

# Texas Woman's University Contract Administration and Management Handbook

The purpose of this Handbook is to offer Texas Woman's University Contract Administrators and Contract Managers recommendations on improving existing contract administration and management processes and practices. It does not attempt to address all issues that may be considered in a particular circumstance. This document is not designed to relieve TWU and Contractors of their responsibility to ensure compliance with laws, rules, and regulations.

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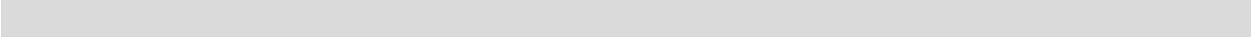
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**I. Purpose**

As an agency of the State of Texas, Texas Woman’s University (TWU) is governed by the Board of Regents. University 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 TWU 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 risk analysis procedures. ([§51.9337\(b\)\(3\)](#)) Additionally, an Institution shall establish a Contract Review Checklist that must be reviewed and approved by the Office of General Counsel ([§51.9337 \(d\)](#)). This Contract Management Handbook (Handbook) does not relieve TWU and Contractors of their responsibility to ensure compliance with all laws, rules, and regulations to their specific programs and funding sources. In the event there is a conflict with language of this Handbook, applicable federal or State statutes and regulations shall prevail.

**II. Overview of Contract Administration and Management**

Table 1 – Departmental and Procurement & Contract Services (PCS) Responsibilities

<b>Departments</b>	<b>Department of Procurement &amp; Contract Services</b>
<i>Contract Management (Day to Day)</i>	<i>Contract Administration (Oversight)</i>
<ul style="list-style-type: none"> <li>• Department provides the initial specifications, scope of work, and technical input from its Subject Matter Experts (SMEs) for the solicitation (which becomes a substantial part of the Contract).</li> <li>• Department monitors Contractor performance for compliance with the terms of the Contract (milestones achieved; deliverables accepted) through its Contract/Project Manager.</li> <li>• Department communicates requests for amendments (e.g. modifications to scope of work; change in funding, etc.) to PCS prior to working directly with the Contractor; and puts the Contractor on notice that PCS is the authority for any Contract amendments.</li> <li>• Departments keeps PCS informed of serious issues and unresolved disputes, so that PCS can work with the Department to address the issues(s) with the Contractor.</li> </ul>	<ul style="list-style-type: none"> <li>• PCS advises the departments regarding solicitation developments (including development of evaluation documents), issues and administers the solicitation, guides the evaluation process, and awards the Contract.</li> <li>• PCS is TWU’s contracting agency and is therefore responsible for amendments, renewals, addressing issues of breach, termination; and final closeout (working closely with the Departmental Contract/Project Manager).</li> <li>• PCS will enforce Contract compliance in cases of unresolved disputes, issue cure notices (unless delegated to the Department), and assist the University with enforcing liquidated damages and other remedies.</li> <li>• PCS receives and pays invoices (tied to deliverables).</li> </ul>

Note: There are functions of Contract Management and Contract Administration that overlap. Additionally, there are some elements of Contract Management and Contract Administration performed by the Department with some elements performed by Procurement and Contract Services.

### III. Definitions

For purposes of clarity, the following terms are defined:

- **Addendum:** a written addition, change, alteration, correction or revision to a solicitation document or a contract.
- **Amendment:** written addition or change to 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 not paid for with appropriated money. Ref. [Texas Government Code §2252.061 \(1\)](#).
- **Best Value:** factors to be considered in determining best overall value for TWU in accordance with [Texas Education Code §51.9335 \(b\)](#).
- **Bid:** an offer to contract with the University, submitted in response to a bid invitation. Bids are usually non-negotiable.
- **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.
- **Bid Opening:** the public opening of bids, in which the names of the bidders responding to a bid solicitation and prices of the bidders are publicly read and recorded.
- **Bid Tabulation:** the recording of bids and bid data submitted in response to a solicitation. The bid tabulation is used for comparison, analysis and record keeping.
- **Board of Regents (BOR):** the governing body of Texas Woman's University
- **Change Order (POCN):** a written alteration that is issued to modify or amend a purchase order.
- **Comptroller:** The Texas Comptroller of Public Accounts.
- **Construction Project:** a building construction project that is financed wholly or partly by a specific appropriation, a bond issue, or federal money. Ref. [Texas Government Code §2166.001](#)  
Includes the construction of:
  - A building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishings;
  - An addition to, or alteration, rehabilitation, or repair of, an existing building, structure, or appurtenant facility and utility
- **Consultant:** an individual or firm that provides consulting services to an Institution and does not involve the traditional relationship of employer and employee. Ref. [Texas Government Code §2254.021](#)
- **Contract:** a legally binding written agreement where a Contractor provides goods and/or services and TWU pays for such goods and/or services in accordance with the established price, terms and conditions.
- **Contract Administration:** actions taken relating to changes to contracts, including renewals and extensions, as well as receipt, review and retention of the contract and contract related documents, and exercise of remedies (e.g. issue amendments, cure notices, etc.).
- **Contract Closeout:** 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:** actions taken to ensure that both the TWU departments and the Contractor comply with the requirements of the contract. Includes some functions related to solicitation development, contract development and close-out, and also includes, but is not limited to, contract monitoring, evaluation of deliverables, invoice review, payment approval,

progress tracking, attending regular status meetings, management of state-owned property used in contract performance, dispute resolution and “day to day” management.

