



**TEXAS STATE TECHNICAL COLLEGE  
CONTRACT MANAGEMENT HANDBOOK  
September 2021**



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## REVISION HISTORY

Version	Date	Name	Description
1.0	May 10, 2017	Contract Management Handbook	Original
1.01	June 6, 2017	Contract Management Handbook	Updated references to two separate contract review checklists to only one (pg. 39), expanded the section related to the distribution of signed copies of contracts (pgs. 39-40).
1.02	August 4, 2017	Contract Management Handbook	Deleted an outdated reference to OGC approval only required for contracts valued at \$10,000 or more.
1.03	September 1, 2017	Contract Management Handbook	Updated instructions for when a contract review checklist is required to state over \$14,000.
1.04	April 10, 2019	Contract Management Handbook	Updated list for contracts that require enhanced monitoring, added link for 1295 form, added vendor compliance verification section, and updated section on buyer certification/training.
1.05	September 1, 2021	Contract Management Handbook	Updated introduction to reference Office of Contract Administration (OCA) team, updated to include addition of contract management/solicitation/risk management software (branded RSolution) Software to process contracts, including Contract Review Checklist and Official copies section, updates verbiage in Post Award section, deleted double reference to risk mgmt., updated Material content changes, add LBB reporting requirements and delete Reporting Contract Performance section, update verbiage in Board Approval section. Updated glossary terms, updated Introduction Section to include OCA, new Certification, and glossary terms. Updated Section C.1 to include OCA. Added cybersecurity training program, updated Section D. Preparing the Solicitation Event to include RSolution processes updated and removed non-applicable appendices.

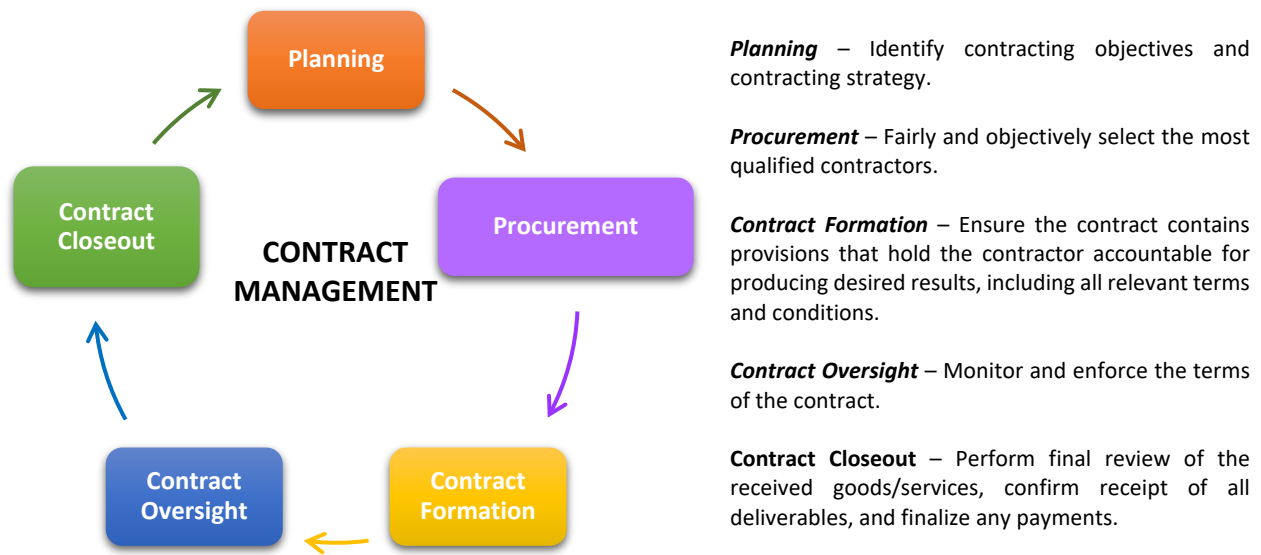
## A. INTRODUCTION

### 1. Purpose of this Handbook

In accordance with [Texas Government Code, Section 2261.256](#), State agencies and institutions of higher education, including Texas State Technical College (“TSTC” or “College”), are required to prepare and publish a contract management handbook (“Handbook”) that establishes consistent contracting policies and practices to be followed by the College. TSTC’s Handbook must be consistent with the [State Comptroller’s Contract Management Guide](#).

The intent of this Handbook is to serve as a guide in the development and management of contracts for TSTC. This Handbook may not address all issues that might need to be considered in a particular circumstance. For complex or unusual contracts, departments should seek specific assistance from TSTC Office of Contract Administration (OCA) as early as possible in the contracting process.

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



This Handbook:

- Provides best practices and practical suggestions related to contracting activities;
- Summarizes mandatory statutory, regulatory and policy compliance requirements related to contracting activities;
- Describes the duties of the contract management team, including how to solicit and select a contractor, develop and negotiate a contract, and monitor contractor performance; and
- Includes model contract documents and templates, and other resources.

### 2. Training and Certification Requirements and Purchasing Authority

Procurement personnel hired by TSTC or transferred to a purchasing position within TSTC must complete the Basic Texas Purchaser Course if the employee performs purchasing activities as fifteen percent (15%) or more of their job activities or makes a purchase in excess of \$5,000.

Procurement personnel hired by TSTC or transferred to a purchasing position within TSTC, who are not already Certified Texas Contract Developer (CTCD) or Certified Texas Procurement Manager (CTPM) certified, must be certified as a Certified Texas Contract Developer (Formerly Certified Texas Procurement Manager) to engage in

contract development functions on behalf of TSTC if the employee develops, evaluates, negotiates, or awards a contract posted to the Electronic State Business Daily or in the Texas Register on behalf of TSTC.

Contract managers hired by TSTC or transferred to a contract manager position who engage in contract management functions on behalf of TSTC and perform contract management duties as fifty percent (50%) or more of their job activities or manage any contracts in excess of \$5,000,000.00 must complete the Certified Texas Contract Manager training.

Sources and useful links: [Government Code 656.051\(c\)](#), [Education Code 51.9337\(b\)\(5\)](#), [Texas State Comptroller training information](#), and [Purchasing Authority SOS – FA.1.16](#).

### 3. Definitions

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

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

**Amendment:** Written addition or change to a contract, including modifications, renewals and extensions signed by all authorized parties.

**Applicable Laws:** All applicable federal, state or local, laws, statutes, regulations, ordinances and orders.

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

**Auxiliary Enterprise:** A business activity conducted at TSTC that provides a service to TSTC and is not paid for with appropriated money, such as the TSTC bookstore.

**Best Value:** Factors to be considered in determining best value in making certain purchases of goods/services (ref. [Texas Education Code, 51.9335](#)).

**Bid:** An offer to contract with the state, submitted in response to an invitation for bids (IFB).

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

**Board of Regents:** The Board of Regents of Texas State Technical College System.

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

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

**College:** Texas State Technical College.

**Competitive:** The specified product or service is available for purchase through more than one vendor e.g., dealers, distributors, resellers, authorized service providers.

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

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

**Consulting Service:** Practice of studying or advising a state agency under a contract that does not involve the

traditional employer/employee relationship (ref. [Texas Government Code, 2254.021](#)).

**Contract:** An agreement (including a purchase order) where a contractor provides goods/services to TSTC and TSTC pays for such goods/services in accordance with the established price, terms and conditions.

**Contract Administration:** This generally refers to the processes that occur after a contract is signed.

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

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

**Contractor (or Vendor):** A business entity or individual that has a contract to provide goods/services to TSTC.

**Controlling Interest:** (1) an ownership interest or participating interest in a Business Entity by virtue of units, percentage, shares, stock or otherwise that exceeds 10 percent; (2) membership on the board of directors or other governing body of a Business Entity of which the board or other governing body is composed of not more than 10 members; or (3) service as an officer of a business entity that has 4 or fewer officers, or service as one of the 4 officers most highly compensated by a Business Entity that has more than 4 officers.

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

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

**Electronic State Business Daily (ESBD):** The electronic marketplace where State of Texas bid opportunities are posted (ref. [Texas Government Code, 2155.083](#)).

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

**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.

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

**Financial Advisors:** Persons or business entities who act as a financial advisor, financial consultant, money or investment manager, or broker.

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

**Group Purchasing Organization (GPO):** Either a purchasing program established by a state agency that is authorized by law to procure goods/services for other state agencies, such as the Texas Procurement and Support Services Division of the Texas Comptroller of Public Accounts and the Texas Department of Information Resources, or any successor agencies, respectively; or group purchasing organization in which the College participates, such as BuyBoard, TIPS/TAPS, E&I, and U.S. Communities Government Purchasing Alliance, etc.



**Handbook:** This Contract Management Handbook.

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

**Institutions of Higher Education:** Institutions of higher education as defined by [Texas Education Code, §61.003\(8\)](#).

**Interested Party:** (1) a person who has a controlling interest in a business entity with whom an institution contracts; or (2) a person who actively participates in facilitating the contract or negotiating the terms of the contract with the institution, including a broker, intermediary, adviser, or attorney for the business entity.

**Intermediary:** A person who actively participates in the facilitation of the contract or negotiating the contract, including a broker, adviser, attorney, or representative of or agent for the Business Entity who:

- (1) Receives compensation from the business entity for the person's participation;
- (2) Communicates directly with the institution on behalf of the business entity regarding the contract; and
- (3) Is not an employee of the business entity.

**Invitation for Bids (IFB):** Best value procurement process used when the requirements are clearly defined, negotiations are not necessary and price is the primary determining factor for selection.

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

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

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

**Pre-proposal Conference:** A meeting chaired by College personnel that is designed to help potential bidders/proposers/respondents understand the requirements of a solicitation. Also known as a pre-bid conference.

**Professional Services:** Services directly related to professional practices as defined by the Professional Services Procurement Act ([Texas Government Code, 2254.002](#)). These include services within the scope of the practice of: accounting; architecture; optometry; medicine; land surveying; and professional engineering.

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

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

**Proprietary Purchase:** Specifications or conditions of the proposed purchase are proprietary to one vendor and do not permit an equivalent product or service to be supplied. The term "proprietary" refers to a product or service that has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services. Proprietary purchases include products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law.

**Procurement Office:** The office designated by the College to purchase goods or services and oversee compliance

with federal, State, and institutional procurement operating policies and procedures.

