential Contractors and Respondents are required to (Texas Comptroller's Guide 01-Sept-2015 Version 1.14):
- (a) Represent and warrant that Contractor's or Respondent's provision of Services or other performance under the Contract will not constitute an actual or potential Conflict of Interest and represent and warrant that it will not reasonably create even the appearance of impropriety.
 - (b) Disclose any current or former employees who are current or former employees of the Institution.
 - (c) Disclose any proposed personnel who are, or are related to, current or former employees of the Institution.
 - (d) Represent and warrant that Contractor or Respondent has not given and will not give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to a public servant or employee or representative of the Institution in connection with the Solicitation or any resulting Contract.
 - (e) Verify that it or any of its principals (including, but not limited to, an owner, proprietor, sole or majority shareholder, director, president, or managing partner) are not debarred, suspended, or otherwise excluded from doing business with System or Institutions. Institution may also verify that an entity or principals are not debarred, suspended, or otherwise excluded to confirm that no Contracts are awarded, extended, or renewed.

G. Contracts with Former or Retired Employees

The following restrictions also apply to Potential Contractors and Respondents:

- 1) [Texas Government Code § 2252.901](#), Contracts with Former or Retired Agency Employees. An Institution may not enter into an employment Contract, a Professional Services Contract, or Consulting Services Contract with a former or retired employee before the first anniversary of the last date on which the individual was employed by the Institution **if appropriated funds** are used to make payments under the Contract. Such Contracts may be made with an employer of a former or retired employee within one year if the individual does not perform Services on Procurements or Projects on which the individual worked while employed by the Institution.
- 2) [Texas Government Code § 2254.033](#), Restriction on Former Employees of a State Agency. An individual who Offers to provide Consulting Services to an Institution and who was employed by the Institution or another State agency any during the prior two years shall disclose in the Offer the nature or previous employment, the date employment terminated, and annual compensation at the time of termination.
- 3) [Texas Government Code §572.069](#), Certain Employment for Former State Officer or Employee Restricted. A former State officer or employee of a State agency who during the period of State service or employment participated on behalf of a State agency in a Procurement or Contract Negotiation involving a Person may not accept employment from that Person before the second anniversary of the date the officer's or employee's service or employment with the State agency ceased.

H. Subcontractors or Assignees

Contractors are not allowed to assign their duties and obligations under a Contract to others such as Subcontractors or assignees except as expressly provided in the Contract with Institutional consent and Subcontractors or assignees are subject to the same disclosure requirements and restrictions set forth in this section. Contractors remain responsible for the disclosure requirements and performance of the Contract notwithstanding any such Assignment or subcontract. This ensures that the evaluated and selected individual or entity will actually be responsible for performance and that proposed transactions may be reviewed for compliance with the Conflict of Interest and related party provisions. (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

SECTION III- CONTRACT MANAGEMENT OVERVIEW

Effective Contract Management techniques, coupled with the Contractor's own quality assurance program, will help to ensure that standards for acceptable performance are met.

It is essential for a Contract Manager to manage the overall Procurement and Contract process and have the ability to communicate with all parties involved.

The five steps of the Contract Management process are:

Planning - Identify objectives and contracting strategy for Procurement. **CMH Article IV**

Procurement –Purchasing, renting, leasing or otherwise acquiring Goods or Services including all functions that pertain to the acquisition such as Planning, Solicitation, award, Contract formation, Contract Administration. (Section I. G. Definitions.)

Preparing the Solicitation
Advertising the Solicitation
Evaluation and Award

CMH Article V
CMH Article VI
CMH Article VII

Contract Formation – Ensure the Contract contains provisions that hold the Contractor accountable to the Specifications and all State and federal required terms and conditions. **CMH Article VIII**

Post-award Contract Administration – Following the award of a Contract, the management actions that must be taken for oversight to have full compliance with all of the terms and conditions contained within a Contract. (Section I. G., Definitions.) **CMH Article IX**

Contract Closeout – Perform final review of the received Goods or Services, confirm the receipt of all Deliverables, and finalize any payments. **CMH Article X**

The level of risk associated with each of these processes varies depending on the type of business relationship and the nature and scope of Goods or Services obtained. For example, a Contract for Professional Services may present more risk than a small dollar Procurement of Goods.



SECTION IV– PLANNING

The first step in the Contract Management process is planning. Planning is crucial to the successful outcome of any Procurement or Contract. Planning assists an Institution 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 each of the following elements must be considered:

A. General Planning

General planning includes identifying a Contract Review team, assessing risk, developing a communication plan, determining the Solicitation method and content of the Procurement, and determining any financial obligation.

As defined by an Institution's Operating Policies and Procedures a Contract Manager, a Contract Administrator, and program personnel may assist in the Contract Management process. The level of participation should be directly related to the level of risk and complexity associated with the Procurement or Contract. Institutional employees who are delegated authority in compliance with *Regents' Rules* shall review Contracts for compliance with Institutional Operating Policies.

The Institutional Originating Department shall submit a request to issue a Solicitation to the Purchasing Office or Contracting Office. The Originating Department will provide input as needed to develop the Scope of Work and serve as the subject matter expert for the Procurement. The Originating Department will assign a Contract Administrator to oversee the Contract, confirm the Goods or Services are received, and payment is made in accordance with the Contract.

Depending on the complexity of the Solicitation and the level of risk, the Purchasing Office or Contracting Office personnel will consult with the Office of General Counsel, the chief information officers, risk management, accounting services, and other Institutional departments to obtain input about compliance with State laws and regulations, Institutional Operating Policies and Procedures, and the Contract.

B. Accountability and Risk Analysis Procedure

As an aspect of governance, accountability has been central to discussions related to problems in the public sector, nonprofit, and private worlds.¹ Accountability is the principle that employees who accept an assignment and the authority to carry it out are answerable to a superior or higher authority for the outcome². In public higher education Procurement, employees are not only answerable to a higher authority, but also to grantees, taxpayers, and donors.

Risk analysis can be the management of factors that create the possibility of loss or injury in the performance of a Contract; includes all activities necessary to identify, analyze, plan, track, or control risk management activities.

Each Institution must develop and comply with the Purchasing Accountability and Risk Analysis Procedure. [Texas Government Code, § 2261.256 \(a\)](#). The procedure must address:

1. assessing the risk of fraud, abuse, or waste in the Contractor selection process, Contract provisions, and payment and reimbursement rates and methods for the different types of Goods or Services for which the Institution enters into Contracts;
2. identifying Contracts that require enhanced Contract monitoring or the immediate attention of Contract Administrator or Contract Administration Team and personnel; and
3. establishing clear levels of Purchasing and Contracting accountability and related personnel responsibilities.

¹ State of Texas Contract Management Guide v. 9-1-15.

² National Institute of Governmental Purchasing; Public Procurement Dictionary of Terms April 2012.

The Institution shall post on the Institution's internet website the procedures described in paragraphs 2 and 3 above and submit to the Comptroller a link to the web page that includes the procedures. [Texas Government Code, § 2261.256 \(c\)](#).

C. Risk Assessment (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

Risks are inherent in all stages of the Procurement process. Institutions 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 the Institution. 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.

Reference Exhibit D – *Purchasing Accountability and Risk Analysis Procedure*

During Negotiations of a Contract, and prior to execution, a preliminary risk assessment should be conducted to make an initial determination about the level, type and amount of management, oversight and resources required to plan and implement the Contract from beginning to end. As the risk associated with a Contract increases, the level and degree of Contract Manager and Contract Administrator participation and oversight should be increased.

D. Risk Management (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

Risk management follows risk assessment and includes identifying specific risks of a Procurement or Contract and seeking to minimize the risks to System or Institution 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 particular Contract. Risk determination is based on both objective and subjective experience.

E. Communications Plan (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

Institutions need to manage both internal and external communications. After identifying internal and external stakeholders (executive management, oversight entities, etc.), the Purchasing Office or Contracting Office will provide guidance to communicate to all stakeholders regarding how communications will be delivered and acceptable content. Institutions should focus on centralized communication throughout the Contract term utilizing the Contract Manager or the Contract Administrator, particularly for any Scope of Work communication. Individuals involved in any Procurement process shall sign a non-disclosure form.

Reference Exhibit E– *Non-Disclosure for Contract Review Team Members*

F. Determining the Procurement Method (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

If a Procurement of Goods or Services requires a Solicitation, the Purchasing Office or Contracting Office shall determine the appropriate method of Solicitation. (See next section regarding Exempt Purchases.)

The Purchasing Office or Contracting Office may request the Originating Department to provide sufficient information for the Contract Review Team to develop the Scope of Work.

Reference Exhibit F– *Request for Solicitation Process*

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 an Institution does not 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 interest of prospective Respondents. A preliminary Solicitation document which provides an initial description of the program objectives and Scope of Work usually accompanies an RFI for review by potential Respondents. Institutions may use, but are not required to incorporate, information contained in a Response to an RFI.
3. 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.
4. 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 to Respondents is based solely on demonstrated competence to perform the Services; and for a fair and reasonable price. § 2254.003. Price is negotiated after the Institution has made a selection based on Qualifications.
5. Request for Quote (Quotes) – A Bid method utilized in the informal Bid process, as determined by the Institution’s chief Procurement officer, to obtain quotations from potential Contractors for the purchase of Goods or Services. Quotes are obtained for small dollar transactions and shall be governed by the Purchase Order terms and conditions.

Each Institution will develop standard Solicitation templates to facilitate a consistent process and ensure that each Solicitation document contains the required provisions. Templates will be reviewed and updated periodically. See Section V, Preparing the Solicitation.

Reference Exhibit G – *Invitation for Bid Template*

Reference Exhibit H – *Request for Information Template*

Reference Exhibit I – *Request for Proposal Template*

Reference Exhibit J – *Request for Qualifications Template*

G. Exempt Purchases (Texas Comptroller’s Guide 01-Sept-2015 Version 1.14)

Some Procurement transactions may be exempt from competitive Procurement requirements. Each Institution shall maintain a list of Exempt Purchase Goods or Services. The chief procurement officer or his or her designee shall make the final determination on an Exempt Purchase.

Examples of Exempt Purchases include, but are not limited to, the following.

1. Emergency Purchases

An Emergency Purchase occurs as the result of unforeseeable circumstances and may require an immediate response to avert an actual or potential public threat. If a situation arises in which compliance with normal Procurement practice is impracticable or contrary to the public interest an Emergency Purchase may be warranted to prevent a hazard to life, health, safety, welfare, property or to avoid undue additional cost to the Institution. Institutions should address Emergency Procurements in their Operating Policies and Procedures.