- **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 TWU to review contracts for procurement compliance, and where appropriate, seek additional review and approval of the Office of General Counsel.
- **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 TWU rules 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:** a purchase made when unforeseen and/or a sudden unexpected occurrence creates a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.
- **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 by [Texas Government Code §2155.001](#). Goods do not include services or real property.
- **Historically Underutilized Business (HUB):** a minority, woman, and/or service disabled veteran-owned business as defined by [Texas Government Code §2161.001](#). See also [Texas Comptroller HUB website](#).
- **Interagency Contract:** a contract between one or more agencies of the State of Texas as defined by [Texas Government Code §771.002](#).
- **Invitation for Bids (IFB):** a procurement process used when requirements are clearly defined. Negotiations are not necessary and price is the major determining factor for selection.
- **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. Ref. [Texas Government Code §2254.021](#)
- **Negotiations:** conferring, discussing, or bargaining to reach a mutual agreement between two or more parties.
- **Offer:** a response to an Invitation for Bid, Request for Proposal, Request for Offer or a Request for Qualification and intended to be used as a basis to negotiate a contract award. See also proposal.
- **Opening Date:** the date and time, after submission of proposals, when sealed proposal responses are opened.
- **Payment Bond:** a bond executed in connection with a contract which secures the payment requirements of the Contractor.
- **Performance Bond:** an instrument executed, subsequent to award, by a successful Proposer or Bidder that protects TWU from loss due to the Contractor’s inability to complete the contract as agreed.

- **Person:** an individual or business entity ([Texas Government Code §572.002 \(7\)](#))
- **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 or the practice of: accounting; architecture; land surveying; medicine; optometry; professional engineering; real estate appraising or professional nursing.
- **Proposal:** a response to a Request for Proposal (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.
- **Proprietary Purchase:** a good or service produced or marketed by a Contractor having the exclusive right to manufacture or sell it. Ref. [Texas Government Code §2155.067](#)
- **Purchase Order:** a legal document issued to a Contractor which formalizes the terms and conditions of any purchase of goods or services.
- **Quote:** a document setting forth an offer to sell goods or services at a certain price under specified conditions.
- **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 to Contractors requesting information for a potential future solicitation. The RFI is typically used as a research and information gathering tool for preparation of a solicitation.
- **Request for Offer (RFO):** a solicitation for automated information systems (which may include a request for hardware, software and other information technology goods and services) requesting the submittal of an offer in response to the required scope of services, including a cost proposal. Negotiations are allowed between a proposer and the issuing agency.
- **Request for Proposal (RFP):** a solicitation requesting submittal of a proposal in response to the required scope of services and usually includes some form of a cost proposal. The RFP process allows for negotiations between a proposer and the issuing agency.
- **Request for Qualifications (RFQ):** a solicitation document requesting submittal of qualifications or specialized expertise in response to the scope of services required. No pricing is solicited with an RFQ.
- **Request for Quote (Quotes):** an informal solicitation document requesting pricing on small dollar purchases.
- **Response:** a submission to TWU from a potential Contractor in response to a solicitation.
- **Scope of Work (SOW):** a detailed, written description of project-specific activities, deliverable and timelines for a Contractor providing services to TWU.
- **Services:** the furnishing of labor, time, and effort by a Contractor, including for a construction project, which may involve to a lesser degree, the delivery or supply of goods.
- **Solicitation:** a document requesting submittal of bids or proposals for goods or services in accordance with advertised specifications.
- **Solicitation Conference:** a meeting chaired by Procurement and Contract Services which is designed to help potential Respondents understand the requirements of a solicitation. Also known as a pre-bid, pre-solicitation or pre-proposal conference.
- **Specifications:** description of the requirements for goods or services including the SOW, to be fulfilled by a Contractor.

- **State of Texas Contract:** Contract that is competitively procured and awarded by the Texas Comptroller's Office.
- **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.
- **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.

#### IV. Ethical Standards and Policies

##### 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' Policy Manual](#).

Texas Woman's University personnel involved with Procurement and Contract Services 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 TWU employees' or officials' independent judgment from being compromised.

##### B. State Ethics Policy

It is the policy of the State of Texas that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest. [Ref. Texas Government Code §572.001](#).

##### C. TWU Ethics Policy for Employees

TWU has policies ensuring that the primary responsibility of officers and employees is to accomplish the duties and responsibilities assigned to that position. Following is a link to all of TWU's policies: <http://www.twu.edu/policy/>

#### **D. Standards of Conduct of Officers and Employees**

As State officers or employees, each TWU officer or employee is expected to comply with all federal, State, and local laws and is subject to disciplinary action for violation of those laws. Ref. [Texas Education Code §51.9337 \(c\) \(1\)](#).