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

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

**Request for Proposal (RFP):** A solicitation event requesting submittal of a proposal in response to the required specifications and usually includes some form of a cost proposal. The RFP process allows for negotiations between a respondent and the College. The mandatory evaluation criteria that must be used to evaluate proposals are specified by the Best Value Statutes.

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

**Responsive:** A respondent or proposal that complies with all material aspects of the solicitation, including submission of all required documents.

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

**Scope of Work (SOW):** An accurate, complete, detailed, and concise description of the work to be performed by the contractor.

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

**Sole Source:** The specified product or service is only available for purchase through a single vendor e.g., manufacturer, publisher, service provider. Examples of sole source proprietary purchases include a back issue of a magazine available from only the publisher and an educational conference available from only the conference sponsor.

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

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

**State:** The State of Texas.

**State Agency:** An agency of the State of Texas as defined in [Texas Government Code, 2056.001](#).

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

**Surety:** A person or entity providing a bond to a contractor to indemnify the College against all direct and consequential damages suffered by failure of contractor to perform the contract and to pay all lawful claims of

subcontractors, materials vendors and laborers as applicable.

**College Policies:** Statewide Operating Standards available at: <http://www.tstc.edu/governance/sos>.

**Vendor (or Contractor):** A business entity or individual that has a contract to provide goods/services to TSTC.

## **B. ETHICAL STANDARDS AND POLICIES**

### **1. General**

TSTC officials and employees are responsible for protecting the safety and welfare of public money. All TSTC officials and employees should act in such a way as to avoid impropriety or the appearance of impropriety. This conduct is particularly important for TSTC purchasing and contract management personnel who are charged with the expenditure of state funds.

### **2. Ethics Policy**

It is the policy of TSTC to operate within the highest ethical conduct and therefore establish ethical principles and standards to ensure that members of the TSTC Board of Regents and all persons employed by the system, regardless of rank or position, are held to the highest ethical standards.

TSTC is committed to operating all of its activities within the spirit and letter of all laws that guide the conduct of TSTC and its employees. Employees must exercise the highest level of integrity, ethics and objectivity in actions and relationships which may affect TSTC or where the employee represents or negotiates on behalf of TSTC. Employees must not misuse the authority or influence of their positions in these relationships.

A special responsibility is imposed on everyone who is entrusted with the disposition of College funds. In performing purchasing responsibilities, all College employees to whom purchasing authority has been delegated must maintain a standard of conduct in accordance TSTC policies and the guidelines listed in this Handbook.

### **3. Standards of Conduct and Conflict of Interest**

TSTC employees may not:

- participate in any work on a contract knowing that the employee, or member of that employee's immediate family, has an actual or potential financial interest in the contract, including, but not limited to, prospective employment. The term "participate" includes, but is not limited to, decision making, approval, disapproval, recommendation, giving advice, investigation or similar action,
- solicit or accept anything of value from an actual or potential vendor,
- be employed by, or agree to work for, a vendor or potential vendor, or
- knowingly disclose confidential information or use such information for personal gain.

TSTC employees must:

- strive to obtain the maximum value for each dollar of expenditure,
- grant all competitive suppliers equal consideration insofar as state or federal statute and institutional policy permit,
- conduct business with potential and current suppliers in an atmosphere of good faith, devoid of intentional misrepresentation,
- demand honesty in sales representation whether offered through the medium of a verbal or written statement, an advertisement, or a sample of the product,
- receive consent of originator of proprietary ideas and designs before using them for competitive purchasing purposes,
- cooperate with trade, industrial and professional associations, and with governmental and private agencies for the purposes of promoting and developing sound business methods, and
- foster fair, ethical, and legal trade practices.

All TSTC employees shall complete annual ethics and conflict of interest training and complete a Conflict of Interest Disclosure Form. The annual Essential Training through Human Resources is the venue for completing the training and submission of the Conflict of Interest Disclosure Form. Before an evaluation committee member or technical advisor serves on an evaluation team, Strategic Sourcing will verify that annual ethics and conflict of interest training has been completed.

TSTC's Employee Ethics and Standards of Conduct policy HR 2.1.12 is available at: <http://www.tstc.edu/governance/hr>.

#### 4. Contracts with Former or Retired Employees

The following restrictions also apply to potential contractors and respondents:

- *Contracts with Former or Retired Agency Employees* - TSTC may not enter into an employment contract or a professional or consulting services contract under Chapter 2254 with a former or retired employee of the College before the first anniversary of the last date on which the individual was employed by the College **if appropriated funds** are used to make payments under the contract. This does not prohibit TSTC from entering into a professional services contract with a corporation, firm, or other business entity that employs a former or retired employee of the agency within one year of the employee's leaving the College, provided that the former or retired employee does not perform services on projects for the corporation, firm, or other business entity that the employee worked on while employed by the College (source: TX Government Code, 222.901).
- *Restriction on Former Employees of a State Agency* – An individual who offers to provide consulting services to TSTC and who was employed by TSTC or another State agency during the prior two years shall disclose in the offer the nature of the previous employment with TSTC or another State agency, the date employment terminated, and annual compensation at the time of termination (source: TX Government Code, 2254.033).
- *Certain Employment for Former State Officer or Employee Restricted* – A former TSTC officer or employee who during the period of TSTC service or employment participated on behalf of TSTC 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 TSTC ceased (source: TX Government Code, 572.069).

#### 5. Disclosures by Potential Contractors

To avoid conflicts of interest, potential contractors should disclose in their responses to solicitations any actual or potential conflicts of interest in their proposed provision of services or other performance under any contracts resulting from the solicitations.

**Solicitation Event Documents** – Specifically, solicitation event documents should require that respondents:

- represent and warrant that their provision of services or other performance under the contract will not constitute an actual or potential conflict of interest.
- disclose any proposed personnel who are related to any current or former employees of the state.
- represent and warrant that they have not given, nor intend to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to an officer or employee of TSTC in connection with the solicitation.
- identify the principals (i.e. owner, proprietor, sole or majority shareholder, director, president, managing partner, etc.) to ensure TSTC does not award, extend, or renew any contract with vendors that are debarred, suspended, or otherwise excluded from doing business with TSTC. Contractors should also be required to update that information throughout the term of the contract resulting from the solicitations.

**Disclosure of Interested Parties** – Briefly stated, TSTC may not execute a contract for goods or services of \$1 million or more unless the business entity presents TSTC with a signed form disclosing interested parties to the contract. Business entities may be unaware of these requirements and successful implementation may require some outreach

and education by TSTC so that the contracting process can be successfully navigated and large contracts executed in a timely ([Texas Government Code, 2252.908](#)).

Specific disclosure requirements include:

- Before TSTC may execute certain contracts of \$1 million or greater, the business entity with which TSTC is contracting must submit Form 1295 – Certificate of Interested Parties to TSTC at the same time the business entity submits the signed contract. This online form is located on the [Texas Ethics Commission](#) website.
- This requirement applies to contracts [including contract amendments, renewals and extensions] that:
  - Have a value of at least \$1 million, not including (1) sponsored research contracts; (2) interagency contracts; or (3) contracts related to health and human services if the value cannot be determined at the time the contract is executed and any qualified vendor is eligible for the contract.

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

**Financial Advisors** - When soliciting and contracting for the services of financial advisors, TSTC must comply with Texas Government Code, Chapter 2263 and the Comptroller’s Contract Management Guide, regarding conflict of interest and related party provisions applicable to those financial advisors.

## 6. Senate Bill 20

In addition, the passage of Senate Bill 20 (SB20) during the 84<sup>th</sup> Legislature established several new provisions related to ethics and purchasing. Below is a brief summary of those provisions:

- Conditional authority for institutions of higher education to continue to use “Best Value” purchasing: Requires the establishment of policies on ethics, conflict of interest, internal audit, training, contract review and delegation to maintain Best Value authority. Best Value authority can be suspended by the State Comptroller for non-compliance. *(Described throughout this Handbook)*
- Conflicts of Interest: TSTC may not enter into contracts if Chancellor, General Counsel, Chief Procurement Officer (or their family members within second degree of consanguinity) owns a 1% interest in the Vendor or could financially benefit. *(Refer to Section B)*
- Internet posting of contracts: all contracts (and Purchase Orders) for purchase of goods and services from a private vendor must be posted on TSTC’s website, including the statutory authority used (if contract was not competitively bid) and the RFP document until the contract expires. *(Refer to Section G-8)*
- Establishment of a Contract Management Handbook: consistent with the State Comptroller’s Contract Management Guide. Handbook should include an accountability and risk analysis procedure, clear delegation of authority guidelines, and contract review procedures. *(This Handbook)*
- Enhanced contract review and approval procedures for contracts exceeding \$1 million. *(Refer to Section H-5)*
- Records Retention: contracts and solicitation event documents must be retained for seven years after contract expires or any legal issues are resolved. *(Refer to Section H)*

Sources and useful links: [Texas Education Code §51.923](#), [Texas Government Code §572.069](#), [Texas Government Code Chapter 572](#), [Texas Government Code Chapter 573](#), [Texas Government Code Chapter 2263](#), [Senate Bill 20 - 84th](#)

[Legislature, Ethics and Standards of Conduct SOS – HR 2.1.12](#), and [Purchasing Authority SOS – FA.1.16](#). [Contract Administration SOS – FA.4.4](#)

## C. PLANNING

Planning is the first step in contract management and is crucial to the successful outcome of any procurement. With proper planning, the College is more likely to successfully achieve contracting objectives. Contract planning includes several preliminary steps, including identifying a contract management team, developing a communication plan, determining the procurement method, developing the specifications and scope of work (SOW) for the goods/services, assessing contracting risk and developing a cost estimate.

If the procurement cannot be handled simply through the development of a straight-forward Invitation For Bid (IFB) and Purchase Order, these steps can be complex and there are many opportunities for error to be introduced into the process. Proper planning will reduce or eliminate the risk of error.

During the planning phase each of the following elements of contract management will be considered:

### 1. Identifying the Contract Management Team

The contract management process may include an executive sponsor, a department contract administrator, contract manager, and purchasing staff.