2. 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 Department 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 at the Institution (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. A Purchasing Office or Contracting Office reserves the right to require additional Quotes or Bids for a Proprietary Purchases.

The written justification will include:

- Explanation of why a unique Scope of Work for a Good or Service is required;
- Details on the unique features of the Good or Service;
- Reason that competing Goods or Services are not satisfactory;
- Any other relevant information to support the sole source documentation; and
- Confirmation that the Procurement does not violate Conflict of Interest policies.

Institutions shall have specific rules or policies pertaining to Proprietary Purchases within their Operating Policies and Procedures.

3. 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 the Institution and shall have a valid business purpose.

Reference Exhibit K— *Exempt Purchase List*

H. Planning for Contract Content

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

I. Technique

Defining the Contract objectives, assumptions, and constraints may sound simple and straightforward, but this definition process can be quite complex. Institutions may find that individuals in the Contract Review Team hold different views as to the Procurement's objectives.

Each Procurement transaction is different; therefore the description of the objective, assumptions and constraints will vary. A good measure of the quality of the Scope of Work is whether the Contract objectives, assumptions, and constraints make sense. Are the objectives, assumptions, and constraints described too broadly or too narrowly?

J. Solicitation Research

The Contract Review Team will seek input from System or Institution personnel and other agencies or Institutions who have developed Solicitations, drafted Contracts, and engaged in Contractor oversight similar to 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 universities, trade associations, and professional organizations to identify industry standards; and
- Publish a Request for Information (RFI).

While researching, Institutions may wish to contact potential Contractors to discuss the Procurement. This is an acceptable practice as long as the Institution solicits information from more than one Contractor and advises the Contractor up front that the Institution’s interest at this point is strictly for Solicitation research purposes and that any formal requests for pricing or other information will be made through a formal Solicitation process (Texas Comptroller’s Guide 01-Sept-2015 Version 1.14).

K. Cost Estimates

An estimated cost of the Procurement will provide an idea of the range of Goods or Services to be included in the Scope of Work.

It is recommended that Institutions contact someone within the Institution who has knowledge in the subject area to assist with the cost estimate. However, if unable to find anyone with knowledge in the subject area, Institutions may choose to conduct research to obtain pricing information. If Contractors are contacted, be sure to advise them that you are obtaining price estimates for information purposes only and that the estimate is not a formal Solicitation. In obtaining price estimates from potential Bidders or Proposers, care should be taken to avoid giving a potential Respondent a competitive advantage.

L. Procurement Lead Time

In order to process a Contract prior to its start date, the table below is provided to assist the System and Institutions in the planning process.

TASK	SUGGESTED LEAD TIME FROM CONTRACT START DATE
Begin Preparation of Solicitation Document – Program Personnel works	180 days
Solicitation document 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

The lead times above **are suggestions only** and may vary depending on the specific requirements, the complexity of the Contract, and the workload of the Purchasing Office and Contracting Office. Less complex Procurements may be accomplished in less time, while more complex Procurements may require more time.

- If the Procurement is very complex and requires Respondents to submit significant documentation and/or complex pricing, additional time for the Solicitation period should be allowed.

- Evaluation of the Bids or Proposals may take more or less time, depending on the size of the Contract Review Team and the complexity of the evaluation. The evaluation period could also increase if oral presentations, discussions or best and final offers are utilized.
- Contract Negotiation and formation timeframes may vary depending on the complexity of the Procurement.
- The Contract execution timeframe may also differ significantly between a Purchase Order and a Contract.
- Depending on the approval and signature requirements of the Institution and the Contractor, the Contract execution lead time may need to be adjusted.

SECTION V– PREPARING THE SOLICITATION

After an Institution’s Purchasing Office determines which Solicitation method is appropriate, the Solicitation document is prepared. Relevant Statutes, Operating Policies and Procedures, *Regents’ Rules*, and industry best practices should be reviewed prior to preparing the Solicitation document. The Contract Review Team involved in preparing a Solicitation, any Institution personnel reviewing the Solicitation, and any other Institutional or outside representative who is involved in the Procurement process must sign and submit a *Disclosure of Potential Conflicts by Institution Officials or Employees* (Exhibit B).

A. Preparing the 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. Scope of Work
10. Evaluation and Award Process
11. Contractor Questionnaire
12. Terms and Conditions or 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.

B. Organization of the Scope of Work

The Scope 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 within 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.

It is very important that the SOW:

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

The following referenced document provides guidelines for drafting a SOW.

Reference Exhibit L –*Scope of Work Guidelines*

One way of organizing the SOW is to divide 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.

C. Characteristics of an Effective Specification

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 the Institution 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 in the Solicitation.
4. **Competitive:** Draft Specifications that encourage competition and provide opportunities for cost savings. Avoid additional requirements that could reduce or eliminate potential Contractors.
5. **Flexible:** Avoid Specifications that lack flexibility which prevent the acceptance of a Response that could offer a greater value.

A Specification is a description of the requirements for a Good or Service that an Originating Department seeks to Procure, and is also a description of what a Respondent must submit to be considered for an award.

D. Specification Types

This Handbook will focus on two of the most common types: Performance Based Specifications and Design Specifications.

1. 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 Respondents to bring their own expertise, creativity, and resources to the Procurement process without restricting them to predetermined methods or detailed processes. This allows the Respondents to provide the Goods or Services at less cost and shifts some of the risk to the Contractors. Performance based Specifications are fashioned so that Respondents are allowed maximum flexibility when satisfying the requirements of a Solicitation.

2. 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 Review Team.

3. Other Specification Options

- a. **Incentives:** Institutions can include incentives in their Contract language. Incentives are used for outstanding performance which exceeds the goals contained in the Contract. Incentive limitations shall be predetermined by the Contract Review Team.

E. 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 relevant environment where the Goods or Services will be used. In certain types of Procurements, it may be critical to describe the existing business processes and Operating Policies and Procedures. If the existing business process will change as a result of the Procurement, then also describe what the business process will be after the Procurement objectives are completed. If the Institution wants the Respondent to recommend new business processes, this information must be included in the Solicitation.

F. Contract Term

The Contract term shall comply with *Regents' Rules* and Institutional Operating Policies and Procedures. 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 shall be clearly defined as to the number and length of each potential option. Automatic renewals shall not be utilized unless approval is obtained from the Board of Regents outside of an original four year term.

G. Historically Underutilized Business (HUB) Requirements

Institutions are required to make a good faith effort to utilize HUBs in Contracts in accordance with Institutional Operating Policies and Procedures. These goals can be achieved through contracting directly with HUBs or indirectly through subcontracting opportunities in accordance with [Texas Government Code, Chapter 2161, Subchapter F](#) and [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B](#).

Specific HUB procedures are detailed in the Operating Policies and Procedures of each Institution.

Each Institution that considers entering into a Contract with an expected value of \$100,000 or more over the life of the Contract (including any renewals) shall, before an Institution prepares the Solicitation, determine whether subcontracting opportunities are probable under the Contract [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B, Rule § 20.14 \(a\)](#).

For all Solicitations and Contracts with an estimated value greater than \$100,000, in which the Institution has determined that there are subcontracting opportunities, HUB subcontracting forms must be submitted or the Response will be considered non-Responsive as addressed in [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B, Rule § 20.14 \(b\)](#).

H. Payment Types (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

The method of payment has a direct impact on how the SOW is written and how a Contract is managed. Institutions must measure or verify that the work is complete and how much and how often the Institution will pay the Contractor. As with Specification types, there are also various payment types. The payments should be consistent with the type of Good or Service delivered. Payments should be structured to fairly compensate the Contractor and encourage timely and complete delivery of the Goods or Services. As a general 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.
8. **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, an Institution may want to recognize cost savings by requiring electronic invoicing and payment. These incentives or requirements must be defined in the SOW.

The Purchasing Office or Contracting Office shall verify that the payment type complies with applicable Statutes, *Regents’ Rules*, Operating Policies and Procedures, and Comptroller Guidelines.

I. Define the Institution’s Role (Texas Comptroller’s Guide 01-Sept-2015 Version 1.14)

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

J. Quantity

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

K. Quality

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

L. Established Standards

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

Contracts will often incorporate by reference “standards” maintained by entities representing particular industries such as Generally Accepted Accounting Principles (GAAP), Institute of Electrical and Electronic Engineers (IEEE) or ISO. If a standard is incorporated by reference, identify any industry, State or Institution standards of performance that relate to each Good or Service received by the Institution. Merely referring to “industry standards” is usually inadequate. If an industry standard is used, specifically identify the standard.

M. 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 shall be merchantable, or a warranty that Goods are fit for a particular purpose.

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

N. Contractor Qualifications

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

O. Bonding Requirements

The three most common forms of bonding are Bid Bonds (deposits), Performance Bonds, and Payment Bonds. Institutions must advise the Respondents in a Solicitation if a bond is required and what forms are acceptable (e.g., irrevocable letter of credit or cashier’s check). When considering whether or not to use a bond, remember that the cost of the bond is typically passed on to the Institution by the Contractor. Some bonds are required by Statute for specific types of Procurements as set forth in:

[Texas Government Code § 2253.021\(a\)](#):

- (1) a Performance Bond if the Contract is in excess of \$100,000, and
- (2) a Payment Bond if the Contract is in excess of \$25,000.

Texas Government Code, Subchapter C, Private Auxiliary Enterprise Providing Services to State Agencies or Institutions of Higher Education - [§ 2252.064](#):

- (a) A Contractor shall execute a bond issued by a surety company authorized to do business in this State in an amount determined by the Institution, but not to exceed the Contract price.

- (b) The bond must be payable to the Institution and conditioned on the faithful performance of the terms of the Contract.

Each Institution must evaluate the risk of performance failure prior to issuing the Solicitation and determine the need for a Performance Bond or Payment Bond.

P. Insurance Requirements

Institutions must also evaluate the risks associated with each Solicitation and include any insurance requirements in the Specification. The Contract Review Team shall consult with the TTUS Risk Manager on insurance requirements as determined by the chief Procurement officer and shall consult with the TTUS Risk Manager on high risk Solicitations.

Q. Evaluation Criteria (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

The Solicitation document must advise the Respondents 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 Review Team to fairly evaluate the Responses. The evaluation criteria may take a variety of sources of information into consideration such as the written Response, oral presentations, documented past performance of the Respondents, and references relevant to the Contract. Specific portions of the required Response should directly relate to the evaluation criteria. To ensure fairness in evaluation, the evaluation criteria 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 Review Team will have when evaluating Proposals, so the evaluation criteria should not be unduly restrictive. Respondents must have notice in the Solicitation of all requirements.