In accordance with [Texas Government Code Chapter 572](#) 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 officers' or employees' official powers or performed the officer's or employees' official duties in favor of another.

Within two years after leaving state agency employment or service, a former state officer or employee may not accept employment with a vendor who was involved in a procurement or contract negotiation with the state agency if the former state officer or employee participated on behalf of the state agency for that procurement or contract negotiation. Ref. [Texas Government Code §572.069](#)

#### **E. Disclosure of Potential Conflicts by TWU Officials & Employees; Prohibited Contracts**

1. TWU 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.
2. TWU employees and officials involved in procurement or contract management must disclose, as required by State law, 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 TWU. Ref. [Texas Government Code §2261.252 \(a\)](#)
3. TWU shall evaluate any disclosed potential conflict of interest when contracting for goods or services. Under [§2261.252 \(b\)](#), if any of the following TWU employees or officials or certain family members has a financial interest in a private vendor, TWU 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. TWU's Board of Regents)
  - b. the governing officer (i.e. TWU's President and Chancellor), executive directors (i.e. TWU's Vice Presidents), General Counsel, chief Procurement Officer (i.e. Assistant Vice President for Procurement and Contract Services); or
  - c. a family member related to any 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.

**F. Conflict of Interest: Disclosure, Representations and Warranties by Potential Contractors and Respondents**

To avoid conflicts of interest, TWU 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 contract 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 TWU shall acknowledge receipt of the certificate, both of which shall be accomplished through the following website: <https://www.ethics.state.tx.us>

TWU shall not enter into a contract that requires Board of Regent's approval prior to execution or has a value of at least \$1 million without the requisite disclosures by potential Contractors or Bidders. Ref. [Texas Government Code §2252.908](#). This requirement does not apply to the following contracts:

1. Where the governing body (BOR) has legal authority to delegate and has exercised that authority to its staff to execute the contract and will not participate in the selection of the business entity with which the contract is entered into. Ref. [Texas Ethics Commission, Chapter 46](#).
2. A sponsored research Contract of TWU or an Interagency Contract. Ref. [Texas Government Code §2252.908 \(c\)](#).

In Responses, potential Contractors and Respondents are required to:

1. 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;
2. Disclose any current or former employees who are current or former employees of TWU;
3. Disclose any proposed personnel who are, or are related to, current or former employees of TWU;
4. 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 TWU in connection with the solicitation or any resulting contract;
5. 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 TWU. TWU 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.

The following restrictions also apply to potential Contractors and Respondents:

Contracts with Former or Retired TWU Employees - TWU 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 TWU 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 TWU. Ref. [Texas Government Code §2252.901](#)

1. Restriction on Former Employees of a State Agency - An individual who offers to provide consulting services to TWU and who was employed by TWU or another State agency any during the prior two years shall disclose in the Offer the nature of previous employment, the date employment terminated, and annual compensation at the time of termination. Ref. [Texas Government Code §2254.033](#)
2. 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. Ref. [Texas Government Code §572.069](#)

#### **G. Employment of Current and Former TWU Employees**

The following restrictions also apply to potential Contractors and Respondents:

1. [Texas Government Code § 2252.901](#), Contracts with Former or Retired Agency Employees. TWU 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 TWU 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 TWU.
2. [Texas Government Code § 2254.033](#), Restrictions on Former Employees of a State Agency. An individual who offers to provide consulting services to TWU and who was employed by TWU or another State agency at any time during the prior two years shall disclose in the Offer the nature of 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 TWU consent and

subcontractor or assignees are subject to the same disclosure requirements and restrictions set forth. 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. Ref. [Texas Comptroller Guide](#)

## **V. Processes**

- A.** Contract Management and Administration are comprised of eight (8) general processes:
- a. Planning
  - b. Monitoring Contractor performance
  - c. Payment approval
  - d. Dispute resolution
  - e. File maintenance
  - f. Change management
  - g. Remedies for non-performance or sub-standard performance
  - h. Contract close-out

## **VI. Planning**

### **A. General**

General planning includes identifying a Contract Review Team, assessing risk, developing a communications plan, determining the solicitation method and content of the procurement and determining any financial obligation.

The Originating Department shall submit a request to issue a solicitation to the office of Procurement and Contract Services. To the extent practical, procedures for Contract Management and Administration should be described in the solicitation document. After the contract is executed, planning should focus on general activities including, but not limited to: management of contract changes, meeting contract requirements, scheduling of contract monitoring activities, payment approval and contract close-out.

Depending on the complexity of the solicitation and the level of risk, the office of Procurement and Contract Services will consult with the office of General Counsel, the chief information officer(s), the Controller and other TWU departments to obtain input about compliance with State laws and regulations.

### **B. Accountability and Risk Analysis Procedure**

As an aspect of governance, accountability has been central to discussions related to problems in the public and private sectors. 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 outcome. 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 activities necessary to identify, analyze, plan, track or control risk management activities.