- Executive Sponsor - the extent and degree of executive sponsorship and participation is directly related to the level of risk associated with the procurement.
- Department Contract Administrator (DCA) - The department-level individual will provide input as needed to develop the scope of work and serve as the subject matter expert for the procurement. In most cases, they are responsible for adherence to all provisions contained within a contract, managing the performance of a contract; and verifying contractor performance for purposes of payment. This person typically will initiate the procurement process by requesting to issue a solicitation event to the Procurement Office. In some cases, such as in construction projects, the individual is an employee from Office of Facilities, Planning, and Construction.
- Contract Manager - The Office of Contract Administration (OCA) individual dedicated to monitoring the overall contract review process and reporting requirements by providing a single point of contact for all department contract administrators.
- Purchasing Staff - Buyers and/or other Procurement personnel who review all procurements above the competitive threshold to ensure that applicable laws and College policies relating to procurement processes are followed (including HUB compliance) and that the procurement method is appropriate.

Depending on the complexity of the solicitation event and the level of risk, Procurement Office staff will consult with the Office of General Counsel, the Office of Information Technology, risk management, accounting services, and other departments to obtain input about compliance with State laws and regulations, TSTC policies and procedures, and the contract.

### 2. Managing Contract Risk

The contract risk management process includes: 1) risk identification, 2) risk analysis, 3) risk evaluation, 4) risk mitigation and contingency planning and 5) risk monitoring. Contract management risks are as varied as the types of contracts. Risk categories common to contract management include product risk, process risk, business continuity risk, financial risk, and schedule risk.

Several factors that may be useful in identifying the level of risk may include, but are not limited to:

- Whether vendor will create, receive from or on behalf of TSTC, or have access to TSTC's records or record systems which will require compliance with use of information resources policies



- The complexity and subject matter of the contract
- The dollar amount of the contract
- The anticipated payment methodology
- Whether the results of the procurement will impact the public or only impact TSTC

The table below provides examples of the various degrees of risks associated with specific contracts:

CONTRACT FACTOR	LOW RISK	HIGH RISK
<b>Complexity</b>	Landscaping Services	Software Development Services implementing new financial system or permitting vendor access to institutional records or record systems
<b>Dollar Amount</b>	\$5,000	\$1,000,000
<b>Payment Methodology</b>	Firm Fixed Price	Cost plus % of savings
<b>Impact to Public or College</b>	Janitorial Services	Outsourcing of Debt Collection Services

The Office of Contract Administration (with originating department input) will conduct a risk assessment in order to determine whether enhanced contract monitoring is required.

### 3. Developing a Communication Plan

For significant contracts, Procurement will develop a plan to manage and control internal and external communication. After identifying internal and external stakeholders (executive management, end users and other subject matter experts, oversight entities, etc.), Procurement, with the assistance of end users and others, will provide guidance to communicate to all stakeholders regarding how communications will be delivered and acceptable content. The focus should be on centralized communication throughout the contract term utilizing the Procurement Staff or the department contract administrator, particularly for any Scope of Work communication.

### 4. Determining the Procurement Method

The procurement method selected is an important factor in the planning process because of the different lead times associated with each method. TSTC uses a variety of procurement methods in accordance with the State of Texas Procurement Manual and the Contract Management Guide.

Some of the most commonly used procurement methods are described below:

Procurement Method	Use When	Advantages	Disadvantages
<b>Invitation for Bids (IFB)</b>	When negotiations are not necessary and price is the major determining factor for selection.	Evaluation and award process are simpler.	Does not permit negotiations.  Price is the primary evaluation criterion; however, all Best Value criteria can be considered.
<b>Request for Proposal (RFP)</b>	When factors other than price are evaluated.  Ability to negotiate is desirable.	Permits negotiation with respondents to obtain the best value for the College.  Permits consideration of factors other than price.	Lead times are greater than for an IFB.  Evaluations are more complex and subjective than for an IFB.

Procurement Method	Use When	Advantages	Disadvantages
<b>Request for Qualifications (RFQ)</b>	Used for professional services covered under Texas Government Code, Section 2254.	Emphasizes the competency of the proposed contractors.	Contractor is selected before price is negotiated.

Refer to Texas Education Code, Section 51, Subchapter T. Construction and Repair of Permanent Improvements.

**5. Planning for Contract Content**

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

**6. Solicitation Event Research**

Procurement staff may assist the department contract administrator in contacting and interviewing people within TSTC and at other institutions of higher education or state agencies who have developed solicitations, drafted contracts and engaged in contractor oversight similar to the solicitation event that is being planned.

Recommended methods of research include:

- using the internet to search for similar solicitation event documents, contracts, and oversight documents;
- reviewing websites of potential contractors for useful information;
- checking with universities, trade associations, and professional organizations to identify industry standards; and
- publishing a Request for Information (RFI).

While researching, TSTC may wish to contact potential contractors to discuss the solicitation. This is an acceptable practice as long as TSTC solicits information from more than one contractor and advises the contractor up front that TSTC’s interest at this point is strictly for solicitation event research purposes and that any formal requests for pricing or other information will be made through a formal solicitation event process (i.e., IFB, RFQ, or RFP).

**7. Developing a Cost Estimate**

Cost estimates are developed during the planning stage of the procurement to assist in determining the procurement method to use and identify any budget constraints. Cost estimates can be developed in-house by subject matter experts or by obtaining pricing information from vendors. If pricing information is obtained from potential bidders, it is important to clarify that the information is for planning purposes only and not a formal solicitation. Also, care should be taken to avoid giving a potential bidder a competitive advantage.

**8. Procurement Lead Time**

Procurement lead time is the interval between a decision to purchase an item and the delivery of the item at the designated location. Depending on the type of procurement, the lead time may include the following steps:

Task	Suggested Lead Time from Contract Start Date
Begin preparation of solicitation event	90 – 180 days
Solicitation event completed	60 – 150 days
Advertise and issue solicitation event	40 – 120 days
Receipt of responses	40 – 90 days

Task	Suggested Lead Time from Contract Start Date
Evaluation of responses	30 – 60 days
Contract negotiation (if applicable and allowed) and contract formation	15 – 45 days
Contract execution – all signatures are obtained	15 days
Performance begins (generally the 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 Procurement Office. Less complex Procurements may be accomplished in less time, while more complex Procurements may require more time.

- If the Procurement is very complex and requires respondents to submit significant documentation and/or complex pricing, additional time for the solicitation event period should be allowed.
- Evaluation of the bids or proposals may take more or less time, depending on the size of the Contract Review Team and the complexity of the evaluation. The evaluation period could also increase if oral presentations, discussions or best and final offers are utilized.
- Contract negotiation and formation timeframes may vary depending on the complexity of the procurement.
- The contract execution timeframe may also differ significantly between a Purchase Order and a contract.
- Depending on the approval and signature requirements of the College and the contractor, the contract execution lead time may need to be adjusted.

## **D. PREPARING THE SOLICITATION**

After Procurement determines which solicitation method is appropriate, a solicitation event is created in RSolution Software. Relevant statutes, policies and procedures, and industry best practices should be reviewed prior to preparing the solicitation event document. To safeguard the integrity of the evaluation process, individuals serving on an evaluation committee or as technical advisors must acknowledge a non-disclosure agreement prior to receiving the responses or participating in evaluation committee activities.

### **1. Preparing the Solicitation**

A solicitation event document should include the following:

- Event Summary and Event Dates
- Description (Background Information and Purpose)
- Prerequisites (Solicitation Event Requirements)
- RSolution Navigation Guide
- Execution of Offer
- Non-Collusion Statement
- Conflict of Interest Questionnaire
- HUB subcontracting requirements (if applicable)
- Deviation/Compliance Signature Form
- Buyer Attachments (if applicable)
- Proposal Requirements
- Evaluation Criteria
- Terms and conditions or a sample contract
- Pricing submittal form (if applicable)
- Exhibits (if applicable)

The solicitation event for a Request for Proposal process or a Request of Qualification process will be much more comprehensive than the solicitation event document for an Invitation for Bid.

### **2. Organizing the Scope of Work**

The Scope of Work (SOW) is very important as it forms the basic framework for the resulting contract. The SOW is a detailed description of what is required of the contractor to satisfactorily perform the work. The success or failure of a contract can usually be linked to the adequacy of the planning, analysis and thoroughness of the SOW. Time spent planning, analyzing, and drafting the SOW will result in saving time, resources, money and will improve the quality of the goods or services provided.

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
- allow for free and open competition to the maximum extent reasonably possible.

If TSTC lacks internal resources or expertise for a particular procurement, TSTC may contract for development of the SOW as necessary and appropriate.

### **3. Specification Types**

Specifications are the primary means of communication between TSTC and a vendor. A specification is a description of the goods/services TSTC seeks to procure. A specification also describes goods/services that must be proposed to be considered for an award. Specifications control quality of the goods/services, the suitability of the goods/services

for the business purpose, and the method of evaluation used in determining best value and in making a contract award.

The following are the characteristics of effective specifications:

Effective Specifications	
<b>Simple</b>	Avoid unnecessary detail, but be complete enough to ensure that requirements will satisfy their intended purpose.
<b>Clear</b>	Use terminology that is understandable to End Users and bidders. Use correct spelling and appropriate sentence structure to eliminate confusion. Avoid legalese type language and jargon whenever possible.
<b>Accurate</b>	Use units of measure that are compatible with industry standards. All quantities and packing requirements should be clearly identified.
<b>Competitive</b>	Identify at least two commercially available brands, makes, or models (whenever possible) that will satisfy the intended purpose. Avoid unneeded “extras” that could reduce or eliminate competition and increase costs.
<b>Flexible</b>	Avoid inflexible or narrow specifications which prevent the acceptance of a response that could offer greater performance for fewer dollars. Whenever possible, use approximate values for dimensions, weight, speed, etc., if the approximations will satisfy the intended purpose.

## 2.1 Performance Based Specifications vs. Design Specifications

Performance-based specifications focus on outcomes or results of the required goods/services rather than how the goods/services are produced. Conversely, design specifications outline exactly how contractor must make the goods or perform the services. Performance based specifications allow respondents to bring their own expertise, creativity and resources to the bid process without restricting them to predetermined methods or detailed processes. This may allow respondents to provide the goods/services at lower cost. Performance-based specifications also shift some risk to contractor. For example, if TSTC utilizes a design specification for a piece of equipment and the equipment ultimately does not satisfy the business need for which it was procured, then the results may be the fault of the College’s specifications. However, if TSTC used performance-based specifications, the unit must perform in accordance with the specifications. If the equipment does not perform, then contractor may be at fault.