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

R. Best Value Considerations (Texas Comptroller's Guide 01-Sept-2015 Version 1.14) and [Texas Education Code § 51.9335](#))

Best Value considerations must be included in the Specifications. The lowest cost is not necessarily the Best Value for all Procurements. For example, a commodity or Service of higher quality, such as a longer life span, may be a better value and investment for the Institution, even if the initial cost is more. Institutions need to think strategically when considering their Procurement needs. Institutions must consider long term needs.

Some items which may typically be considered under Best Value include:

1. Installation costs;
2. The long-term cost to the Institution of acquiring the Contractor's Goods or Services;
3. The quality and reliability of the Goods or Services;
4. Delivery terms;
5. Contractor's past performance including the Contractor's 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 Institution's needs;
8. The Contractor's past relationship with the Institution;
9. The impact on the ability of the Institution to comply with laws and rules relating to Historically Underutilized Businesses and to the Procurement of Goods or Services from Persons with disabilities;
10. The cost of employee training;
11. The effect of the purchase on the Institution;
12. The Contractor's anticipated economic impact to the region;

13. Other factors relevant to determining the Best Value for the Institution; and
14. Any relevant factor that a private business entity would consider in selecting a Contractor.

S. Proposal Submission Requirements

The Specifications must include a listing all of the required information that Respondents must submit with their Response to assist Respondents 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 Institution may want to specify the size of paper, number of copies, etc.

T. Monitoring

The methods used to monitor Contractor performance must be clearly stated in the Solicitation to give Contractors advance notice if requirements include producing time-consuming reports or maintaining stringent testing requirements outside normal industry parameters. The Institution 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.

U. Reporting

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

If Deliverables are specified, include the format of the Deliverable and the 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 Institutions' 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.

V. Inspection and Testing

The SOW must provide any requirements for inspection and testing and Institutions shall 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 the buyer [1] or not discoverable by a reasonably prudent inspection. [2]

The Institution will not have an obligation to the Contractor for any lost overhead or profit resulting from a replacement or cancellation.

W. Final Acceptance

The SOW must clearly define how an Institution 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 Administrator and a Contractor to monitor the Contract performance.

X. Additional Issues to Consider

Listed below are additional issues which Institutions should consider when preparing the SOW. Institutions should consider the effect on costs when including these items:

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

[1] *Centex Homes v. Buecher*, 95 S.W.3d 266, 274 (Tex.2002).

[2] *Brown v. Caldwell & Family Custom Homes, Inc.* 2012 WL 4662544, October 4, 2012.

Gupta v. Ritter Homes, Inc., 646 S.W.2d 168, 169 (Tex.1983); *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 488, 503 (Tex.App.-Houston [14th Dist.] 2007, pet. denied) (op. on reh'g).

SECTION VI– ADVERTISING THE SOLICITATION

When marketing a Solicitation, consideration must be given to the type of Procurement method used. For example, the advertising requirements of Goods or Services are different from those of a Major Construction Project. Institutions should refer to the appropriate Statute to ensure the proper advertising procedures are followed. Below is a table to assist in determining recommended advertising options.

Type of Procurement	Applicable Statute*	Advertising Method(s)
Goods or Services	Texas Education Code §51.9335	Institutional bidding systems, Electronic State Business Daily (ESBD), Centralized Master Bidder’s List (CMBL), newspapers, HUB organizations, print media.
Professional Services	Texas Government Code Chapter 2254	Institutional bidding systems, Electronic State Business Daily (ESBD), Centralized Master Bidder’s List (CMBL), newspapers, HUB organizations, print media.
Consulting Services	Texas Government Code Chapter 2254	Institutional bidding systems, Electronic State Business Daily (ESBD), Centralized Master Bidder’s List (CMBL), newspapers, HUB organizations, print media. The Solicitation shall be posted in the Texas Register if paid for by appropriated funds.
Construction	Texas Education Code § 51.9335 and Subchapter T - §§ 51.776-51.785	Institutional bidding systems, Electronic State Business Daily (ESBD), Centralized Master Bidder’s List (CMBL), newspapers, HUB organizations, print media.

A. The 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. Institutions may utilize the list to solicit Bids or Proposals from Contractors registered on the CMBL.

B. The 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. Institutions can utilize the ESBD to solicit Procurements to Vendors on the CMBL. The ESBD is available on the internet at <http://esbd.cpa.state.tx.us/>.

C. The Texas Register

The Texas Register is used to advertise various types of Procurements as required by Statute. The [Texas Register](#) is administered by the Secretary of State’s Office.

D. Institutional Bidding System

Each component Institution may publish the Solicitation notifications in their respective Institutional bidding system. The system allows Contractors to register to receive notifications relating to their respective commodity types. The Institutional bidding system may also accommodate electronic submittals of Procurement Responses.

E. Newspapers

If required by Statute or Institutional policy, each component Institution shall publish Procurement notices, in a newspaper of general circulation in print or online.

F. Required Posting Of Certain Contracts

In 2015, the legislature enacted legislation which requires the Institution to post certain Contracts for the public to view. [Texas Government Code § 2261.253](#). For **each** Contract for the Procurement of Goods or Services from a private Contractor, the Institution shall post on its Internet website:

1. each Contract the Institution enters into until the Contract expires or is completed, including Contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the Contractor;
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.

G. Pre-Solicitation Conferences

Institutions may conduct mandatory or non-mandatory pre-solicitation conferences. Institutions should carefully consider the use of a mandatory conference as this may limit competition. Conferences should be mandatory only if an on-site visit is required to have a full understanding of the Procurement or if the Solicitation is so complex that the Institution's Contract Review Team believes attendance is critical for potential Respondents to fully understand the Procurement. Pre-solicitation conferences provide a forum for Institution personnel to respond to questions regarding a Solicitation. The benefits derived 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 Institution 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 Contractors prior to submitting their Response. In some cases, it may be sufficient to take digital pictures of the sites and provide this information in a slide presentation at the conference in lieu of the conference attendees traveling to the various sites. A copy of the slide presentation can be provided to the conference attendees and can be posted online.
4. Conferences provide a forum for Institutions to provide additional information, schematics, plans, reports, or other data that is not easily transferable or distributed through hard copy.
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. All conferences attendees must be documented through a sign-in sheet. This is especially important if the conference is mandatory since the Institution can use the sign-in sheet to document Respondent attendance at the conference.

The Purchasing Office or Contracting Office will conduct the conference, in coordination with relevant Institutional representatives.

The Purchasing Office or Contracting Office should facilitate the meeting and answer Procurement process related questions, while other Institutional representatives may respond to the technical questions. It may not be possible to answer all questions at the conference. In these circumstances, the answers may be provided as an Addendum. It is recommended that the Purchasing Office or Contracting Office record minutes of the pre-solicitation conference.

All changes to Solicitations must be made through an Addendum issued by the Institution. 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 – Purchasing Office or Contracting Office representative introduces Institution representatives 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 main 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. Closing Summary – Summarize the changes that were agreed to be made through the issuance of an Addendum. Review any unanswered questions to be addressed at a later date. Remind attendees that no oral changes are binding; the changes must be in the form of a written Addendum.

H. Communication With Respondents

All communication with potential Respondents flows through the Purchasing Office or Contracting Office or other designated personnel as detailed in the Solicitation document. The Solicitation document shall identify a single point of contact within the Purchasing Office or Contracting Office and describe all applicable forms of communication such as telephone, email, etc. Should a potential Respondent contact other Institutional personnel, they must politely decline to discuss the Procurement and advise the Respondent to contact the appropriate person. While the Purchasing Office or Contracting Office 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 authorized Purchasing Office or Contracting Office personnel in regards to a Solicitation may be disqualified.

I. 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, posted through the Institutional bidding system, or hand delivery.

The questions and answers will be posted any Institutional bidding system and should be distributed to all registered potential Respondents.

J. Barring Vendors from Participating in Institutional Contracts

Under [Texas Government Code § 2155.077](#), the Comptroller may bar a Contractor from participating in State Contracts based on the following including, 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 Contractor 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 Contractor is barred from participating in State Contracts, the Comptroller shall determine the period of Vendor Debarment. The period for Vendor Debarment must be commensurate with the seriousness of the Contractor's action and the damage to the State's interests.

K. Solicitation Submission and Opening (Texas Comptroller's Guide 01-Sept-2015 Version 1.14)

The Solicitation documents shall state the date, time, and location of the public opening to be held by the Institution if applicable. Respondent's Proposals may be evaluated on a variety of factors in addition to price. At the sole discretion of each Institution and as indicated in each Solicitation documentation, Institutions may choose to not conduct a public reading of Respondent names or pricing tabulations prior to award of Contract(s). The Solicitation document must provide information to the Respondent(s) that the Responses cannot and will not be provided prior to award of Contract(s).

L. Consulting Services

1. Texas Government Code, Subchapter B: Main Provisions as Applicable to Institutions of Higher Education

[Texas Government Code § 2254.021](#) – Definitions

“Consulting Services’ means the service of studying or advising a State agency under a Contract that does not involve the traditional relationship of employer and employee.”

“Major Consulting Services Contract’ means a Consulting Services Contract for which is it reasonably foreseeable that the value of the Contract will exceed \$25,000.”

[Texas Government Code § 2254.023](#) – Applicability of Subchapter. This subchapter applies to Consulting Services that a State agency acquires with money:

- (1) appropriated by the legislature;
- (2) derived from the exercise of the statutory duties of a State agency; or
- (3) received from the federal government, unless a federal law or regulation conflicts with the application of this subchapter.

[Texas Government Code § 2254.024](#) – Exemptions

(a) This subchapter does not apply to or discourage the use of Consulting Services provided by:

- (1) practitioners of Professional Services described in Subchapter A;
- (2) private legal counsel;
- (3) investment counselors;
- (4) actuaries;
- (5) medical or dental Services providers; or
- (6) other Consultants whose Services are determined by the governing board of a retirement system trust fund to be necessary for the governing board to perform its constitutional fiduciary duties, except that the governing board shall comply with Section [2254.030](#).

[Texas Government Code § 2254.026](#) – Contract with a Consultant. A State agency may Contract with a Consultant only if:

- (1) There is a substantial need for the Consulting Services; and

(2) the agency cannot adequately perform the Services with its own personnel or obtain the Consulting Services through a Contract with a State governmental entity.