TWU 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 the payment and reimbursement rates and methods for the different types of goods or services for which TWU 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.

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

**C. Risk Assessment (Texas Comptroller's Guide)**

Risks are inherent in all stages of the procurement process. TWU 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 TWU. Risk factors are indicators that assess the risk of the contract or project objectives not being achieved.

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

During 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 the Contract Manager and Contract Administrator participation and oversight should be increased.

**D. Risk Management (Texas Comptroller's Guide)**

Risk management follows risk assessment and includes identifying specific risks of a procurement or contract and seeking to minimize the risks to TWU 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. Rather, risk determination is based on both objective and subjective experience.

**E. Communications Plan (Texas Comptroller's Guide)**

TWU needs to manage both internal and external communications. After identifying internal and external stakeholders (executive management, oversight entities, etc.), the office of Procurement and Contract Services will provide guidance to all stakeholders regarding how communications will be delivered as well as acceptable content. TWU shall focus on centralized communication throughout the contract term utilizing the Contract Manager and the Contract Administrator, particularly for Scope of Work communication. Individuals involved in any of the procurement process shall sign a non-disclosure statement/form.

## **VII. Determining the Procurement Method**

If a procurement of goods or services requires a solicitation, the office of Procurement and Contract Services will determine the appropriate method of the solicitation.

The Originating Department may be asked to provide sufficient information for the Contract Review Team to develop the Scope of Work.

- A. 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.
- B. Request for Proposal (RFP)** – The RFP is 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.
- C. Request for Qualifications (RFQ)** – The RFQ is 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. Price is negotiated after TWU has made a selection based on qualifications.
- D. Request for Offer (RFO)** – The RFO is generally used for technology commodity purchases. The process is generally the same as the RFP process. Request for Offer purchases include the purchase of automated information systems and is covered under [Texas Administrative Code, Title 34 and Section 20.391](#).
- E. Request for Quote (Quotes)** – Quotes is a bid method utilized in the informal bid process, as determined by TWU’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, in most instances, shall be governed by the purchase order terms and conditions.

TWU has developed 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 VIII, Preparing the Solicitation.

- Reference Exhibit 1 – Invitation for Bid Template
- Reference Exhibit 2 – Request for Proposal Template
- Reference Exhibit 3 – Request for Qualifications Template
- Reference Exhibit 4 – Request for Offer Template

- F. Exempt Purchases (Texas Comptroller’s Guide)**

Some procurement transactions may be exempt from competitive procurement requirements. TWU shall maintain a list of Exempt Purchases. 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 TWU.

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 TWU (either 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. The office of Procurement and Contract Services reserves the right to require additional quotes or bids for a Proprietary Purchase.

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.

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 TWU and shall have a valid business purpose.

Reference Exhibit 5 – Exempt Purchase List

**H. Procurement Lead Time**

In order to process a contract prior to its start date, the table below is provided to assist TWU Departments in the planning process.

TASK	SUGGESTED LEAD TIME FROM CONTRACT START DATE
Begin Preparation of Solicitation Document	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)	50 days
Contract Execution – all signatures 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 office of Procurement and Contract Services. Less complex procurements may be accomplished in less time, while more complex procurements may require additional 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 TWU and the Contractor, the contract execution lead time may need to be adjusted.

## **VIII. Preparing the Solicitation**

After the office of Procurement and Contract Services determines which solicitation method is appropriate, the solicitation document is prepared. Relevant Statutes, Policies and Procedures, and industry best practices should be reviewed prior to preparing the solicitation document. The Contract Review Team involved in preparing a solicitation, any TWU personnel reviewing the solicitation, and any other outside representative who is involved in the procurement process must sign and submit a Non-Disclosure Statement. (Exhibit 6)

### **A. 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
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 for Qualification process will be much more comprehensive than the specifications for an Invitation for Bids.

## **B. 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.

It is very important that the SOW:

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

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. Operations, and
7. Maintenance

## **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 TWU and to potential Contractors. Use correct spelling and appropriate sentence structure to eliminate confusion. Avoid legalese type language and jargon when 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.

#### **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. An acceptance process for each deliverable
5. A compensation structure that is consistent with the type and value of goods or services provided, and
6. 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 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 TWU wants the Respondent to recommend new business processes, this information must be included in the solicitation.

#### **F. Contract Term**

The maximum contract term must be established prior to the 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**

TWU endeavors to promote full an equal opportunity for businesses to supply TWU with goods or services that are necessary to support our educational mission. In this regard, TWU commits to select proposers in accordance with: TWU needs, TWU resources, HUB goals and guidelines as established by the Texas legislature, and TWU policies and procedures for contracting with HUBs, specifically Policy 4.03. The policy applies to all contracts with an expected value of \$100,000 or more.

If HUB subcontracting opportunities are probable, TWU will declare such probability in its IFBs, RFPs, or other purchase solicitation documents, and shall require submission of the appropriate HUB Subcontracting Plan with the response. Failure to submit a required HUB Subcontracting Plan will result in rejection of the response.