Performance-based specifications may permit respondents maximum flexibility when satisfying the requirements of a solicitation. Design specifications may limit respondent’s flexibility. Mixed specifications include both performance-based specifications and design specifications. Consider the purchase of media and advertising services:

- **Performance Based Specification:** Contractor shall provide media services for TSTC which shall increase student enrollment by a minimum of 3 percent in the next fiscal year. Applications shall increase by a minimum of 10 percent. These figures will be measured based on TSTC’s student database.
- **Design Specifications:** Contractor shall conduct at least seven (7) media campaigns for TSTC during the fiscal year. Three of these campaigns must be directed to increase new student applications.
- **Mixed Specifications:** Contractor shall provide media services for TSTC which shall include a minimum of seven media campaigns during the fiscal year. Media services shall provide for a minimum increase of 3 percent in student enrollment in the next fiscal year based on TSTC’s student database.

Performance-based specifications focus on results. Design specifications focus on resources. If TSTC uses design specifications only, contractor may provide all seven campaigns, but the desired result of increased enrollment may or may not occur.

As with all performance measures, TSTC must ensure that performance specifications are reasonable and measurable. Note that the specification clearly outlines how the results will be measured. While performance based contracts are sometime preferable, when using this type of specification the planning, expertise and contract management may be different than design specifications.

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

It is not always beneficial to use performance-based specifications. Consider the following examples of when to use performance and design specifications:

- **New installation, entire system provided by one vendor.** Consider using performance-based specifications to allow the contractor to provide the system that provides best value to the College.
- **New installation, system provided by various suppliers.** Consider using design specification to ensure that all of the components (for example, HVAC controls, chillers, and boilers, etc.) that must work together will work together.
- **Expansion of an existing installation.** Consider using design specifications because the new equipment must connect and integrate with the existing system.

#### 4. Elements of a Deliverable

Deliverables defined in a solicitation event may include the following elements:

- A description of the work.
- A standard for performance.
- Test conditions, method or procedure to verify that the deliverable meets with the standard.
- A method or process to monitor and/or ensure quality in the deliverable.
- An acceptance process for each deliverable.
- A compensation structure that is consistent with the type and value of work performed.
- 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. If the existing business process will change as a result of the procurement, then also describe what the business process will be after the procurement objectives are completed. If the College wants the respondent to recommend new business processes, this information must be included in the solicitation.

#### 5. Contract Term

A reasonable contract term compliant with all applicable laws must be established prior to the solicitation event and must be included in the solicitation event 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. As a general policy, it's recommended that the maximum time for contracts without reissuing a competitive solicitation event be 5 years. This includes any renewal or extension periods.

Individual business needs may inform the decision regarding length of contract term. Contract terms exceeding five (5) years, including renewal periods, should be justified based on compelling business needs and approved by the Office of Contract Administration.

Contracts must include a “funding out” clause. This contract is contingent upon the continued availability of funding. If funds become unavailable through lack of appropriations, legislative or executive budget cuts, amendment of the Appropriations Act, state agency consolidations, or any other disruptions of current appropriations, provisions of the Termination Article shall apply.

#### **6. Historically Underutilized Business (HUB) Requirements**

TSTC is required to make a good faith effort to utilize HUBs in Contracts in accordance with goals specified in the *2009 State of Texas Historically Underutilized Business Disparity Study*. These goals can be achieved through contracting directly with HUBs or indirectly through subcontracting opportunities in accordance with [Texas Government Code, Chapter 2161, Subchapter F](#) and [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B](#).

If TSTC is considering entering into a Contract with an expected value of \$100,000 or more over the life of the Contract (including any renewals), before preparing the Solicitation, TSTC must determine whether subcontracting opportunities are probable under the Contract (see: [Texas Administrative Code, Title 34 Part 1, Chapter 20, Subchapter B, Rule § 20.14 \(a\)](#)).

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

Specific HUB procedures are detailed in the Texas Comptroller of Public Account’s (CPA) Procurement Manual at <http://www.window.state.tx.us/procurement/pub/manual/>.

#### **7. Payment Types**

The method of payment has a direct impact on how the statement of work is written and how the contract is managed. The College must measure or verify that the work is complete and how much and how often the College will pay the contractor. As with specification types, there are also various payment types. The payments method should be consistent with the good or services delivered. Payments should be structured to fairly compensate the contractor and encourage timely and complete performance of work. As a general rule, payment should be approximately equal to the value of the completed work.

<b>Payment Type:</b>	<b>Commonly used for:</b>	<b>Payment based on:</b>
<b>Cost Reimbursement</b>	Interagency Cooperation Agreements Interlocal Cooperation Agreements	Reimbursement of allowable costs in accordance with the approved budget. May be associated with grants.
<b>Cost Plus Incentives</b>	Materials contract where the materials are unknown at the time of contract award. Example: Job order contracts.	Contractor's cost <u>plus</u> a percentage of cost or cost <u>plus</u> fixed fee. This payment method is discouraged because there is no incentive for contractor to minimize costs.
<b>Fee For Service</b>	Contracts where a fee can be established per unit of goods/services. Example: When providing flu shots to employees, unit of service may be one flu shot.	Number of completed good/service units.
<b>Firm Fixed Price</b>	Contracts where a firm fixed price can be established for goods/services to be provided. SOW must provide clear and accurate specifications. Examples: Contracts for common goods/services, including office supplies and furniture.	Firm fixed price agreed upon at the time the contract is awarded. In this pricing method, contractors carry any pricing risk because the fee does not change, regardless of costs incurred by contractor to provide the goods/services. This risk may cause contractors to inflate the quoted price to protect themselves from fluctuations in material/labor costs.
<b>Firm Fixed Price with Escalator</b>	Contracts where a firm fixed price can be established for goods/services to be provided, including longer term contracts and contracts where the costs of materials/labor are subject to market fluctuations. Examples: Lumber, steel, fuel and paper contracts.	Firm fixed price subject to escalation based on a fixed percentage or an index such as the Consumer Price Index. Contractors are less likely to inflate the quoted price to protect themselves against possible increases in materials/labor because the contract allows for market adjustments to the price.
<b>Progress Payments</b>	Contracts where the SOW is completed in phases or stages. Examples: Consulting services and construction.	Payment is based on pre-established deliverables. Deliverables must be measurable.
<b>Time and Materials with Fee Cap</b>	Service contracts under which the volume of labor/ materials required to perform the work are difficult to forecast. Examples: Electrician, plumber and carpenter services.	Payment is based on the number of hours worked for a specific SOW <u>plus</u> cost of materials <i>subject to</i> maximum fee cap.
<b>Other Payment Provisions</b>	Travel reimbursements or payment discounts	Travel reimbursement should generally be limited to the rates allowed by the Comptroller. Solicitations should encourage respondents to include payment discounts.

The payment type chosen must comply with applicable Statutes, Comptroller Guidelines and TSTC's policies and procedures.

## 8. Define The College's Role

Clearly define the role the College will play in the work to be performed and any specific contributions, resources or tasks the College will provide. Detail any background data or work already accomplished that the anticipated Contract will build on and make it available during the Solicitation phase of the procurement. Specify whether the contractor should rely on the accuracy of any such background data or work or whether the data or work is provided for information purposes only. If provided for informational purposes only, advise if the contractor is responsible for



verifying the accuracy of the information to the extent necessary to perform the contract. Define the roles of the College staff that will administer the contract and monitor the contractor's progress.

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

**QUALITY** – The solicitation event document must identify the level of quality required for acceptable performance. For example: All dusting shall be done so as to ensure cleanliness of surfaces, as determined through inspection by the department contract administrator.

## 9. Established Standards

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

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

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

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

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

## 10. Contractor Qualifications

The statement of work should specify the minimum qualifications required of the contractor. Typically in an RFP, the contractor qualifications are less stringent than in an IFB because the contractor qualifications are part of the evaluation criteria. At a minimum, the statement of work should require that the contractor have a specified level of experience in the type of work to be performed.

## 11. Bonding Requirements

Bonds are a form of security. The three most common forms of bonding are bid bonds (deposits), performance bonds, and payment bonds. TSTC must advise the respondents in a solicitation event if a bond is required and what forms are acceptable (e.g., irrevocable letter of credit or cashier's check). When considering whether or not to use a bond, remember that the cost of the bond is typically passed on to the College by the contractor. Some bonds are required by Statute for specific types of procurements, as set forth in:

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

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

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

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

## 12. Evaluation Criteria

The solicitation event must advise the respondents how a proposal 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 evaluation team to fairly evaluate the proposals. The evaluation criteria may take a variety of sources of information into consideration such as the written response, the oral presentation, 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 should reflect only those requirements specified in the solicitation event. The language within the solicitation event will determine the scope of the evaluation criteria and the flexibility the evaluation team will have when evaluating proposals, so the evaluation criteria should not be unduly restrictive. Respondents must have notice in the solicitation event of all requirements. The solicitation event should clearly state the consequence of failing to meet these requirements such as reduction in evaluation score or disqualification. Consider carefully any requirements that may disqualify a proposal. For example, the HUB Subcontracting Plan is required by state statute; therefore, agencies have no choice but to disqualify the respondent if they do not submit the plan. However, if the respondent fails to submit a copy of a license, is that really a valid reason for disqualification?

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

**BEST VALUE CONSIDERATIONS** - Best Value considerations must be included in the specifications. The lowest cost is not necessarily the best value for all procurements. For example, a commodity or service of higher quality, such as a longer life span, may be a better value and investment for the College, even if the initial cost is more. Some items which may typically be considered under Best Value include:

- the purchase price;
- the reputation of the vendor and of the vendor's goods or services;
- the quality of the vendor's goods or services;
- the extent to which the goods or services meet the College's needs;
- the vendor's past relationship with the College;
- the impact on the ability of the College to comply with laws and rules relating to historically underutilized businesses and to the procurement of goods and services from persons with disabilities;
- the total long-term cost to the College of acquiring the vendor's goods or services;
- any other relevant factor that a private business entity would consider in selecting a vendor; and
- the use of material in construction or repair to real property that is not proprietary to a single vendor unless the College provides written justification in the request for bids for use of the unique material specified.