2. Texas Government Code, Subchapter B: Provisions Establishing Oversight Requirements

[Texas Government Code, Chapter 2254, Subchapter B](#), establishes six (6) oversight requirements for Institutions using private Consulting Services paid for with appropriated funds. *See Table Below*. Because different State entities oversee these requirements, the distinctions between them may not be obvious. The statutory guideline for each requirement is:

Requirement	Basic Description of Requirement ³	Statutory Reference Government Code	Contact Agency ⁴
Notification	Provide notice regarding consent to contract with Consultant and provide information demonstrating that the state agency has complied or will comply with § 2254.026 and § 2254.027	§ 2254.028(a)	Governor’s Office of Budget Planning and Policy and Legislative Budget Board
Finding of Fact	Obtain a finding of fact showing that consulting Services are necessary	§ 2254.028(a)	Governor’s Office of Budget Planning and Policy
30-Day RFP Publication	Publication must: (1) invite Consultants to provide Offers; (2) name the individual who Consultants should contact; (3) state closing date for receipt of Offers; and (4) provide the procedure by which Contract will be awarded.	§ 2254.029	Secretary of State
20-Day Selection Publication	Publication must: (1) describe the activities that the Consultant will conduct; (2) state the name and business address of the Consultant; state the total value as well as the beginning and ending dates of the Contract; and (4) state the due date for documents, films, recordings, or reports from Consultant to state agency.	§ 2254.030	Secretary of State
Archives	On request, must provide copies of all documents, films, recordings, or reports compiled by the Consultant under the Contract.	§ 2254.036	Governor’s Office of Budget Planning and Policy and Legislative Budget Board

3. Texas Government Code, Subchapter B: Provisions for Major Consulting Services Contracts

[Texas Government Code § 2254.028](#) – Notice of Intent. *See Table Above for Description of § 2254.028(a)*.

- [Section 2254.028\(c\)](#): Subsection (a) does not apply to a Major Consulting Services Contract if an Institution includes in the invitation published under [Texas Government Code § 2254.029](#) a finding by the president of an Institution that the Consulting Services are necessary and an explanation of that finding.

³ In this column, the bolded word “**and**” means that each requirement listed must be met.

⁴ In this column, the bolded word “**and**” means that both offices must be contacted.

[Texas Government Code § 2254.029](#) – Publication in Texas Register **Before** entering into Major Consulting Services Contract. *See Table Above for Description.*

[Texas Government Code §2254.030](#) – Publication in Texas Register **After** Entering into Major Consulting Services Contract. *See Table Above for Description.*

4. [Regents' Rules](#)

07.12.4 e. Board delegation of authority for Contracts that provide for the Services of a Consultant

- (1) With an initial consideration in excess of \$25,000 and upon recommendation of the chancellor:
 - (a) Board approval is required prior to the execution of a consulting contract and prior to the execution of all modifications that increase the consideration of such a Contract.
 - (b) A consulting Contract may be executed prior to approval by the board if:
 - i. the Contract includes a provision that limits the total amount to be paid to the Consultant to no more than \$25,000 unless and until such time as the board has approved the agreement; and
 - ii. the chair and chair of the Finance and Administration Committee authorize execution of the agreement in advance of approval by the board.
- (2) With an initial consideration of \$25,000 or less:
 - (a) Board approval is not required, but notice of the proposed Contract must be provided to the chair and the chair of the Finance and Administration Committee prior to execution of the Contract.
 - (b) A report of the Contract shall be provided as an Information Agenda item at the next board meeting.
 - (c) Approval of the board is required prior to execution for any modification, where the modification will cause the total consideration to exceed \$25,000.

M. [Professional Services](#)

Contracts for Professional Services are exempt from complying with the above provisions of [Texas Government Code Chapter 2254, Subchapter B](#) (Consulting Services):

However, Contracts for Professional Services must comply with [Texas Government Code § 2254, Subchapter A](#), the Professional Services Procurement Act. In § 2254.002 (2) Professional Services means services

- (A) within the scope of the practice, as defined by State law, of:
 - i accounting;
 - ii architecture;
 - iii landscape architecture;
 - iv land surveying;
 - v medicine;
 - vi optometry;
 - vii professional engineering;
 - viii real estate appraising;
 - ix professional nursing; or
- (B) provided in connection with the professional employment or practice of a Person who is licensed or registered as:
 - i. a certified public accountant;
 - ii. an architect;
 - iii. a landscape architect;
 - iv. a physician, including a surgeon;

- v. an optometrist;
- vi. a professional engineer;
- vii. a State certified or State licensed real estate appraiser; or
- viii. a registered nurse.

Services provided by the above 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. In order to Contract for such Services, the Institution would follow the Consulting Services Contract requirements.

N. Mixed Services

When a Contract involves both Consulting Services and one or more other Services, an Institution must comply with the Consulting Services requirements when the primary objective of the Contract is the purchase of Consulting Services. For instance, if a Contractor proposes to analyze the Institution'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. However, the Institution must comply with the Procurement procedures under [Texas Education Code, § 51.9335](#) and any Institutional policies.

Institutions are 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.

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.

O. Architectural, Engineering, or Land Surveying Services

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

Institutions 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, the Institution must:

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

SECTION VII– EVALUATION AND AWARD

Institutions 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 which Responses are Responsive and to have sufficient and accurate information to make a sound decision.

As previously discussed in Section V, the Request for Proposal and Request for Qualification 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 criteria in addition to cost. In the RFP process, the Contract Review Team will determine the best overall value to the Institution. In the RFQ process, the Contract Review Team will determine the best qualified Response(s) in accordance with the Specifications.

In an Invitation for Bid process, a Contract Review Team will evaluate if the Bidder is Responsive in accordance with the requirements and 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 the Institution.

A. Contract Review Teams

1. **Composition and Role.** A Contract Review Team will be comprised of individuals who are stakeholders in the final Goods or Services or individuals who have the necessary technical or program expertise. It is important that team members understand the needs of the Institution and the desired outcome of the Procurement. The Contract Review Team should bring together as much knowledge as possible to select the Contractor. Contract Review Team members will have input into the Solicitation document. 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.
2. **Size of Teams.** The recommended size of a Contract Review Team is three to five members. However, some projects may require additional members or additional teams due to the nature of the Procurement. Coordination and management of the evaluation process becomes more difficult as the size and number of teams increase. To avoid potential individual bias, it is strongly encouraged that a Contract Review Team not be less than three members.
3. **Appointment and Voting.** A Contract Review Team is appointed by or under the supervision of chief Procurement officer who provides, or assigns responsibility to provide, an orientation to team members about their role in the evaluation and award process. Generally, a representative from the Purchasing Office or Contracting Office is appointed to serve as the team leader for a Contract Review Team and is a non-voting member. Other personnel from the Purchasing Office or Contracting office may serve as voting members for the evaluation and award process.
4. **Team Training.** Before evaluating any Responses, the Contract Review Team leader will instruct the Contract Review Team and outline the team's duties and responsibilities, specifically including the critical nature of confidentiality to the integrity of the evaluation process. Each Contract Review Team member will submit a signed Non-Disclosure and Conflict of Interest Form to the Purchasing Office or Contracting Office prior to any activity as a team member.

The team leader 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 other Solicitations.

B. Scoring Matrix

A Scoring Matrix is used by the Contract Review Team members to score individual Responses based on the Specifications and evaluation criteria defined in the Solicitation document. A Scoring Matrix to be completed prior to the evaluation. The team leader shall provide instructions for completing the Scoring Matrix.

Reference Exhibit M–*Scoring Matrix Sample for the Solicitation Process*

C. Responsive Submissions

After all Responses are opened and recorded, the Purchasing Office or Contracting Office does an initial administrative review to determine if the Responses submitted are Responsive and the Contractor is Responsible. At a minimum, this review shall 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 legal counsel is sometimes necessary to determine a Proposal's Responsiveness.

Only those Responses deemed to be Responsive and from a Responsible Respondent will be provided to the Contract Review Team.

D. Rejection of Responses

If an Institution receives less than three Responses to a Solicitation, the Institution may elect to accept these Responses, extend the opening, or reject the Responses and reissue the Solicitation. The Institution shall include language in the Solicitation document which defines the rights of the Institution in this situation. Proper documentation shall be retained to fully support all actions.

If the Institution chooses to reissue the Solicitation, the Specifications should be reviewed for any unduly restrictive requirements.

E. Proposal and Qualification Evaluations

Once Responses have been reviewed and considered Responsive and a Contractor is deemed Responsible by the Purchasing Office or Contracting Office, the Contract Review Team shall 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 Review 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 Review 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 was 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 shall any team member attempt to pressure other members to influence evaluation scores.

F. References, Background, and Credit Checks

The Contract Review Team, the Purchasing Office, or the Contracting Office may verify any references included in the Response and conduct any other reference, credit check, or background check deemed appropriate. The Contract Review Team may also use the Comptroller's Vendor Performance System in evaluating a Contractor's past performance. http://www.window.state.tx.us/procurement/prog/vendor_performance/

All reference, credit, or background checks must be documented in writing. It will be beneficial if the individual conducting the reference, credit, or background check uses 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 Institution may want to consider using the following statement in the Solicitation document in lieu of checking references for all Respondents:

[Institution name] 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, an Institution 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 an Institution.

G. Oral Presentations and Discussions

Oral presentations or discussions with Respondents are conducted at the option of the Institution, and if used the Solicitation document will 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 Institution 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 the chief Procurement officer or his or her designee. The competitive range shall 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. A prepared script will help ensure consistency.

H. Best and Final Offers

An Institution 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 is 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, an Institution may choose to select the Best Value Respondents with which to commence Negotiations.

I. Negotiations

In any Contract, there are usually terms or conditions that each party may be willing to relinquish. The first step in the Negotiation process is determining the Best Value Responses. Then, an Institution must identify those terms and conditions that are essential, desirable, or subject to Negotiation.

An Institution 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 or in the case of an Emergency or Proprietary Purchase, 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 the chief Procurement officer.

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 afford one Respondent an advantage over another.

Negotiations are not authorized to use technical leveling or technical transfusion techniques.

- 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: ([See Texas Government Code § 552.153 \(2\) \(C\)](#)).
 - 1) disclosing competing Respondents' cost or prices (even if the disclosure is made without identifying the other Respondent by name); and
 - 2) advising a Respondent of its cost or price standing relative to other Respondents.

Even in the RFP process, care must be taken to avoid inadvertently changing the Specifications in order to provide an advantage to one or more Respondents.

J. Negotiation Strategies

Negotiation strategy must be tailored to suit the particular facts and circumstances of the specific Solicitation. In all events, an Institution may continue with Negotiations with the next Best Value Contractor until the best interest of the Institution is achieved which may result in either an award or a termination of the Negotiation.