#### **H. Payment Types (Texas Comptroller's Guide)**

The method of payment has a direct impact on how the SOW is written and how a contract is managed. TWU must measure or verify that the work is complete and how much and how often payments will be made to 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.

Following are the most commonly used payment types:

1. **Fee for Service** – a specific fee for a unit of service. Payments are made for each unit of service completed.
2. **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.
3. **Progress** – payment is based on pre-established deliverables. The deliverables must be measureable.
4. **Time and Material** – payment is based on the number of hours worked for a specific SOW.

In addition, TWU may want to recognize cost savings by requiring electronic invoicing and payments. These incentives or requirements must be defined in the SOW.

#### **I. Define TWU's Role (Texas Comptroller's Guide)**

Clearly define the role TWU will play in the work to be performed and any specific contributions, resources, or tasks that will be provided. 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 TWU 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. 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 International Organization for Standardization (ISO). If a standard is incorporated by reference, identify any industry or State standards of performance that relate to each good or service received by TWU. Merely referring to "industry standards" is usually inadequate.

#### **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.

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.

#### **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. TWU 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 TWU 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. Performance Bond if the contract is in excess of \$100,000, and
2. Payment Bond if the contract is in excess of \$25,000.

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

1. A Contractor shall execute a bond issued by a surety company authorized to do business in Texas in an amount determined by TWU, but not to exceed the contract price.
2. The bond must be payable to TWU and conditioned on the faithful performance of the terms of the contract.

TWU 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**

TWU 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 Office of Risk Management on insurance requirements as determined by the chief Procurement Officer.

**Q. Evaluation Criteria** (Texas Comptroller's Guide) [Texas Education Code § 51.9335](#)

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.

**R. Best Value Consideration**

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 may be a

better value and investment for TWU, even if the initial cost is more. TWU must think strategically when considering their procurement needs and consider long term needs.

Some items which may typically be considered under best value include:

1. Installation costs
2. Long-term cost to TWU of acquiring the Contractor's goods or services
3. Quality and reliability of the goods or services
4. Delivery terms
5. Contractor's past performance including experience
6. Reputation of the Contractor and of the goods or services
7. Extent to which the goods or services meet TWU's needs
8. Contractor's past relationship with TWU
9. Cost of employee training
10. Effect of the purchase on TWU
11. Contractor's anticipated economic impact to the region, and
12. Other factors relevant to determining best value.

#### **S. Proposal Submission Requirements**

The Specifications must include a listing of all of the required information that Respondents must submit with their response. Additionally, recommended or required response formats must be specified in this section, such as order of information, page number limitations, and electronic format.

#### **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. TWU 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. A baseline should be established for timelines and budgeting for the report to be useful.

If deliverables are specified, include the format of them and the quantity required. Provide details of all items that must be included in the report. These requirements are usually addressed in the SOW with the solicitation.

If Contractor provided information is anticipated to be reported as part of TWU's 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 TWU shall describe provisions for inspection and testing of goods or services purchased under the contract.

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 returned in whole or in part and must be replaced at the Contractor's expense.

TWU 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 TWU will determine that a contract has been satisfactorily completed. The SOW sets a standard for acceptance of the goods or services and establishes a procedure to accept or reject the goods or services based on specific factors. A formal acceptance process for each requirement in a contract allows the Contract Manager and a Contractor to monitor the contract performance.

#### **X. Additional Issues to Consider**

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

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

<b>IX. Advertising the Solicitation</b>
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When marketing a solicitation, consideration must be given to the type of procurement method used.

Below is a table to assist in determining recommended advertising options:

Type of Procurement	Applicable Statute	Advertising Method(s)
Goods or Services	<a href="#">Texas Education Code §51.9335</a>	TWU bidding system, ESBD, CMBL, newspapers, HUB organizations, print media
Professional Services	<a href="#">Texas Government Code Chapter 2254</a>	TWU bidding system, ESBD, CMBL, HUB organizations, print media
Consulting Services	<a href="#">Texas Government Code Chapter 2254</a>	TWU bidding system, ESBD, CMBL, HUB organizations, print media. The Solicitation shall be posted in the Texas Register if paid for with appropriated funds.
Construction	<a href="#">Texas Education Code §51.9335</a> and §§51.776-51-785	TWU bidding system, ESBD, CMBL, 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. TWU may utilize the list to solicit bids or proposals from Contractors registered on the CMBL.

**B. The Electronic State Business Daily (ESBD)**

The ESBD is an internet based resource used for posting procurement opportunities. It is administered by the Comptroller. The ESBD is available on the internet at <http://esbd.cpa.stat.tx.us>.

**C. The Texas Register**

The Texas Register is used to advertise various types of procurements as required by Statute. It is administered by the Office of the Secretary of State.

**D. TWU Electronic Bidding System (TBuy)**

TWU publishes the solicitation notifications in an electronic bidding system. This system allows Contractors to register to receive notifications relating to their respective commodity types. It may also accommodate electronic submittals of procurement responses.