**SCORING WEIGHT** - There are several schools of thought on how much information is provided to the respondents regarding the evaluation criteria. At a minimum, the criteria must include the weight assigned to each criterion. The table below indicates sample evaluation criteria:

Sample Evaluation Criteria	Sample Weight
Cost	60%
Proposed services, including work plan and methodology	20%
Experience, skills and qualifications of company and staff	20%

When establishing scoring weight of each criterion, cost is typically the most significant evaluation factor. However, there are procurements in which the skills and experience of the contractor or other factors may be more important than cost. For example, if a trainer has to have a specific set of skills, TSTC may be willing to pay more for these skills. When establishing the criteria weight, consider the importance of the criteria to the overall project. The criteria deemed most important by TSTC should be weighted higher than the other criteria.

### 13. Proposal Submission Requirements

The solicitation event should include a listing of the required information that respondents must submit with their proposal. This will assist respondents to confirm that all required documentation is submitted. The table below lists examples of the types of documentation that respondents would be required to submit in order to satisfy the requirements listed on a solicitation:

Evaluation Criteria	Solicitation Event Requirement	Submission Requirement
<b>Contractor Qualifications</b>	Licensed Architect.	Copy of License.
<b>Contractor Experience</b>	Minimum of five (5) projects of similar size and scope.	Detailed information regarding building size, dollar amount and scope of project for each individual project and any additional information necessary to evaluate contractor experience.
<b>Financial Capability</b>	Financially capable of handling a project of this size and scope.	Copy of latest financial statements, including balance sheets, Dunn and Bradstreet report, etc.
<b>Proposed Services</b>	Business Plan for how proposed services will be performed.	Business plan should include, the number of staff resources and experience level, implementation strategy, reporting requirements, response times, etc.

### 14. Monitoring

The methods used to monitor contractor performance must be clearly stated in the solicitation event to give contractors advance notice if requirements include producing time-consuming reports or maintaining stringent testing requirements outside normal industry parameters. TSTC 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 department contract administrator must consider monitoring methods to ensure the contractor performs as specified in the SOW. Additionally, different funding sources such as federal grants may have specific requirements for contract monitoring. The department contract administrator must be familiar with these requirements and include them in the SOW.

### 15. Reporting

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

If deliverables are specified, include the format of the deliverable and the quantity required. For example, if a deliverable is a final project report, state how many copies of the report are needed and specify the format of the report. Provide details of all items that must be included in the report. These requirements are usually addressed in the SOW within the Solicitation.

If contractor provided information is anticipated to be reported as part of the Colleges' 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. If possible, include in the solicitation event document the desired format or a sample of any required reports.

#### **16. Inspection and Testing**

The SOW must provide any requirements for inspection and testing and TSTC shall describe provisions for inspection and testing of goods or services purchased under the contract. Tests may be performed on samples submitted from regular shipments.

All external costs of inspection and testing should be borne by the contractor. In the event inspected and tested goods or services fail to meet or exceed all conditions and requirements of the contract, the goods or services should be rejected in whole or in part and must be replaced at the contractor's expense. Latent defects can result in cancellation of a contract. "Latent defects" are those that are not known by or expressly disclosed to the buyer or not discoverable by a reasonably prudent inspection. The College will not have an obligation to the contractor for any lost overhead or profit resulting from a replacement or cancellation.

#### **17. Final Acceptance**

The SOW should clearly define how the agency will determine that the contract has been satisfactorily completed. The SOW sets a standard for acceptance of the deliverable and establishes a procedure to receive or reject the deliverable based on specific factors.

Tracking the status of several phases, segments and deliverables, where each deliverable may have multiple tasks, activities, and products, can be challenging. A formal acceptance process for each step in a contract allows the administrator and the contractor to know the conditions of contract performances.

#### **18. Additional Issues to Consider**

Listed below are additional issues which TSTC should consider when writing the SOW. These items may affect pricing, so it is important that respondents are aware of these requirements. The SOW answers – who, what, when, where, why and how. If these questions are answered, it is a reasonable assumption that the scope of work is complete.

- Data security and privacy requirements;
- Accessibility of electronic and information resources requirements;
- Licenses or permits required;
- Use of state agency equipment;
- Storage space for contractor materials/supplies;
- Access to the College's premises;
- Intellectual property/copyright issues;
- Subcontractor requirements;
- Insurance requirements; and
- Conflict of interests/organizational restrictions.

## E. ADVERTISING THE SOLICITATION

### 1. Advertising

When marketing a solicitation, consideration must be given to the type of procurement method used and the types of goods or services being procured. For example, effective advertising for goods/services may be different from effective advertising for professional services. Procurement personnel should refer to appropriate statutes and TSTC SOS's to ensure compliance.

Below are some options available for advertising the solicitation:

- **Electronic State Business Daily (ESBD)**  
The Electronic State Business Daily (ESBD) is an internet-based resource for posting procurement opportunities. It is administered by the State Comptroller and is available at <http://esbd.cpa.state.tx.us>. TSTC posts procurement opportunities exceeding \$50,000 on this website.
- **The Centralized Master Bidders List (CMBL)**  
The CMBL is an electronic database of registered contractors that have provided information for the primary contact, commodity codes, and the goods or services they provide. TSTC uses the list to notify registered contractors about procurement opportunities. The CMBL is also administered by the State Comptroller and is available at: <https://www.comptroller.texas.gov/purchasing/vendor/cmbL>.
- **TSTC's Procurement Services Website**  
All procurement opportunities advertised on the ESBD are also posted on the Procurement Services section of the TSTC public website. In addition, solicitations over \$50,000 are also posted here as well as bid tabulations and award information. The website is available at: <https://bids.sciquest.com/apps/Router/PublicEvent?CustomerOrg=TSTC>.
- **Other Options for Marketing Solicitations**  
If required by Statute or internal policy, TSTC may also publish solicitation event announcements in newspapers (in print or online), HUB organizations, or the Texas Register.

### 2. Communication with Respondents

All communication with potential respondents should be made only through the Procurement Office. The solicitation event shall identify a single point of contact within the Procurement Office and describe all acceptable forms of communication, such as telephone and email. Although purchasing staff may not be able to answer technical questions, they will obtain the responses from the appropriate staff (end users, department contract administrator, etc.) and ensure that the information is communicated to all potential respondents. Should a potential respondent contact other College personnel, they must politely decline to discuss the procurement and advise the respondent to contact the appropriate buyer as listed on the solicitation. A respondent that contacts someone other than designated staff in the purchasing office regarding the solicitation event may be disqualified.

### 3. Written Questions

The solicitation event 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 are specified in the solicitation event, if Written questions may be submitted via RSolution Software. If the solicitation event is posted on the ESBD, the questions and answers will be posted in the solicitation event as they become available.

### 4. Pre-Solicitation Conferences

TSTC may conduct mandatory or non-mandatory pre-solicitation conferences. Invitations will be sent via RSolution Software. College personnel 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 event is so complex that staff believe attendance is critical for potential respondents to fully understand the procurement.

Pre-solicitation conferences provide a forum for staff to respond to questions regarding a solicitation. The benefits derived from conducting pre-solicitation conferences include:

- The conferences allow potential respondents to address specific questions or concerns with the solicitation. If any issues are identified at the conference, the agency will publish an addendum to the solicitation.
- Conferences allow potential respondents to address specific questions or concerns with the solicitation, including questions about submittal requirements and HUB compliance.
- Conferences are important when there is a need for on-site visits by contractors prior to submitting their response. In some cases, it may be sufficient to take digital pictures of the sites and provide this information in a slide presentation at the conference in lieu of the conference attendees traveling to the various sites. A copy of the slide presentation can be provided to the conference attendees and is posted online (ex: ESBD, Procurement Services website).
- Conferences provide a forum for agencies to provide additional information, schematics, plans, reports, or other data that is not easily transferable or distributed through hard copy.
- All potential respondents receive the same information.
- Subcontracting relationships may develop through the contacts established by potential respondents at the conferences.

The solicitation event will indicate the date, time and location of the pre-solicitation conference. All conferences attendees must be documented through a sign-in sheet. This is especially important if the conference is mandatory because the sign-in sheet is the document used by TSTC to verify respondent attendance at the conference.

The Procurement Office should conduct the conference, in coordination with the department contract administrator/end users. The Procurement Office should facilitate the meeting and answer procurement related questions, while the department contract administrator/end users respond to the technical questions. If it is not possible to answer all questions at the conference, unanswered questions should be answered in writing as soon after the conference as possible. Depending on the significance of the questions asked and answers given, the purchasing office may consider posting the questions and answers for the benefit of potential respondents unable to attend the conference. If clarification of the solicitation event is necessary, addenda to the solicitation event may be issued.

All changes to solicitation events must be made through an addendum issued by the College via RSolution Software. The addendum is provided to all potential respondents via RSolution Software, and is automatically updated in ESBD. When issuing an addendum, consider the amount of time remaining until the opening date of the solicitation. It may be necessary to extend the bid opening or proposal deadline – which can also be done through the addendum process.

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

- Opening – Purchaser introduces College representatives and explains their roles in the procurement.
- Introduction – Attendees introduce themselves and identify the company they are representing.
- Solicitation Event Overview/Review – This is the main focus of the conference. The document is reviewed page by page or section by section. It is not necessary or recommended to read the entire document, but

the entire document should be addressed. Questions should be answered as the pages or sections are discussed.

- 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. See **Appendix A** for a sample Pre-Solicitation Conference Agenda and **Appendix B** for Pre-Solicitation Conference Guidelines.

## 5. Solicitation Event Submission and Opening

The solicitation event in RSolution will indicate the date and time when event is closing. Respondent's Proposals may be evaluated on a variety of factors in addition to price. The solicitation event participants will be posted on the RSolution public website. The solicitation event document should also provide information to respondent(s) that the responses cannot and will not be provided prior to award of contract(s).

## 6. Consulting Services

If TSTC does not purchase goods or services under Texas Education Code 51.9335, then TSTC must follow Texas Government Code 2254, Subchapter B. "Consulting service" means the service of studying or advising a state agency under a contract that does not involve the traditional relationship of employer and employee. "Major consulting services contract" means a consulting services contract for which it is reasonably foreseeable that the value of the contract will exceed \$25,000 (for an institution of higher education other than a public junior college). Solicitations for consulting services must include a "finding of fact" from the Chancellor that the consulting services are necessary.