Like other parts of the Contract Management process, planning is essential to conducting a successful Negotiation. Members of a Contract Review Team should communicate with the Office of General Counsel for assistance to determine which business terms and conditions are essential and those that may be negotiated. The Office of General Counsel will identify the terms and conditions that are essential to the Contract or are mandated by law. These are the terms or conditions upon which an Institution is either unable or unwilling to compromise. The Contract Review Team in conjunction with the Office of General Counsel can then cooperatively negotiate the Contract.

Do **not** provide the list of essential or other prioritized issues to the Respondent as the list will offer a negotiating advantage. Before meeting with the Respondent, review any objections to the Contract terms and conditions. The objection should explain why the Respondent is objecting to each term or condition.

Be prepared to explain why a particular term or condition is essential or objectionable and place the burden on the Respondent to identify an alternative solution that meets an Institution'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 Institution 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 the Institution want, specifically? (Can it be obtained without undue risk to the Institution?)
2. What will having what the Institution wants, specifically, do for the Institution? (Examining this aspect may provide common ground to explore options that meet the needs of both parties.)
3. How will the Institution know, specifically, when the Institution has received what it wants?

If the parties cannot reach an agreement, the Institution should consider beginning Negotiations with the next Respondent.

NOTE: Once an Institution proceeds to negotiate with the next Best Value Respondent, the Institution cannot return to the Negotiation process with any of the Respondents with which Negotiations failed.

K. Award

An Institution shall award a Contract for the purchase of Goods or Services that provides the Best Value for the Institution in compliance with the Specifications. In some cases, an Institution may elect to issue only a Purchase Order

that serves 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 by a Respondent.

Upon award of a Contract an Institution shall notify all Respondents.

The information in this chapter is not intended to constitute legal advice.

The purpose of this chapter is to provide general guidelines regarding Contract formation. However, there are many variations and exceptions to these general instructions. Please consult the Office of General Counsel for any questions about applicable Statutes, regulations, *Regents' Rules*, and Operating Policies and Procedures.

A. Approach to Contract Formation

Fundamentally, the purpose of a written Contract is to document the agreement of two or more parties in order to prevent misunderstanding and conflict. If properly formed, a Contract creates a legal, binding, and enforceable set of obligations for the parties involved. 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.

Additionally, creating Contracts for a State Institution of higher education is complicated by the interplay of State and federal Statutes, regulations, *Regents' Rules*, and Operating Policies and Procedures pertaining to issues such as fiscal constraints, constitutional and statutory requirements, and requirements to be a Contractor with a State agency.

B. Elements of a Contract, pending possible updates

The basic and essential elements necessary to form a binding Contract⁵ are:

1. **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;⁶
2. **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,⁷
 - The manner in which the acceptance was made strictly complied with the terms of the offer,⁸
 - The acceptance was communicated to the offeror,⁹ and
 - The form of the acceptance was clear and definite;¹⁰
3. **Mutual Assent**—also known as a “meeting of the minds”—requires “a mutual understanding and assent to the expression of the parties' agreement.”¹¹ The parties must agree to the same thing, in the same sense, and at the same

⁵ *Davis v. Chaparro*, 431 S.W.3d 717, 722 (Tex. App.—El Paso 2014, pet. denied); *IHS Acquisition No. 171, Inc. v. Beatty-Ortiz*, 387 S.W.3d 799, 806 (Tex. App.—El Paso 2012, no pet.); *Cessna Aircraft Co. v. Aircraft Network, L.L.C.*, 213 S.W.3d 455, 465 (Tex. App.—Dallas 2006, pet. denied).

⁶ *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008).

⁷ *Ducc Realty Co. v. Cox*, 356 S.W.2d 807, 809 (Tex. App.—Waco 1962, no writ).

⁸ *Beatty-Ortiz*, 387 S.W.3d at 806.

⁹ *Dempsey v. King*, 662 S.W.2d 725, 726-27 (Tex. App.—Austin 1983, writ dismissed).

¹⁰ *Engleman Irrigation Dist. v. Shields Bros.*, 960 S.W.2d 343, 352 (Tex. App.—Corpus Christi 1997).

¹¹ *Domingo*, 257 S.W.3d at 40.

time; their agreement must be based on “an objective standard, considering what the parties did and said, not their subjective states of mind;”¹²

4. **A communication** that each of the parties has consented to the terms of the Contract;
5. **Execution and delivery** of the Contract with an intent that it become mutual and binding on the parties; and
6. **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.¹³

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.

C. Drafting a 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 used by the Institutions in most Contracts, but unless otherwise specified, may be modified to meet an Institution’s needs.

An Institution that repetitively bargains for the same or similar Goods or Services may develop a template Contract with terms that are standard for a specific type of transaction.

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.

D. Planning for the Contract

Just like other Contract Management processes, an Institution needs to plan for drafting a Contract allowing adequate time to prepare and review the final Contract. A best practice is to include a draft of the standard Institution Contract in the Solicitation document. This allows the Respondent to make an offer with knowledge of the proposed contractual terms and conditions. However, as a practical matter, it may be difficult to prepare a draft Contract with a detailed SOW due to the potential for Negotiation and resource limitations.

Some recommended planning steps are:

- Collecting and reviewing 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.
- Finally, allow adequate time to consult with the Office of General Counsel regarding potential legal issues.

E. Form of the Contract

¹² *Id.* at 39.

¹³ *Id.* at 40.

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.

1. Formal Contract

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

2. Purchase Order

A Purchase Order uses a layered approach, i.e., the Purchase Order usually relies on a number of 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 the Institution 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 the Institution's 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, an Institution is advised to use its terms, rather than accepting terms a Contractor proposes.

F. Contract Terms

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

Reference Exhibit N – *Standard Terms and Conditions*

G. Authority to Contract ([See Regents' Rules, Chapter 07.12 and Regents' Rules Chapter 08 discussed in Handbook Section XI Construction Contracts](#))

Only persons having actual authority established by the Board of Regents' or as properly delegated from those given delegation authority can approve, sign, and execute Contracts committing the TTU System or any component Institution. Written Contracts shall be executed whenever a TTU System component enters into a binding Contract with another party which involves any material consideration. Material consideration does not have to be monetary.

An Institution may enter into a Contract for the purchase of Goods or Services that has a value exceeding \$1,000,000 or involving a sale or lease of land and/or improvements thereon, or a commitment of funds or other resources for more than four years:

1. only if the Board of Regents approves the Contract and the approved Contract is signed by the chancellor or president; or
2. in accordance with [Regents' Rules 07.12.4](#) which delegates to the chancellor or president authority to approve Contracts in excess of \$1,000,000 over the term of the Contract, but the per annum amount is less than \$1,000,000.

Reference Exhibit O–*Summary of Delegated Contract Authority*

H. Binding Signatures

Original signatures by those in authority to Contract are the generally accepted norm through which a Contract becomes binding. Additionally, it is possible that an email or a chain of emails that make it clear a party accepts the terms of a Contract can be enforceable. Faxed signatures or emails need to be followed up with original signatures.

The System and its Institutions accept digital signatures that are compliant with the ESIGN Act of 2000 and the Uniform Electronic Transaction Act (UETA) of 1999 when the signature platform authenticates users by password, and the platform produces a time stamp for the digital signature. Compliant digital signatures are considered “original signatures.”

SECTION IX– POST-AWARD CONTRACT ADMINISTRATION

The following section serves as recommended guidance for the Contract Administration process. Each Institution shall develop a Contract Administration Operating Policy and Procedure in order to formalize the process.

A. Post-award Contract Administration may include:

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

The primary tasks of Contract Administrator:

1. Read and understand the Contract. Consult with Contract Manager or where appropriate, the Office of General Counsel when there are questions.
2. At regular intervals verify Contractor performance for compliance with Contract requirements.
3. Identify possible noncompliance with a Contract by monitoring a Contractor's performance.
4. Determine if corrective action is necessary and communicate with the Contract Manager.
5. Develop plan for Contract Closeout.

The SOW is the roadmap for Contract Administration. The goal is for the parties to satisfactorily perform their responsibilities. Effective Contract Administration minimizes or eliminates problems and potential claims and disputes.

The extent of Contract Administration will not be the same for all Contracts. The level of Contract Administration necessary should be consistent with the complexity and level of risk of the Contract, the Contract term, and dollar value.

B. Contract Manager Responsibilities at the Purchasing Office or Contracting Office

Contract award is not the final measure of success. The Contract Manager will guide the Contractor Administrator until the completion of Services or final receipt of Goods.

A key factor in successful Contract Management post-award Contract Administration is communication between a Contract Administrator and a Contract Manager.

The primary post-award responsibilities of a Contract Manager may include, but are not limited to:

1. Guiding the Contract Review Team throughout the process.
2. Consulting with Office of General Counsel to address any legal concerns or issues.
3. Receiving and responding to formal Contract communications between the Institution and the Contractor.
4. Managing, approving, and documenting any changes to the Contract.
5. Documenting and assisting in resolving disputes with Contractor in a timely manner.
6. Establishing control of correspondence, data, and reports.
7. Coordinating with the Purchasing Office or Contracting Office provide all Contract documentation in the repository.
8. Providing notices and exercising remedies, as appropriate, when a Contractor's performance is deficient in consultation with the Office of General Counsel.
9. Providing formal written documentation accepting the Deliverables as appropriate.
10. Reviewing encumbrances to confirm compliance with the Contract.
11. Performing random sampling of invoices to verify compliance with Institutional Operating Policies and Procedures and the Contract terms.
12. Providing oversight of the Contract Close-out process to properly document the Contract file.
13. Regularly review performance for Contract Administration process improvement.

C. Contract Administrator Responsibilities at Originating Department.

The Purchasing Office or Contracting Office shall identify a single Contract Administrator at the Originating Department. A Contract Administrator needs to have a proficient understanding of the Contract provisions, the ability to communicate about Contract obligations to all parties involved, and maintain control over the Contract performance.

A good Contract Administrator monitors that Contract requirements are satisfied, that Goods or Services are delivered in a timely manner, and that financial interests of the Institution are protected.

Contract Administrators must have sufficient knowledge of contracting principles as it relates to their responsibilities in managing the Contract. It is the Contractor's responsibility to perform and meet the requirements of the Contract. To do so, Contractors need technical direction and approval from a Contract Administrator, provided in a timely and effective manner. All guidance provided to a Contractor must be within the scope of the Contract. All variances shall be clearly defined in the Specifications.