**E. Required Posting of Certain Contracts**

In 2015, the legislature enacted legislation which requires TWU to post certain contracts for the public to view. For each contract for the procurement of goods or services from a private Contractor, TWU shall post on its Internet website:

1. Each contract TWU 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 do not apply to a memorandums of understanding, Interagency contracts or a contract for which there is no cost.

#### **F. Pre-Solicitation Conferences**

TWU may conduct mandatory or non-mandatory pre-solicitation conferences. TWU 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 Contract Review Team believes attendance is critical for potential Respondents to fully understand the procurement. Pre-solicitation conferences provide a forum for TWU personnel to respond to questions regarding a solicitation. The benefits derived from conducting pre-solicitations 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, TWU 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.
4. Conferences provide a forum for TWU 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 conference attendees must be documented through a sign-in sheet. This is especially important if the conference is mandatory since TWU can use the sign-in sheet to document Respondent attendance at the conference.

The office of Procurement and Contract Services will conduct the conference, in coordination with relevant TWU representatives. PCS should facilitate the meeting and answer procurement process related questions, while other TWU 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 to the solicitation. It is recommended that PCS record minutes of the pre-solicitation conference.

All changes to solicitations must be made through an addendum issued by TWU. The addendum is provided to all potential Respondents, usually posting online. When issuing an addendum, consider the amount of time remaining until the opening date of the solicitations. 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 – PCS representative introduces TWU representatives and explains their role 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.

#### **G. Communication with Respondents**

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

#### **H. 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 TWU bidding system, or hand delivery.

The questions and answers will be posted on TWU's bidding system and should be distributed to all registered potential Respondents.

#### **I. Barring Vendors from Participating in TWU 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 interest.

#### **J. Solicitation Submissions and Opening** (Texas Comptroller's Guide)

The Solicitation documents shall state the date, time, and location of the public opening to be held by TWU if applicable. Respondents' proposals may be evaluated on a variety of factors in addition to price. At the sole discretion of TWU and as indicated in each solicitation documentation, TWU 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).

#### **K. Consulting Services**

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

[Texas Government Code §2254.023](#) – Applicability of Subchapter. This subchapter applied to Consulting Services that a State agency acquired 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

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.

#### **L. Professional Services**

Contracts for Professional Services are exempt from complying with the above provisions of Texas Government Codes 2254, Subchapter B (Consulting Services):

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

1. Within the scope of the practice, as defined by State law, of:
  - i. Accounting
  - ii. Architecture
  - iii. Landscape architect
  - iv. Land surveying
  - v. Medicine
  - vi. Optometry
  - vii. Professional engineering
  - viii. Real estate appraising
  - ix. Professional nursing, or
2. 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 professional that fall outside their scope of practice may be governed by other procurement requirements.

#### **M. Mixed Services**

When a contract involves both consulting services and one or more other services, TWU must comply with the consulting services requirements when the primary objective of the contract is the purchase of consulting services.

TWU is prohibited from using competitive bidding to purchase or award a contract for professional services. 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 fee 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.

#### **N. Architectural, Engineering, or Land Surveying Services**

When procuring professional architectural, engineering, or land surveying services, TWU 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, TWU 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 for a fair and reasonable price.

### **X. Evaluation and Award**

TWU 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 discussed in Section VIII, 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 TWU. In the RFQ process, the Contract Review Team will determine the best qualified Response(s) in accordance with the specifications.

In an Invitation for Bids 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 TWU.

#### **A. Contract Review Team**

##### 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 TWU 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.

##### 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 team members increase. To avoid potential individual bias, it is strongly encouraged that a Contract Review Team be comprised of a minimum of three members.

##### Appointment and Voting.

A Contract Review Team is appointed by or under the supervision of the 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 office of Procurement and Contract Services is appointed to serve as the team leader for a Contract Review Team and is a non-voting member.

##### 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 Statement to the office of Procurement and Contract Services 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 must be completed prior to the evaluation. The team leader shall provide instructions for completing the scoring matrix.

### **C. Responsive Submissions**

After all responses are opened and recorded, the office of Procurement and Contract Services 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:

- Sign affirmation and Conflict of Interest disclosure
- HUB subcontracting plan completed and affirmation signed
- Bonds and evidence of insurability
- Any other required documentation in accordance with the specification, and
- That the minimum qualifications are met.

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 TWU receives less than three responses to a solicitation, we may elect to accept these responses, extend the opening, or reject the responses and reissue the solicitation. TWU shall include language in the solicitation document which defines the rights of TWU in this situation. Proper documentation shall be retained to fully support all actions.

If TWU 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 PCS, 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 or 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 or the office of Procurement and Contract Services may verify any references included in the response and conduct any other reference, credit or background check deemed appropriate. The Contract Review Team may also use the [Comptroller's Vendor Performance Tracking System \(VPTS\)](#) in evaluation a Contractor's past 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.

#### **G. Oral Presentations and Discussions**

Oral presentations or discussions with Respondents are conducted at the option of TWU, 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 TWU may have regarding the response. Demonstrations of product functionality are recommended when appropriate.