## 7. Professional Services

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

- within the scope of the practice, as defined by state law, of:
  - accounting
  - architecture
  - landscape architecture
  - land surveying
  - medicine
  - optometry
  - professional engineering
  - real estate appraising
  - professional nursing, or
- provided in connection with the professional employment or practice of a person who is licensed or registered as:
  - a certified public accountant
  - an architect
  - a landscape architect
  - a physician, including a surgeon
  - an optometrist
  - a professional engineer
  - a state certified or state licensed real estate appraiser, or
  - a registered nurse.
  - provided by a person lawfully engaged in interior design, regardless of whether the person is registered as an interior designer under Chapter 1053, Occupations Code.

Contracted services provided by the above professionals that fall outside their scope of practice may be governed by other procurement requirements. For instance, management consulting services provided by a certified public

accountant would not be exempt as a professional service. In order to contract for such services, TSTC would follow the consulting services contract requirements if the services are not being purchased under Texas Education Code 51.9335.

Governmental agencies are prohibited from using competitive bidding to purchase or award a contract for “professional services”. The selection of a vendor or award of a contract for “professional services” must be based on two criteria:

- The demonstrated competence and qualifications to perform the services; and
- A fair and reasonable price. The professional fees under the contract:
  - Must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations; and
  - May not exceed any maximum provided by law.

#### **8. Mixed Services**

If TSTC does not purchase goods or services under Texas Education Code 51.9335, then TSTC must follow Texas Government Code 2254, Subchapter B. When a contract involves both consulting services and one or more other services, TSTC must comply with the consulting services requirements when the primary objective of the contract is the purchase of consulting services. For instance, if a contractor proposes to analyze TSTC’s information systems needs and develop and implement an automated information system, the primary objective of the contract is not the analysis provided. It is the delivery of a data information system. This contract is not a consulting services contract; therefore, the requirements for consulting services contracts do not apply. However, TSTC must comply with the procurement procedures under [Texas Education Code, 51.9335](#) and any institutional policies in this situation.



## F. EVALUATION AND AWARD

Evaluations must be conducted in a fair and impartial manner consistent with Texas law governing procurement, purchasing, and contracts. As previously discussed in Section D of this Handbook, the solicitation event document should include a general description of the evaluation process, the evaluation criteria, and the relative weights to be assigned to each evaluation criterion.

During the planning stage for the procurement, the contract management team should develop an evaluation guide, which identifies the evaluation team, the detailed scoring matrix, the process for evaluation of responses and award of any contracts, and an anticipated evaluation schedule.

### 1. Evaluation Teams

- **Composition and Role.** The evaluation team should be comprised of individuals who are stakeholders in the goods or services being procured or individuals who have the necessary technical or program expertise. It is important that team members understand the needs of the institution and the desired outcome of the procurement. The evaluation team will also include a representative of the purchasing office (buyer) who is usually the team leader and serves as a non-voting member.

The evaluation team should bring together as much knowledge as possible to select the contractor. 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 an evaluation team is three to five members. However, complex projects may require additional members or additional teams due to the nature of the procurement. To avoid potential individual bias, it is strongly encouraged that the evaluation team not be less than three members. Coordination and management of the evaluation process becomes more difficult as the size and number of teams increase.
- **Team Training.** Before evaluating any responses, the evaluation team leader provides a training for the evaluation team to outline the team's duties and responsibilities. This may be a separate meeting, but often times is held in conjunction with and just prior to the evaluation. Team members should be instructed on their responsibilities including the critical nature of confidentiality to the integrity of the evaluation process. Each evaluation team member should acknowledge a Non-Disclosure Statement in RSolution software prior to engaging in any discussion about or having access to proposal documents. An evaluation team member must ensure that all potential conflicts of interest are properly disclosed through the Conflict of Interest Disclosure form, typically completed on an annual basis through Human Resources Essentials Training.

Procurement ensures all team members are made aware of evaluation criteria and are provided an opportunity for further explanation if required. Communication between team members during the evaluation must be limited to asking questions of the team leader and if allowed, obtaining information from technical experts to better understand the proposal contents and requirements. Each proposal must be evaluated individually against the requirements of the solicitation event document. Each solicitation event document response is considered independently, of all other solicitations. Refer to **Appendix C** for the Evaluation Team Guidelines.

### 2. Scoring Matrix

The scoring matrix, which should be a part of a well-developed evaluation guide, is used by the evaluation team members to score the individual responses based on the evaluation criteria defined in the solicitation. The evaluation team scoring matrix should be completed in RSolution Software prior to publishing the solicitation event because, when developing the scoring matrix, it may become apparent that the solicitation event needs to be supplemented

or revised. If time does not permit the scoring matrix to be completed prior to publication, the scoring matrix must be completed prior to the opening and review of the solicitation event responses. Failure to complete the scoring matrix before the opening of responses may subject the procurement to protests.

### **3. Responsive Proposals**

The Procurement Office determines if the proposals submitted via RSolution are responsive. This is sometimes referred to as an administrative review. At a minimum, this includes the signed Execution of Offer, HUB Subcontracting Plan and any other required documents such as bid bonds. In addition, the Procurement Office will review the proposals to ensure that minimum qualifications are met.

RSolution Software has a list of Prerequisites ensure the proposals are responsive. The evaluation team will only be provided with those proposals deemed responsive.

### **4. Single Responses**

To determine why only one response is received to a competitive solicitation, the Procurement Office or other appropriate employee of the College may do the following:

- Re-review the solicitation event for any unduly restrictive requirements.
- Contact some potential respondents to determine why they did not submit a response.

If it is determined that there were unduly restrictive requirements in the solicitation event, TSTC may decide to re-advertise the solicitation. Otherwise, TSTC should consider the reasons that other responses were not received and determine if it is in the best interest of the College to make an award, to re-advertise with a revised solicitation, or to determine if a proprietary or single source purchasing justification is required.

### **5. Proposal Evaluation**

Once the proposals have been reviewed and deemed responsive by the Procurement Office, the evaluation team shall be provided with the qualified responses. Evaluations are completed using RSolution Software.

Purchasing staff and technical experts need to be available to answer technical questions regarding responses. All written and oral evaluation questions should be presented to the evaluation team leader to seek answers to such questions.

Once evaluations are complete, the 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 conduct a meeting with all team members to discuss the situation to ensure the criteria was clear to all team members and that information was not overlooked or misunderstood. If after this discussion, a team member feels that he/she did not understand the criteria, the requirement, or missed information that was included in the response, the evaluator, at his own discretion, may revise his evaluation score. Under no circumstances should any team member attempt to pressure other members to change evaluation scores.

### **6. References**

The evaluation team may verify any references included in the response and conduct any other reference or credit check deemed appropriate. The evaluation team may also use the Vendor Performance System in evaluating past vendor performance. [http://www.window.state.tx.us/procurement/prog/vendor\\_performance](http://www.window.state.tx.us/procurement/prog/vendor_performance)

All reference checks must be documented in writing. The same script or format of questions must be used when conducting reference checks so that the results are consistent and fair to all respondents. A sample reference check guideline is provided in **Appendix D**.

Sometimes it is difficult to obtain information from the references provided, either because the references have a policy of not providing reference information or because they cannot be reached in a timely manner. Depending on

the importance of the procurement, TSTC may want to consider using the following statement in the solicitation event in lieu of checking references for all respondents.

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

By using this clause, TSTC is not required to check references but may choose to do so. Whether or not to check references as part of the evaluation criteria is at the discretion of the College based on the individual procurement.

## **7. Oral Presentations/Discussions**

Oral presentations or discussions are conducted at the option of the College. If conducted, the solicitation event must state approximately when oral presentations or discussions will occur. Oral presentations and discussions provide an opportunity for respondents to highlight the strengths and unique aspects of their response and to provide answers to questions the College may have regarding the response. Demonstrations of product functionality are recommended when appropriate, such as information technology procurements.

Oral presentations and demonstrations can be scheduled for all respondents or limited to the top ranked vendors in the competitive range. The team should look for a “natural break” in the scores that will determine the competitive range. The competitive range should consist of those responses determined to be reasonably considered for award.

Oral presentations and demonstrations should be fair to all parties. The time allowed and the format should be the same for all presenters. A prepared script will ensure consistency.

## **8. Best and Final Offers**

After oral presentations or demonstrations are completed, discussions between TSTC and respondent may be held. If discussions are held and TSTC intends to permit respondents to revise their responses, all respondents within the competitive range who participated in oral presentations or demonstrations will be given equal opportunity to discuss and submit revisions to their responses.

Revisions of proposals are normally accomplished by formally requesting best and final offers (BAFO). The request sets a deadline for receipt of BAFO responses and provides instructions regarding information and documentation that should be submitted. After consideration of all BAFO responses, TSTC may choose to select the Best Value Respondents with which to commence negotiations.

## **9. Negotiations**

Before negotiating with respondents, TSTC should closely review the terms of the solicitation event to confirm that negotiation is permitted. For example, the Invitation for Bid method does not allow negotiations unless only one bidder submitted a bid or in the case of an emergency or proprietary purchase, while the RFP method does allow negotiations.

During negotiations TSTC may not use “technical leveling” and/or “technical transfusion” techniques. “Technical leveling” means helping a respondent bring their proposal up to the level of other proposals through successive rounds of discussion, usually by pointing out proposal weaknesses. “Technical transfusion” means disclosing technical information or approaches from one respondent’s proposal to other competitors in the course of discussion.

In addition, the following disclosures are prohibited:

- disclosing competing respondents’ cost/prices (even if the disclosure is made without identifying the vendor by name); and
- advising a respondent of its price standing relative to other respondents.

Care must be taken to avoid making substantial changes to the College's contracting objectives, requirements and specifications set out in the solicitation. If the contracting objectives, requirements or specifications are substantially changed through the negotiation process, the pool of contractors who may have been interested in submitting a response may change. Additional contractors may have competed, if the changed objectives, requirements and specifications were included in the original solicitation. Whenever it appears that contracting objectives, requirements or specifications may have been changed, General Counsel should be consulted before proceeding further.

Negotiations may continue until the best value for the College is achieved and an award to one or more respondents is made.

NOTE: A request for a respondent to clarify its proposal is not the same as negotiation of the terms of respondent's proposal. However, when seeking clarifications, staff should not give one respondent an advantage over another and should extend the same opportunity to each respondent.

## **10. Negotiation Strategies**

Negotiation strategy should be tailored to suit the particular facts and circumstances of the specific procurement. When establishing negotiation strategy, care should be taken to avoid giving the respondents a cost or price that must be met to proceed in the selection process. Suggesting a cost or price could keep the competitive process from generating the cost or price that is the best value to TSTC. Also, be mindful that disclosing competitor costs or prices is not allowed, even if done without tying the cost or price to the specific vendor. In addition, a respondent cannot be told its price standing relative to other competitors.