The primary post-award responsibilities of the Contract Administrator may include, but are not limited to:

1. Serving as the point of contact for disseminating instructions regarding the SOW to the Contractor.
2. Receiving and responding to informal communications between an Institution and a Contractor.
3. Establishing scope of authority, clear lines of communication and reporting, and specific individuals who will interact directly with a Contractor.
4. Managing Institutional assets used in Contract performance.
5. Providing access to Institution facilities, equipment, data, personnel, materials, and information.
6. Identifying, documenting, and resolving minor disputes with a Contractor in a timely manner.
7. Implementing a quality control and assurance process.
8. Maintaining appropriate documentation as required by the applicable retention guidelines.
9. Documenting significant events including deficiencies, Deliverables, and milestones.
10. Monitoring the Contractor's progress and performance to confirm Goods or Services conform to the Contract requirements.
11. Inspecting and approving the final Goods or Services received and providing documentation of acceptance to a Contract Manager.
12. Monitoring budgets to verify sufficient funds are available for the duration of the Contract.
13. Monitoring default terms and conditions in the Contract.
14. Authorizing payments consistent with the Contract documents and in accordance with Institutional Operating Policies and Procedures.
15. Performing the Contract Close-out responsibilities.

Contract Administrators are **not** authorized to:

1. Instruct a Contractor to start work prior to a fully executed Contract and receipt of any required bonds and insurance or other requirements.
2. Alter the scope or terms of the Contract without a formal Contract Amendment processed through the Purchasing Office or Contracting Office.
3. Approve changes to the HUB Subcontracting Plan or approve substitutions or additions of Subcontractors without written approval from the Purchasing Office or Contracting Office.
4. Extend the term of the Contract without execution of formal Contract Amendment processed through the Purchasing Office or Contracting Office.
5. Allow the Contractor to incur any obligations outside of the scope of the Contract.

D. Contract Review Team Responsibilities

The number of participants in the Contract Review Team will vary in number from one to many depending on the size, level of risk, and complexity of the Contract. Early in the Procurement process, the Purchasing Office or Contracting

Office shall identify personnel to participate on the Contract Review Team. The Contract Review Team responsibilities continue through the post-award Contract Administration phase.

The primary post-award responsibilities of the Contract Review Team may include, but are not limited to:

1. Reviewing the sequence of activities, dependencies, required or desired outcomes, and acceptable performance levels.
2. Reviewing post-award timetable and start and end date for each performance component. Include milestones with accompanying timeframes, and monitoring and reporting requirements.
3. Monitoring and documenting Contractor activity on a specified frequency to identify problem areas.
4. Meeting with a Contractor to review progress, discuss problems, and consider necessary changes.
5. Reviewing Contract performance problems and providing input on viable solutions.

E. Post-Award Planning

In order to properly plan, a Contract Administrator must understand all components of the Solicitation and the Contract.

Procedures for Contract Administration are described in the Solicitation document. A Contract Administrator should use template checklists to monitor Contract compliance, key components of which may include, but are not limited to:

1. Expected costs
2. Potential risks
3. Timelines for performance
4. Options for inspection and acceptance
5. Key dates of the Contract

Exhibit P – *Contract Administration Checklist*

F. Post-Award Conference

Not every Contract requires a formal post award conference. The Contract Review Team shall decide if a post-award conference is necessary. Factors used to determine the need for a post-award conference include:

1. Type of Contract;
2. Level of risk associated with the Contract;
3. Value and complexity;
4. Length of Contract, period of performance, or delivery requirements;
5. Procurement history of the Goods or Services required;
6. Institution's prior experience with the Contractor;
7. Any special or unusual Contract requirements; and
8. Any special or unusual payment requirements.

For less complex, low risk, low-dollar value Contracts, a post-award conference is not necessary. A Contract Manager shall provide the name of the Contract Administrator to the Contractor.

A post-award conference is held soon after a Contract is awarded. It is a meeting held with a Contractor awarded a Contract, and **prior** to beginning performance under a Contract, to verify that a Contractor fully understands the expectations, will perform accordingly, and can provide the foundation for an effective Contract Administration effort. Although both a Contractor and Institution personnel should be fully aware of the Contract requirements, the post-award conference assists those involved directly in the Contract Administration process to understand all requirements of Contract performance. The post-award conference cannot be used to change the terms of the Contract.

G. Monitoring Performance

Monitoring the performance of a Contractor is a key function of proper Contract Administration in order to assess whether the Contractor is performing all duties in accordance with the Contract and to allow the Contract Review Team to identify and address any developing issues.

Small dollar value or less complex Contracts normally require little, if any, monitoring. However, that does not preclude the possibility of more detailed monitoring if deemed necessary by the Contract Review Team. Conversely, large dollar Contracts may need little monitoring if the Goods or Services Procured are not complex, and an Institution is comfortable with the Contractor's performance and the level of risk associated with the Contract.

Each Institution shall develop a procedure to identify each Contract that requires enhanced Contract or performance monitoring and information on the Contract to the Board of Regents. An Institutions' chief Procurement officer shall immediately notify the Board of Regents of any serious issue or risk identified with respect to a Contract monitored in accordance with [Texas Government Code § 2261.253\(c\)](#).

Exhibit Q— *Institutional Policy for Contract Performance Monitoring*

Exhibit R- *Report Form for Contracts Requiring Enhanced Monitoring (Contracts greater than \$1,000,000)*

Exhibit S- *Report Form for Contracts Requiring Enhanced Monitoring (Contracts greater than \$5,000,000)*

H. Reporting

Reports are used by the contracting parties to monitor the progress of Contract compliance. Reporting requirements must be clearly defined in the Solicitation document providing for the frequency, content, format, and recipients of each report.

Below is a listing of common Contract reports that may be utilized by the parties. The Contract Review Team will determine what reports are effective monitoring tools for each Contract.

1. **Service Level Reports** are used to document the performance of a Contractor. These reports may provide information on backorders, product returns, and fulfillment cycles.
2. **Progress or Milestone Reports** are a useful means of assessing the routine progress of a Contractor. The report can be used as a gauge of determining milestone completion and can be used as an approval tool for progress payments.
3. **Subcontractor Reports** document the activity of Subcontractors. Often, these reports are required by Statute or other governmental regulation.
4. **Product Usage Reports** are useful reports for commodity Contracts. These reports detail purchases of a product category and can be used to determine pricing advantages. An example would be a store brand versus name brand report.
5. **Ordering Activity Reports** provide information to the Institution on spend trends. An example would include a report on the number of orders less than \$50. This information can be used to negotiate improved shipping prices for the Institution.
6. **Historical Metrics** are used to measure Contract success. Historical metrics are used to compare the progress of a Contract over a longer period of time. Historical metrics may include total spend reports across multiple years of the Contract.
7. **Asset Reports** may be required by the Institution to document assets being purchased on behalf of the Institution by the Contractor. This would assist the Institution in identifying any asset that would necessitate inventory tracking.
8. **Revenue Reports** are often required on Auxiliary Contracts that provides revenue for the Institution. The report should clearly detail the net sales received by the Contractor, the formula used to calculate the revenue, and the revenue amount payable to the Institution.
9. **Statutory Reports** are required by Statute and the requirements should be clearly defined in the SOW. This may include HUB Subcontracting reported information.
10. **Regulatory Reports** are required by a regulatory body and should be clearly defined in the SOW. This may include reports on hazardous materials utilized in the performance of the Contract.

11. **Contract Close-Out Reports** provide value to both Contracting parties as the reports document the completion of the SOW. Examples may include construction punch-out lists, final sales reports, audits, lessons learned, and Vendor Performance Forms.

I. Risk Management

A preliminary risk assessment should be conducted to make an initial determination on the level, type, and amount of resources required to successfully manage the risk associated with the Contract. As the risk associated with a Contract increases, the degree of Contract Review Team oversight should be increased. (Refer back to Section IV C).

J. Payment Approval

Any costs incurred by a Contractor are to be in accordance with the Contract terms.

Payments must be reviewed by the Contract Administrator or his or her designee for compliance with the Contract pricing terms. Payment review shall include, but is not limited to:

1. The Contractor is billing only for Goods or Services received by an Institution;
2. The Goods or Services have been inspected and accepted;
3. The invoice is correct and complies with the pricing, terms and conditions of the Contract; and
4. The total payments do not exceed the Contract limits.

If a Contract Administrator disputes a payment, the accounts payable office will be notified and payment withheld until a Contractor Administrator, with input from a Contract Manager, is satisfied with the Contract performance. (See next section.)

Payments must be made in accordance with [Texas Government Code Chapter 2251 Payment for Goods and Services](#) providing for payment of invoices within 30 days unless the Contract performance is in dispute. The invoice payment date is determined by the later of the date that a correct invoice is received, or the date Goods are received or the performance of Services was completed.

Advance payments are only permissible if necessary and serves a public purpose as determined by the Contract Manager. Advance payments are permissible for:

1. Books and library materials for an Institution;
2. Cost savings recognized by an Institution;
3. Expedited delivery;
4. Lease costs;
5. Penalties;
6. Purchase of real property;
7. Specialized Goods or Services;
8. Subscriptions; and
9. Tuition, except that Institution employees may not be reimbursed for tuition before the class begins.

Each Institution shall develop and maintain an Operating Policy and Procedure addressing payment approvals.

K. Withholding Payment

The Purchasing Office or Contracting Office is responsible to protect the interests of an Institution and under appropriate circumstances, it may be necessary to withhold payments from Contractors. Circumstances where it may be necessary to withhold payment include, but are not limited to:

1. There is a material breach of the Contract by a Contractor;
2. Errors in the invoice;
3. Unsupported or undocumented costs;
4. To remedy previous overpayments on the same Contract; and

5. Contractor's performance is non-conforming or unacceptable.

L. Contract Change Methods

Throughout the term of the Contract it may become necessary to make changes to the Contract. These changes can be minor, administrative changes such as a change of address, or they can be substantial changes that affect the price and delivery.

There are basically two ways to change a Contract:

1. One is by mutual agreement, in which all parties to the Contract agree in writing that a modification is necessary to alter a provision of the Contract.
2. The second is the right to unilaterally modify the Contract. In this case, terms and conditions in the original Contract set forth the situations under which either party may exercise a right to modify the Contract without the other party's consent.

Failure to manage and control changes can result in an unintended modification to the SOW, extension of the schedule, increase in the Contract cost, circumvention of the Procurement process, and diminished Contractor accountability. An effective change management process may include, but is not limited to:

1. Formal, written approval by all parties of Contracts changes prior to the change taking place;
2. Evaluation of the impact of each change to the Contract objective;
3. If the Contract contains a contingency allowance, a plan for deductions against this allowance will be requested and approved in writing;
4. Formal documentation of all changes in compliance with an Institution's Operating Policies and Procedures; and
5. Purchasing Office or Contracting Office review and authorization any formal Change Order document.