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 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**

TWU may request Best and Final Offer(s) (BAFOs) from the Respondents in the Request for Proposal process. The BAFO serves as an official revision of the RFP process. 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, TWU 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, TWU must identify those terms and conditions that are essential, desirable or subject to negotiation.

TWU may negotiate terms and conditions in some solicitations and not in others. Whether or not the solicitation process permits negotiations will be determined by the chief Procurement Officer.

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 approach from one response to other competitors in the course of discussion.
- Prohibited disclosures include: (See [Texas Government Code §552.153 \(2\) \(C\)](#)).
  - Disclosing competing Respondents' cost or prices (even if the disclosure is made without identifying the other Respondent by name); and
  - Advising a Respondent of its cost or price standing relative to other Respondents.

Even in the RFP process, care must be taken to avoid inadvertently changing a specification 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, TWU may continue with negotiations with the next best value Contractor until the best interest of the University is achieved which may result in either an award or a termination of the negotiation.

Like other parts of the Contract Management and Administration process, planning is essential to conducting a successful negotiation. Members of the 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 TWU 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 objections 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 TWU's needs. 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 TWU 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 TWU want, specifically?
2. What will having what TWU wants, specifically, do for TWU?
3. How will TWU know, specifically, when TWU has received what it wants?

If the parties cannot reach an agreement, TWU should consider beginning negotiations with the next Respondent.

NOTE: Once TWU proceeds to negotiate with the next best value Respondent, TWU cannot return to the negotiation process with any of the Respondents with which negotiations failed.

#### **K. Award**

TWU shall award a contract for the purchase of goods or services that provides the best value in compliance with the specifications. In some cases, TWU 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 it governs over a response, a quote and any other document provided by a Respondent.

Upon award of a contract TWU shall notify all Respondents.

### **XI. Contract Formation**

The purpose of this chapter is to provide general guidelines regarding contract formation. However, there are many variations and exceptions to these general instructions.

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

#### **B. Drafting a Contract**

Contracts typically include standard terms and conditions, often referred to as 'boilerplate' or 'standard' terms and conditions. This section provides reference to standard terms and conditions used by TWU in most contracts, but unless otherwise specified, may be modified to meet TWU's needs.

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.

### **C. Planning for the Contract**

Just like other contract management processes, TWU 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 TWU 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 potential for negotiation and resource limitations.

Some recommended planning steps are:

- Collecting and reviewing similar contracts.
  - 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.
- Allow adequate time to consult with the office of General Counsel regarding potential legal issues.

### **D. Form of the Contract**

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

1. Formal Contract – This form 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. In other words, 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 the form of a quote or a solicitation response, and TWU indicates acceptance of the offer by issuing a purchase order

with standard terms and conditions attached. Together these various documents comprise the offer, 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 TWU'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, TWU is advised to use its terms rather than accepting terms a Contractor proposes.

#### **E. 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.

#### **F. Authority to Contract**

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 TWU. Written contracts shall be executed whenever TWU enters into a binding contract with another party which involves any material consideration. Material consideration does not have to be monetary.

#### **G. 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.

## **XII. Post Award Contract Administration and Management**

### **A. Overview**

Post-award Contract Management 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 the Contract Administrator are:

1. Read and understand the contract. Consult with the 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 associated with the contract, the contract term and dollar value.

#### **B. Contract Administrator Responsibilities in the office of Procurement and Contract Services**

Contract award is not the final measure of success. The Contract Manager will guide the Contract Administrator until the completion of services or final receipt of goods.

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

The primary post-award responsibilities of a Contract Administrator 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 TWU 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 Contract Manager to ensure all contract documentation is 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 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 and Contract Management process improvement.

#### **C. Contract Manager Responsibilities at Originating Department**

The office of Procurement and Contract Services shall identify a single Contract Manager at the Originating Department. A Contract Manager needs to have a clear 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 Manager monitors to ensure the contract requirements are satisfied, that goods or services are delivered in a timely manner and that financial interests of TWU are protected.

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

Serving as the point of contact for disseminating instructions regarding the SOW to the Contractor.

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

Contract Managers are **not** authorized to:

1. Instruct a Contractor to start work prior to a fully executed contract, an approved TWU purchase order, and receipt of any required bonds and insurance or other requirements.
2. Alter the scope of terms of the contract without a formal contract amendment processed through PCS.
3. Approve changes to the HUB Subcontracting Plan or approve substitutions or additions of subcontractors without written approval from PCS.
4. Extend the term of the contract without the execution of a formal contract amendment processed through PCS.
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, PCS 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 Management or Administration are described in the Solicitation document. A Contract Manager 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

#### **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 the 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. TWU's prior experience with the Contractor
7. Any special or unusual contract requirements
8. Any special or unusual payment requirements

For less complex, low risk, low-dollar value contracts, a post-award conference is not necessary.

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 TWU personnel should be fully aware of the contract requirements, the post-award conference assists those involved directly in the Contract Administration and Contract Management 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 Management and 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 contract may need little monitoring if the goods or services procured are not complex, and TWU is comfortable with the Contractor's performance and the level of risk associated with the contract.