Negotiation is based on the willingness of each party to compromise. In any contract, there are usually terms or conditions that each party may be willing to relinquish. Before conducting negotiations, identify those terms or conditions that are essential and those that are desirable but negotiable. Like other parts of the contract management process, planning is essential to conducting a successful negotiation. The best practice is to meet with members of the evaluation team and divide the terms and conditions into groups. Identify the terms and conditions that are essential to the contract. These are the terms or conditions upon which the College is either unable or unwilling to compromise. Then identify and prioritize the terms and conditions that are desirable, but not essential to the contract and which the Institution is willing to compromise or relinquish.

Do not provide the list of essential or other prioritized issues to the respondent as the list will offer a negotiating advantage. Before meeting with the respondent, review any objections to the contract terms and conditions. The objection should explain why the respondent is objecting to each term or condition. Be prepared to explain why a particular term or condition is essential or objectionable and place the burden on the respondent to identify an alternative solution that meets the College's needs. Do not feel pressured to agree or disagree to a single term or condition without considering the impact of all negotiated terms and conditions within the context of a final agreement. When all negotiated terms and conditions are completed, consider any resulting new risks, costs, or benefits.

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

- What does the party want, specifically?
- What will having what the party wants, specifically, do for the party? (Examining this aspect may provide common ground to explore options that meet the needs of both parties.)
- How will the party know, specifically, when the party has received what it wants?

If the parties cannot reach an agreement, TSTC should consider beginning negotiations with the next respondent.

## **11. Award**

TSTC shall award a contract for the purchase of goods or services that provides the best value for the College in compliance with the specifications. In some cases, TSTC may elect to issue only a Purchase Order that serves as the agreement between the parties. The terms and conditions of the Purchase Order will state that it governs over a response, a quote and any other document provided by a respondent. Upon award of a contract, the Procurement Office shall make any notifications required by applicable laws or TSTC policy to announce the award of the contract.

#### **12. Nepotism Disclosure Requirements**

Before awarding or re-awarding any major contract (\$1 million or more), any person who makes decisions or recommendations at any point throughout the process of major contract development, evaluation, award, monitoring and re-award are required to disclose in writing to the Chancellor (or his designee) any relationship the prescribed person has with the respondent or potential respondent(s) with pecuniary interest value of \$25,000 or higher who directly or indirectly controls more than 10% interest in the respondent's company. This Act took effect on September 1, 2005 and applies only to a contract awarded or extended on or after that date. Instructions for completing this disclosure are available in **Appendix G**

## G. CONTRACT FORMATION

**The information in this section is not intended to constitute legal advice.** The purpose of this section is to provide general guidelines regarding contract formation. However, there are many variations and exceptions to these general instructions. Please consult the Office of General Counsel for any questions about applicable Statutes, regulations, and policies and procedures.

### 1. Approach to Contract Formation

Fundamentally, the purpose of any written contract is to (1) create a legal, binding and enforceable obligation, and (2) serve as a reference document that records the terms of an agreement to prevent misunderstanding and conflict as to those terms at a later date. Most often, conflicts over contracts arise well into a contract period – when memories fade and prove to be unreliable. With this in mind, clarity of the terms and completeness of the issues addressed are of primary importance. The person who drafts the contract must (1) know the subject matter and the concerns of the parties thoroughly enough to anticipate potential areas of disagreement and confusion, and (2) specifically address those areas in the contract.

Thoroughness and precision are necessary in determining the scope of a contract because contract law does not allow parties to add terms not part of the original contract without the consent of both parties. This rigidity in contract law is mostly seen as an advantage to both parties. However, this advantage may become a liability if TSTC does not include all necessary terms and conditions in the contract.

Creating contracts for the state is an exercise in balancing potentially conflicting interests. These interests include (1) the state's requirements, fiscal constraints, and statutory requirements, and (2) the contractor's requirements. The primary concern should always be the benefit of the contract to the State as a whole, or more specifically, the taxpayers of the State.

Negotiating the best contract for the state does not necessarily mean taking advantage of the contractor. While onerous and unnecessarily harsh provisions may be legal, they usually have negative future consequences that outweigh the initial gains. Contractors who feel they have been aggrieved by the state are less likely to provide good service and are more apt to engage in legal action. Or, these contractors may decide to never contract with the state again, thus limiting future competition on state contracts. In addition, contractors who have been informed by other contractors of bad experiences with the state, may demand more money on future contracts to do the same work to offset that perceived risk.

### 2. Legal Elements of a Contract

The essential elements necessary to form a binding contract are usually described as:

- **Offer:** An offer is considered the indication of one party of a willingness to enter into a bargain made in a manner that justifies the other parties' belief that assent to the bargain is invited and will create an obligation.
- **Acceptance:** Acceptance of an offer can occur in several ways. Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. An acceptance may not change the terms of an offer. If it does, the offer has not been accepted and is rejected. However, an acceptance with a material change in a proposed offer also creates a counteroffer, which, before a contract is formed, must be accepted by the other party.
- **Mutuality of Obligation:** Mutuality of obligation is also known as a "meeting of the minds." Mutuality of obligation refers to the parties' mutual understanding of and assent to the terms of their agreement. The parties must agree to the same thing, in the same sense, at the same time. The determination of a meeting of their minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did, and not their subjective state of mind. Unexpressed subjective intent is irrelevant. In determining

whether mutual assent is present, a court looks to the communications between the parties and to the facts and circumstances surrounding those communications. The offer must be clear and definite, just as there must be a clear and definite acceptance of all terms contained in the offer. Where a meeting of the minds is contested, the determination of the existence of a contract is a question of fact. If a court determines that one party reasonably drew the inference of a promise from the other party's conduct, that promise will be given effect in law.

To be enforceable, the parties must have agreed on the essential terms of the contract. Full agreement on all contractual terms is the best practice and should be the norm. However, parties may agree upon some contractual terms, understanding them to be an agreement and leave other non-essential contract terms to be agreed upon later. Use caution when leaving contract terms to be agreed upon in the future because when an essential term is left open for future negotiation there is nothing more than an unenforceable agreement to agree. Such an agreement is void as a contract.

- **Certainty of Subject Matter:** In general, a contract is legally binding only if its terms are sufficiently definite to permit a court to understand the parties' obligations. Material terms of an offer cannot be accepted to form a contract unless the terms are reasonably definite. Material contract terms are those that are essential to the understanding between the parties. The material terms of a contract must be agreed on before a court can enforce the contract. The unique facts and circumstances surrounding each contract are considered to determine which contract terms are material.

As a general rule, an agreement to enter into negotiations for a contract later does not create an enforceable contract. However, as previously discussed, parties may agree on the material terms of a contract and understand them to be an agreement, and leave other immaterial portions of the agreement to be established later.

When immaterial terms are omitted from contracts, a court may imply or supply the term to preserve the enforceability of the contract. A court may uphold an agreement by supplying missing immaterial terms. Historically, Texas courts prefer to validate transactions rather than void them. However, courts may not create a contract where none exists. Therefore, courts will not insert or eliminate material terms. Whether or not a court will imply or supply missing contract terms will depend on the specific facts of the transaction. An example of terms that have been implied or supplied by a court are time and place of performance.

- **Consideration:** Consideration is an essential element of any valid contract. Consideration is a present exchange bargained for in return for a promise. It may consist of some right, interest, profit, or benefit that accrues to a party, or alternatively, of some forbearance, loss or responsibility that is undertaken or incurred by a party. Consideration is not required to be monetary.
- **Competent Parties:** Parties to a contract must be competent to enter into a binding contract. In Texas, a person typically must be eighteen years of age and of sound mind to be competent.

### 3. Drafting the Contract

There are several types of provisions that are typically included in contracts, including but not limited to:

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

### 4. Planning for the Contract Preparation

Just like other contract management processes, TSTC 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 contract in the solicitation event document. This allows the respondent to make an offer with knowledge of the proposed contractual terms and conditions. However, as a practical matter, it may be difficult to prepare a draft contract with a detailed SOW due to the potential for negotiation and resource limitations.

Some recommended planning steps are:

- Collecting and reviewing TSTC's contract templates or contracts that have been previously approved by Legal Counsel, if any.
- Reviewing similar contracts entered into by other institutions. Studying risks, contracting objectives, assumptions and constraints in other contracts may be helpful. However, do not automatically adopt terms and conditions from another contract without a thorough and independent review of how the terms and conditions relate to the current procurement.
- Preparing an outline containing headings for the major terms and conditions. This makes it easier to group related terms and conditions. An outline will also illustrate gaps in the structure of the contract.
- Finally, allow adequate time to consult with the Office of General Counsel regarding potential legal issues.

## 5. Form of the Contract

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

### ▪ **Formal Contract**

A formal contract offers the greatest opportunity to avoid conflicting provisions, because all 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. Generally, any purchase for goods or services over \$50,000 that is not associated with a Department of Information Resources (DIR) contract, Texas SmartBuy contract (or similar State of Texas contract), or an auxiliary enterprise purchase will require a formal contract.

### ▪ **Purchase Order**

A Purchase Order uses a layered approach, i.e., the Purchase Order usually relies on a number of documents that in combination, constitute a contract. For example, a contractor delivers an offer, in a form requested by TSTC (quote, solicitation event response, etc.), and TSTC indicates acceptance of the offer by issuing a Purchase Order with standard terms and conditions attached. Together these various documents comprise the offer and acceptance and evidence of the basis of an agreement.

Despite the potential for conflicting or additional terms, when used properly, a Purchase Order is often relatively fast, efficient and rarely has problems. When using a purchase order as evidence of a contract, TSTC should ensure the inclusion of the TSTC standard PO terms and conditions rather than blindly accepting terms the contractor proposes. All final terms and conditions that vary from either the offer or the acceptance must be contained in a written document signed by both parties.

## 6. Contract Terms

During the development of the formal contract, devote careful attention to the details. There are certain clauses that are essential and some that should be included in all contracts. Please consult with General Counsel regarding any questions related to the applicability of contract terms. See **Appendix E** for the template of TSTC's Standard Contract Addendum that can be used by The Office of Contract Administration.