M. Contract Change Types

1. Material Contract Changes

Whether or not a change is considered a material change to the Contract depends upon the Solicitation process, and the Contract. The Contract and any Amendments must be consistent with the Specifications, the Procurement cooperative program requirements, or be allowed by *Regents' Rules* and Institutional Operating Policies and Procedures.

If a change is needed to a Contract that was competitively solicited, the change must be within the scope of the Solicitation.

In order to determine what constitutes a change to the Specifications, a Contract Manager will determine whether the changes are material. Material changes are measured by whether the changes would substantially alter the original Specifications. Where there is a need for material changes, the chief Procurement officer of an Institution will evaluate the changes and determine if there is a need to resolicit to allow for fair competition.

2. Administrative Changes

These are changes that are within the scope of the Contract and do not affect or alter the rights of the parties. These changes are typically executed via a unilateral Amendment.

Examples of administrative changes include:

1. Changes in billing or contact information;
2. Corrections of typographical errors not affecting the substance of the Contract;
3. Changes as permitted by the specific Contract language; and
4. Changes in Institution personnel assigned to the Contract.

3. **Substantive Changes**

These are changes to a Contract that affect the rights of both parties. Such changes generally require bilateral Amendments.

Examples of substantive changes include:

1. Change in the price of the Contract;
2. Change in the delivery schedule;
3. Change in the quantity;
4. Change or nature of Deliverables;
5. Change in SOW that is non-material;
6. Change of key personnel by the Contractor; and
7. Change of any terms and conditions (administrative changes excluded).

4. **Constructive Changes**

If a Contractor perceives that work beyond the scope of the Contract was ordered by the Institution, the Contractor may claim that the Contract was “constructively” changed, and the Contractor may be entitled to additional compensation for the changes. A constructive change will require a bilateral Amendment or Change Order.

Constructive changes may occur when Institution personnel:

1. Provide suggestions to a Contractor;
2. Accelerate the delivery schedule;
3. Direct the work to be performed differently;
4. Change the sequencing of the work;
5. Delay accepting or rejecting Deliverables;
6. Delay reviewing invoices and approving payment; and
7. Interfere with or hinders performance.

The Contract Administrator is responsible for managing the performance of a Contract and is charged with managing the Contract in a way to prevent constructive changes.

N. **Dispute Resolution**

Dispute resolution is governed by [Texas Government Code Chapter 2260](#) for certain Contract claims against an Institution and the State. The goal of any dispute resolution process is to resolve problems before these escalate to the next level. To avoid escalation, and avoid Institution personnel actions exacerbating potential problems, it is imperative that the Contract Administrator respond promptly to all Contractor inquiries by taking the following initial steps including, but not limited to:

1. **Identify the problem** - many times what may appear to be a problem can be resolved by providing a Contractor with information or clarification.
2. **Report** – a Contract Administrator shall report the issue to the Contract Manager even in cases where action may not be required from the Contract Manager.
3. **Research facts** – obtain information regarding the potential problem from all relevant sources including members of the Contract Review Team and the Contractor. This resulting information will be maintained in the Contract file.
4. **Evaluation** – review the facts in conjunction with the requirements and terms and conditions of the Contract. A Contract Manager, in consultation with Office of General Counsel and the Contract Review Team, will then determine an appropriate course of action.

O. **Termination for Default Notifications**

Prior to terminating a Contract for default, a cure notice should be sent to the Contractor if the parties so agreed in the Contract. A cure notice letter allows a Contractor to have a defined period of time to “cure” the deficiency or violation. The Contract Administrator and Contract Manager shall consult with the chief Procurement officer who shall then consult with the Office of General Counsel in his or her discretion before sending cure notices.

If the Contractor fails to cure the situation or provide a satisfactory explanation as requested and within the time allowed, the Contract may be terminated by sending a notice of termination containing at least the following information:

- 1) The Contract number or Purchase Order number;
- 2) The date of Contract or Purchase Order;
- 3) The effective date of termination;
- 4) Reference to the clause under which the Contract is being terminated;
- 5) A concise, accurate statement of the facts justifying the termination; and
- 6) A statement that the Goods or Services associated with a Contract being terminated may be solicited and that the Contractor may be held liable for additional costs (if permissible under the Contract).

P. Termination

When a Contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions. A Contract may be terminated under the following processes.

1. Termination For Convenience

A termination for convenience, also known as no-fault termination (or “without cause”), allows an Institution to terminate a Contract, in whole or in part, at any time in its sole discretion, if it is determined that such termination is in the best interest of the Institution.

The Purchasing Office or Contracting Office shall provide a Contractor with written notice specifying whether an Institution is terminating all or part of the Contract. The notice of termination shall give the effective date of termination. If the Contract is being selectively terminated, the notice shall specify which part(s) of the Contract are being terminated.

It is recommended that Institutions include a no-fault termination clause in the Solicitation documents and the Contract. There may be circumstances in which an Institution should not enter into a Contract with a no-fault termination clause

If the Institution includes a no-fault cancellation clause, it is important to include language that the Institution will not be liable for anticipated profits, unabsorbed overhead, or interest on borrowing.

2. Termination for Default

A Contract may be terminated for default (or “with cause”) when an Institution concludes that a Contractor has failed to perform, make progress, or has otherwise breached the Contract. An Institution is not required to terminate a Contract even though the circumstances permit such action. The Purchasing Office or Contracting Office may determine that it is in the Institution’s best interest to pursue other alternatives. Examples of such alternatives include extending the delivery or completion date, allowing a Contractor to continue performance, or working with a Contractor’s surety to complete the outstanding work.

Conversely, a Contractor may also have the right to terminate a Contract for default if an Institution fails to perform.

Termination for default should be used as last resort and not as punishment. The purpose of a termination for default is essentially to protect the interests of an Institution.

Factors to consider prior to making a termination for default decision include, but are not limited to:

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

A Contract must describe in detail the default obligations of the parties. A defaulting party may have additional financial obligations to the other party.

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

1. Acts of God or a public enemy.
2. Actos of an Institution.
3. Fire.
4. Floods.
5. Epidemics.
6. Strikes.
7. Freight embargos.
8. Unusually severe weather.

Severe weather, although beyond the control of either party, will not generally constitute an excusable delay if it is not considered “unusually severe weather”. For example, a snow storm in Amarillo in February would not be considered unusual, while it would be considered unusual in Austin. On the other hand, a snow storm in Amarillo in June would be unusual.

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

Q. Institution Reporting of Contracting Information

In accordance with [Texas Government Code § 2261.254](#), each Institution shall develop and implement Contract reporting requirements for each Contract for the purchase of Goods or Services that has a value exceeding **\$1,000,000**. Each Institution must provide information to its chief financial officer on:

1. compliance with financial provisions and delivery schedules under the Contract,
2. corrective action plans required under the Contract and the status of any active corrective action plan, and
3. information about any Liquidated Damages assessed or collected under the Contract.

In addition, each Institution shall verify the:

1. accuracy of any information reported about the Contract is based on information provided by a Contractor, and
2. receipt showing delivery of Goods or Services scheduled under the Contract.

In accordance with [Texas Government Code § 2261.255](#) the Institution's chief Procurement officer must report the following information to the Institution's chief financial officer and the System's chief financial officer for Contracts with a value exceeding **\$5,000,000**:

- 1) Verification from the chief Procurement officer that the Solicitation method and Contractor selection process complies with State law and Institution policy; and
- 2) Submit to the TTUS Board of Regents information on any potential issue that may arise in the Solicitation, Procurement, or Contractor selection process.

R. Contract File

Institutions are required to maintain documentation related to each Contract. Under [Texas Government Code § 441.1855](#) each Institution:

- 1) shall retain records of each Contract entered into by the Institution and all related Contract Solicitation documents; and
- 2) may destroy the Contract and supporting documentation only after the **seventh anniversary** of the date:
 - (A) the Contract is completed or expires; or
 - (B) all issues that arise from any litigation, claim, Negotiation, audit, open records request, administrative review, or other action involving the Contract or supporting documentation are resolved.

This retention period for Contracts and associated documents applies notwithstanding an Institution's retention schedule.

S. Documentation File

The chief Procurement officer at each Institution shall develop a plan for Procurement and contracting file contents, which should be stored electronically as resources allow.

Generally, it is recommended that the following documents are retained in a central repository in the Purchasing Office or Contracting Office:

1. A copy of the current Contract and all Amendments.
2. The Solicitation document, the Contractor's Response, evaluation determination, and the notice of award document.
3. A list of Institutional furnished property or Services.
4. A copy of the pre-award conference summary, if conducted.
5. A copy of all general correspondence related to the Contract;
6. A copy of all routine reports required by the Contract.
7. A copy of all notices to proceed, stop work orders, deficiency notices, or Change Orders.
8. The records and minutes of all meetings, both internal and external. Include sign-in sheets and agendas.
9. A copy of all Contractor invoices, credit memos, information relative to discount provisions for prompt payment, letters pertaining to Contract deductions or fee adjustments; a copy of all backup documentation for Contractor payment or progress payment.
10. Copies of any audit documentation.

Because of limited storage resources, the following Contract documentation may be retained in the Contract Administrator's office or stored electronically as resources allow:

1. A copy of all Specifications, drawings or manuals incorporated into the Contract by reference;
2. A list of Contractor submittal requirements;
3. A schedule of compliance review, internal correspondence, if applicable;
4. A copy of all general correspondence related to the Contract issued from the Contract Administrator;
5. The originals of all Contractor data or report submittals;
6. A copy of all routine reports required by the Contract;

7. A copy of all letters of approval pertaining to such matters as materials, the Contractor's quality control program, prospective employees, and work schedules;
8. The records and minutes of all meetings, both internal and external. Include sign-in sheets or agendas; and
9. Contract monitoring documentation.

SECTION X – CONTRACT CLOSE-OUT

The purpose of the Contract Close-out process is to confirm that both parties to the Contract have fulfilled all contractual obligations. In addition, Contract Close-out is the time to assess the success of the Contract and recognize any process improvements for future Contracts. The chief Procurement officer at each Institution shall determine the appropriate Contract threshold that requires a formal Contract Close-out.

To initiate the close-out process, an Institution should first determine that a Contractor has substantially performed all required contractual obligations.

A Contract is completed when all Goods or Services have been received and accepted; all Deliverables have been accepted; all administrative actions have been accomplished; and all Institutional furnished equipment and materials have been returned.