TWU 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. The 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\(c\)](#).

#### **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.

Following 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 TWU 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 TWU.
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 TWU to document assets being purchased on behalf of TWU by the Contractor. This would assist in identifying any asset that would necessitate inventory tracking.
8. Revenue Reports are often required on Auxiliary Contracts, the formula used to calculate the revenue, and the revenue amount payable to TWU.
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.

## **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 Manager 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 TWU;
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 Manager disputes a payment, the accounts payable office will be notified and payment withheld until a Contractor Manager, with input from a Contract Administrator, is satisfied with the contract performance.

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 Administrator. Advance payments are permissible for:

1. Books and library materials for TWU
2. Cost savings recognized by TWU
3. Expedited delivery
4. Lease costs
5. Penalties

6. Purchase of real property
7. Specialized Goods or Services; and
8. Subscriptions.

#### **K. Withholding Payment**

PCS is responsible for protecting the interests of TWU 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**

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 contract 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 TWU policies and procedures; and
5. PCS review and authorization on 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 TWU Policies and Procedures.

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 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 include:

- Changes in billing or contact information;
- Corrections of typographical errors not affecting the substance of the contract;
- Changes as permitted by the specific contract language; and
- Changes in TWU 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 include:

- Change in the price of the contract;
- Change in the delivery schedule;
- Change in the quantity;
- Change in nature of deliverables;
- Change in SOW that is non-material;
- Change of key personnel by the Contractor; and
- 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 TWU, 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 change may occur when TWU personnel:

- Provide suggestions to a Contractor
- Accelerate the delivery schedule
- Direct the work to be performed differently
- Change the sequencing of the work
- Delay accepting or rejecting deliverables
- Delay reviewing invoices and approving payments, and
- Interfere with or hinder performance.

The Contract Manager 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 and TWU and the State. The goal of any dispute resolution process is to resolve problems before they escalate to the next level. To avoid escalation, and avoid TWU personnel actions exacerbating

potential problems, it is imperative that the Contract Manager respond promptly to all Contractor inquiries by taking the following initial steps including, but no 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 Manager shall report the issue to the Contract Administrator 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 Administrator, in consultation with General Counsel and the Contract Review Team, will then determine an appropriate course of action.

#### **O. Termination for Default Notification**

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 General Counsel at 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. Contract number or Purchase Order number
2. Date of the Contract or Purchase Order
3. 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.

##### Termination for Convenience

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

The office of Procurement and Contract Services shall provide a Contractor with the written notice specifying whether TWU 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.

Best practice for TWU is to discern whether a no-fault termination clause should be included in the Solicitation documents and the Contract. If it is determined that a no-fault termination clause is to be used, it is important to include language that TWU will not be liable for anticipated profits, unabsorbed overhead or interest on borrowing.

#### Termination for Default

A Contract may be terminated for default (or “with cause”) when TWU concludes that a Contractor has failed to perform, make progress, or has otherwise breached the Contract. TWU is not required to terminate a Contract even though the circumstances permit such action. PCS may determine that it is in TWU’s best interest to pursue other alternatives.

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

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

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

1. Has TWU 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. TWU 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, TWU is within its legal 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. Fire
3. Floods
4. Epidemics
5. Strikes
6. Freight embargos

## 7. Unusually severe weather

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. Reporting of Contracting Information

In accordance with [Texas Government Code § 2261.254](#), TWU 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. TWU 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, TWU 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](#) TWU's chief Procurement Officer must report the following information to the 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 University policy; and
2. Submit to TWU's Board of Regents information on any potential issue that may arise in the solicitation, procurement or Contractor selection process.

## R. Contract File

The office of Procurement and Contract Services at TWU is required to maintain documentation related to each Contract. Under [Texas Government Code § 441.1855](#) TWU:

1. Shall retain records of each Contract entered into by TWU 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 TWU's retention schedule.

## **S. Documentation File**

The chief Procurement Officer shall develop a plan for procurement and contracting file contents, which should be stored electronically as resources allow.

Generally, the following documents are retained in a central repository in the office of Procurement and Contract Services:

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 TWU 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 and copies of all backup documentation for Contractor payment or progress reports.
10. Copies of any audit documentation.

## **XIII. 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 shall determine the appropriate contract threshold that requires a formal close-out.

To initiate the close-out process, TWU 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 TWU furnished equipment and materials have been returned.

Upon confirmation of completion, TWU 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.

### Reporting Contractor Performance

Upon completion or termination of a contract, and as part of the close-out process, TWU shall review the Contractor's performance in accordance with the 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](#).

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

<b>XIV. Appendix Index</b>
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- A. Exhibit 1 – IFB Template**
- B. Exhibit 2 – RFP Template**
- C. Exhibit 3 – RFQ Template**
- D. Exhibit 4 – RFO Template**
- E. Exhibit 5 – Exempt Purchases**
- F. Exhibit 6 – Non-Disclosure Statement**