Upon confirmation of completion, an Institution shall make final payment to a Contractor. Final payment shall not be made until all compliance and corrective actions have been successfully completed and the Contract Administrator or his or her designee has provided final acceptance.

A) Reporting Contractor Performance

Upon completion or termination of a Contract, and as part of the close-out process, each Institution shall review the Contractor's performance in accordance with the Institution's contract monitoring process and may report to the Comptroller using the Vendor Performance Tracking System VPTS in accordance with [Texas Government Code § 2155.089](#) and [§ 2262.055](#).

An Institution may report Contractor's performance on any purchase of \$25,000 or more including delegated purchases, TPASS Contracts, and Exempt Purchases. [34 TAC, Title 34, Part 1, Chapter 20, Subchapter C, Rule §20.108](#).

SECTION XI – CONSTRUCTION PROJECTS AND PROFESSIONAL SERVICES

Generally this section applies to the Procurement of Major Construction Projects and Minor Construction Projects and associated Services, including Architectural and Engineering Services (as defined below), required to complete Construction Projects. Other sections of this Handbook may be applicable to Construction Projects as required by statute or *Regents' Rules*. Some processes detailed in this Handbook do not necessarily apply to the Contracts defined in this Section.

A) Construction and Professional Services Definitions

For the purposes of this section, the following definitions are assigned:

Architect: an individual registered as an architect under Chapter [1051, Occupations Code](#).

Architectural Services: Services provided by a person who is licensed or registered as an architect or a landscape architect as set forth in Texas Government Code [Chapter 2254](#), and within the scope of the practice of architecture as defined by [Texas Occupations Code Chapter 1051](#).

Construction Manager-Agent: a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the Institution regarding construction, rehabilitation, alteration, or repair of the Facility.

Construction Manager-at-Risk: a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a Facility at the contracted price as a general Contractor and provides consultation to the Institution regarding construction during and after the design of the Facility.

Construction Project: generally includes both a Major Construction Project and Minor Construction Project.

Contractor: in the context of a Contract for the construction, rehabilitation, alteration, or repair of a Facility, or for the provision of Services related to a Construction Project, means a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the Facility or providing related Services at the contracted price.

Design-Build Contract: a single Contract with a Design-Build Firm for the design and construction of a Facility. [Texas Education Code §51.780\(1\)](#).

Design-Build Firm: a partnership, corporation, or other legal entity or team that includes an Engineer or Architect and builder qualified to engage in building construction in Texas. [Texas Education Code §51.780\(2\)](#)

Design Criteria Package: a set of documents that provides sufficient information to permit a Design-Build Firm to prepare a response to an Institution's Request for Qualifications and any additional information requested, including criteria for selection. The Design Criteria Package must specify criteria the Institution considers necessary to describe the project and may include, as appropriate, the legal description of the site, survey information concerning the site, interior space requirements, special material requirements, material quality standards, conceptual criteria for the project, special equipment requirements, cost or budget estimates, time schedules, quality assurance and quality control requirements, site development requirements, applicable codes and ordinances, provisions for utilities, parking requirements, or any other requirement, as applicable. [Texas Education Code §51.780\(3\)](#).

Engineer: an individual licensed as an engineer under [Chapter 1001, Occupations Code](#).

Engineering Services: Services provided by a person who is licensed or registered as a professional engineer as set forth in Texas Government Code Chapter 2254, and within the scope of the practice of engineering as defined in Texas Occupations Code Chapter 1001.

Facility or Facilities: any building(s) or structure(s), any improved or unimproved land, or any part of any such building(s), structure(s), or land that is owned, used, or occupied by the TTU System.

FP&C Office and FP&C: The Office of Facilities Planning and Construction, a division of the TTU System administration.

Job Order Contract: a contract for a Minor Construction Project to repair, rehabilitate, or alter a facility in which the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of pre-described and pre-priced tasks as defined by [Texas Education Code § 51.784](#).

Major Construction Project: a Construction Project with a budget \$2,000,000 or more. [See Regents' Rules 08.01.3](#). For purposes of this Handbook.

Minor Construction Project: a Construction Project with a budget less than \$2,000,000. [See Regents' Rules 08.01.4](#). For purposes of this Handbook.

Renovation Project: generally includes both a Major Construction Project and Minor Construction Project.

B) Construction Authority - Regents' Rules Chapter 8

TTUS *Regents' Rules* Chapter 8 sets forth authority for the TTUS construction program. An outline summary of *Regents' Rules* Chapter 8 follows.

Regents' Rules, [Section 08.01.1](#) identifies the construction procurement methods that may be used as set forth in *Texas Education Code*, Chapter 51, Subchapter T, [§§ 51.776-51.785](#), "Construction and Repair of Permanent Improvements" and further discussed below in **part C**.

Regents' Rules, [Section 08.01.2](#), authorizes the TTUS Chancellor or designated representative, upon recommendation of the president, to initiate a construction project using the delivery methods identified in 08.01.1

Regents' Rules, [Section 08.01.3](#) identifies a Major Construction Project as having a total project budget of \$2,000,000 or more, and lists activities that must be accomplished before a project is submitted to the Board for approval.

Regents' Rules, [Section 08.01.4](#) identifies a Minor Construction Project as having a total project budget less than \$2,000,000. These projects are managed by the physical plant officer at component institutions.

Regents' Rules, [Section 08.01.5](#) requires competitive procurement for all Major and Minor Construction Projects unless it is an emergency or performed by TTUS personnel.

Regents' Rules, [Section 08.01.6](#) states that the chancellor or president as applicable, or designated representative shall execute all construction contracts authorized by the Board.

Regents' Rules, [Section 08.01.7](#) requires that emergency construction projects, as declared by the chancellor on recommendation of the president, may be approved by the chair of the Board or the chair of the Facilities Committee and reported to the Board at its next meeting.

Regents' Rules, [Section 08.01.8](#) requires that wage rates shall be as required by [Texas Government Code §2258.022](#) (as amended or modified).

Regents' Rules, [Section 08.01.9](#) allows the TTUS Office of Facilities Planning and Construction to receive a management fee for all projects managed by this Office to support its operations.

Regents' Rules, [Section 08.02](#) through [08.05](#) pertains to design guidelines, preservation, cornerstones and plaques, and naming TTUS buildings and facilities.

Regents' Rules, [Section 08.06](#), requires construction to conform with applicable codes and standards as listed.

Regents' Rules, [Section 08.07](#) through [08.11](#) prioritizes use of TTUS space and facilities, including free speech activities, on-campus speakers, solicitation activities, and sales of publications which must benefit TTUS.

C. Construction Procurement Methods - Texas Education Code, Chapter 51, Subchapter T, §§ 51.776-51.785,

In accordance with *Regents' Rules* [Section 08.01](#), the TTU System shall use the Procurement methods set forth in *Texas Education Code*, [Chapter 51](#), Subchapter T, [§§ 51.776-51.785](#), "Construction and Repair of Permanent Improvements" (as may be amended or modified) for all Construction or Renovation Projects. A summary of these statutes follows – please click on the link to see the current statute.

[Texas Education Code §51.776. Definitions.](#)

See Handbook Section IX A above for definitions.

[Texas Education Code §51.777, Delegation of Authority.](#)

See Handbook Section IX. B above regarding authority for the TTUS construction program in *Regents' Rules*, [Chapter 08](#).

[Texas Education Code § 51.778. Competitive Bidding on Contracts.](#)

- (a) Except as otherwise provided in this subchapter, all contracts for the construction or erection of permanent improvements at an institution are void unless made after advertising for bids for the contracts in a manner prescribed by the institution's board, receiving sealed competitive bids, and awarding of the contract to the lowest responsible bidder by the board.
- (b) If a contract awarded under sealed competitive bidding is to be recommended for award to other than the lowest bidder, any bidder making a lower bid than the recommended bid shall be notified of the recommendation for award and shall be allowed an opportunity before the award to present evidence to the board or its designated representative as to the responsibility of that bidder.

[Texas Education Code §51.779. Evaluation of Bids and Proposal for Construction Services.](#)

An institution must determine the best value method, base its selection on published criteria, and document its selection.

[Texas Education Code §51.780. Design-Build Contracts for Facilities.](#)

Design-build means a single contract with a design-build firm for the design and construction of a facility. An institution identifies an Engineer or Architect to act as its representative, requests qualifications for proposals for the project, and prepares a design criteria package. An institution will publish the request for qualifications and evaluate qualifications to select a design-build firm in two phases. In phase one, the request and evaluations of qualifications do not include cost or price related factors. In phase two, an institution shall evaluate offerors based on the published criteria and results of any interview, and the institution may request additional information. The institution shall select the design-build firm whose proposal offers the best value based on published criteria and evaluations rankings. If the institution is unable to negotiate a contract with the offeror, then it shall proceed to negotiate with the next offeror in order of ranking. Upon selection of a design-build firm, the firm's Engineers or Architects complete the design for review by the institution's Architect or Engineer. The institution will separately contract for inspection, texting and verification services.

[Texas Education Code §51.781. Contracts for Facilities; Construction Manager-Agent.](#)

This method may be used for Construction Projects where the Board enters into a contract with a Construction Manager-Agent who provides administrative personnel, equipment, on-site management and other services. A Construction Manager-Agent represents the System in a fiduciary capacity. The Board also selects an Engineer or Architect to prepare the construction documents, and procures a general contractor, trade contractors or subcontractors.

[Texas Education Code §51.782. Contracts for Facilities; Construction Manager-at-Risk.](#)

This method may be used for Construction Projects when the Board selects and contracts with an Engineer or Architect, and uses either a one-step or two-step process to publish and obtain qualifications from Offerors. If a two-step process is used, the Board may not request fees or prices in step one. A Construction Manager-at-Risk public advertises for bids or proposal from other trade contractors or subcontractors, and may perform some of the elements of the work itself if it submits its proposal in the same manner as other potential Contractors.

[Texas Education Code §51.783. Selecting Contractor for Construction Services through Competitive Sealed Proposals.](#)

To select a Contractor for Construction Projects, the Board is responsible to select and contract with an Engineer or Architect, provide for inspection services, publish a Request for competitive proposals identifying criteria, evaluate and rank the proposals, and select the Offeror who presents the best value based on the published criteria.

[Texas Education Code §51.784. Job Order Contracts for Facilities Construction or Repair.](#)

This section applies to procedures for Minor Construction Projects where the work is of recurring nature and delivery times and quantities are indefinite.

[Texas Education Code §51.785. Certain Contracts Prohibited.](#)

See Handbook Sections II. E. and Section VI. N.

Exhibit T – Uniform General Conditions and Supplementary General Conditions