## 7. Authority to Contract

- ***Signature Authority and Approvals***



An authorized employee's signature on a contract will reflect a representation that the contract has been properly submitted, reviewed and approved in accordance with all TSTC policies and procedures, and that the contract is in the best interest of the College. Only persons having actual authority to act on behalf of TSTC can bind the College in a contract.

Employees authorized to execute contracts are identified on *TSTC's Delegation of Authority to Sign Contracts/Agreements*, included as **Appendix F**. No other employee may sign a contract binding TSTC without a delegation of authority to do so as set out in this chart.

▪ **Contract Review Checklists**

The Contract Review Checklist and related instructions are included as **Appendix I**. This form is housed in RSolution Software and is generated when a contract is created. The Office of General Counsel (OGC) reviews and approves contract review procedures, including a Contract Review Checklist (CRC). A CRC is created for all contracts that are reported to the Legislative Budget Board (LBB), which include any contract for the purchase or sale of goods or services with a total value exceeding \$50,000.

Memorandums of Understanding (MOUs) and similar type agreements shall be exempted from the checklist requirement. General Counsel reviews all LBB-reportable contracts, including revenue-generating agreements, unless the contract uses a template previously approved by OGC and there are no material alterations to the template.

▪ **Vendor Compliance Verifications**

Prior to executing a contract or issuing a purchase order, the Procurement Office must perform the following vendor compliance checks:

- (a) Vendor hold check – Not earlier than the seventh day before and not later than the date of entering into the contract, TSTC must perform a [vendor hold search](#). TSTC may not enter into a written contract with the vendor unless the contract requires payments under the contract to be applied to the vendor's state debt ([Government Code 2252.903](#)).
- (b) Debarment check – [Debarred vendor list](#) shows vendors that have been debarred and may not be awarded a contract.
- (c) System of Award Management (SAM) check – [SAM](#) has a searchable database of vendors that are excluded from contract participation at the federal level.
- (d) Divestment lists – TSTC may not award a contract to a vendor that boycotts Israel ([Government Code 2271](#)) or that does business with Iran, Sudan, or a foreign terrorist organization ([Government Code 2252.152](#)). These [divestment lists](#) are found on the Texas Comptroller web site. If the vendor is not a sole proprietor, has more than ten full-time employees, or the contract has a value of \$100,000 or more that is to be paid wholly or partly from public funds, then TSTC may not contract with a company for goods or services unless the contract contains a written verification from the company that it does not boycott Israel and will not boycott Israel during the term of the contract.

▪ **Board Approval**

TSTC may not enter into a contract with a total value exceeding \$1 million, including any amendment, extension, or renewal of the contract that increases the value of the original contract to greater than \$1 million, unless the TSTC Board of Regents (BOR) approves the contract, expressly delegates authority to exceed that amount, or expressly adopts an exception for that contract. The BOR must approve any amendment, extension, or renewal of a contract with a value that exceeds 25 percent of the value of the original contract approved by the BOR unless the authority to exceed the approved amount is expressly delegated by the BOR or an exception is expressly adopted by the BOR for that contract ([Education Code 51.9337\(f\)](#)). The BOR shall approve construction related contracts of \$500,000 or more.

▪ **Execution of Contract**

After (1) vendor compliance verification, (2) proper execution by the Contractor, and (3) Board approval (if required), the contract may be executed and dated by the TSTC authorized representative. Only the Chancellor, or a delegate that has received proper delegation from the Chancellor authorizing the delegate to sign contracts of similar nature and value, may sign the contract on behalf of TSTC. Some situations may allow for the contract to be executed by a TSTC authorized representative before the Contractor executes the contract.

▪ ***Binding Signatures***

Electronic signatures by those in authority to contract are the usually accepted norm through which a contract becomes binding. There may be instances where time considerations dictate the need to accept a faxed, email, or original signature as evidence a respondent accepts the terms of a contract.

▪ ***Official Copies***

RSolution Software will be the repository for all contracts. A copy of any contract executed outside the software system must be forwarded to the Office of Contract Administration.

**8. Required Posting of Certain Contracts**

In 2015, the legislature enacted legislation which requires state agencies to post certain contracts for the public to view. For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website

- each contract the agency 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;
- 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
- for contracts that were the subject of competitive procurement, the request for proposals or bids until the contract expires or is completed.

A state agency monthly may post contracts described by Texas Government Code, Section 2261.253, Subsection (a) that are valued at less than \$15,000. TSTC's contracts are posted at: <http://www.tstc.edu/procurement/ctr>.

## H. CONTRACT ADMINISTRATION

Contract administration and oversight includes the following seven general processes:

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

### 1. Department Contract Administrator Responsibilities

The primary tasks of the department contract administrator (DCA) may include:

- Read and understand the contract. Consult with the Procurement Office, the Office of Contract Administration, or the Office of General Counsel when there are questions;
- Verify contractor performance for purposes of payment;
- Identify possible non-compliance with a contract by monitoring a contractor's performance;
- Determine if corrective action is necessary and communicate with the Procurement Office to take action, if required; and
- Develop a completion plan for contractor exit requirements, including acceptance of the goods/services, final payment, and contract close-out.

The SOW is the roadmap for contract administration. The goal is for the parties to satisfactorily perform their responsibilities. Effective contract administration minimizes or eliminates problems and potential claims and disputes. The extent of contract administration will not be the same for all contracts. The level of contract administration necessary should be consistent with the complexity and level of risk of the contract, the contract term, and dollar value.

A DCA needs to have a proficient understanding of the contract provisions, the ability to communicate about contract obligations to all parties involved, and maintain control over the contract performance. In most cases, the DCA will be someone from the originating department. However, in some cases such as in contracts related to construction projects, the DCA will be an employee of the Facilities Services area.

A good DCA monitors that contract requirements are satisfied, that goods or services are delivered in a timely manner, and that financial interests of the College are protected. It is the contractor's responsibility to perform and meet the requirements of the contract. Contractors need technical direction and approval from a DCA, provided in a timely and effective manner. All guidance provided to a contractor must be within the scope of the contract. All variances shall be clearly defined in the specifications.

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

- Serving as the point of contact for disseminating instructions regarding the SOW to the contractor.
- Receiving and responding to informal communications between the College and a contractor.
- Establishing scope of authority, clear lines of communication and reporting, and specific individuals who will interact directly with a contractor.
- Managing College assets used in contract performance.
- Providing access to institution facilities, equipment, data, personnel, materials, and information.
- Identifying, documenting, and resolving minor disputes with a Contractor in a timely manner.
- Implementing a quality control and assurance process.
- Maintaining appropriate documentation as required by the applicable retention guidelines.
- Documenting significant events including deficiencies, deliverables, and milestones.

- Monitoring the contractor’s progress and performance to confirm goods or services conform to the contract requirements.
- Inspecting and approving the final goods or services received and providing documentation of acceptance to Procurement.
- Monitoring budgets to verify sufficient funds are available for the duration of the contract.
- Monitoring default terms and conditions in the contract.
- Authorizing payments consistent with the contract documents and in accordance with institutional operating policies and procedures.
- Performing the contract close-out responsibilities.

DCAs are **not** authorized to:

- Instruct a contractor to start work prior to a fully executed contract and receipt of any required bonds and insurance or other requirements.
- Alter the scope or terms of the contract without a formal contract amendment processed through the Procurement Office or General Counsel Office.
- Approve changes to the HUB subcontracting plan or approve substitutions or additions of subcontractors without written approval from the Procurement Office.
- Extend the term of the contract without execution of formal contract amendment processed through the Procurement Office or General Counsel Office.
- Allow the contractor to incur any obligations outside of the scope of the contract.

## **2. Procurement Office and Office of Contract Administration Responsibilities**

Contract award is not the final measure of success. The Procurement Office and Office of Contract Administration will work together to guide the department until the completion of services or final receipt of goods. A key factor in successful contract administration is communication between a department, the Office of Contract Administration, and the Procurement Office.

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

- In coordination with DCA, consult with Office of General Counsel to address any legal concerns or issues.
- Receive and respond to formal contract communications between the institution and the contractor and engage the Office of General Counsel in reviewing or drafting formal communication when needed.
- Coordinate approval of any changes to the contract.
- Document and assist in resolving disputes with contractor in a timely manner.
- Maintain appropriate contract records and document significant contract events.
- Provide notices and exercise remedies, as appropriate, when a contractor’s performance is deficient in consultation with the Office of General Counsel.
- In coordination with DCA, provide formal written documentation accepting the deliverables as appropriate.
- Provide oversight of the contract close-out process to properly document the procurement file.
- Regularly review performance for contract administration process improvement.

## **3. Post-Award Planning**

In order to properly plan, the DCA must understand all components of the solicitation event and the contract. The DCA may use checklists to monitor contract compliance, key components of which may include, but are not limited to:

- Expected costs
- Potential risks
- Timelines for performance
- Options for inspection and acceptance
- Key dates of the contract

## **4. Post-Award Conference**

Not every contract requires a formal post-award conference. Factors used to determine the need for a post-award conference include:

- Type of contract;
- Level of risk associated with the contract;
- Value and complexity;
- Length of contract, period of performance, or delivery requirements;
- Procurement history of the goods or services required;
- Institution's prior experience with the contractor;
- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

For less complex, low risk, low-dollar value contracts, a post-award conference is not necessary. Procurement shall provide the name of the DCA to the contractor.

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

## 5. Monitoring Performance

Monitoring the performance of a contractor is a key function of proper contract administration in order to assess whether the contractor is performing all duties in accordance with the contract and to allow the DCA 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 DCA and the Office of Contract Administration. Conversely, large dollar contracts may need little monitoring if the goods or services procured are not complex, and the College is comfortable with the contractor's performance and the level of risk associated with the contract.

- Except with regard to memoranda of understanding, interagency/interlocal contracts or contracts for which there is not a cost, TSTC must (1) establish procedures to identify contracts that require enhanced contract or performance monitoring and submit information on those contracts to the Board of Regents, and (2) report serious issues or risks with respect to monitored contracts to the Board of Regents ([Texas Government Code, Section 2261.253](#)).
- In addition, TSTC must develop and comply with a purchasing accountability and risk analysis procedure providing, among other things, for (1) assessment of risk of fraud, abuse or waste in the procurement and contracting process, and (2) identification of contracts that require enhanced monitoring ([Texas Government Code, Section 2261.256](#)). This procedure is included as **Appendix J - Purchasing Accountability and Risk Analysis Procedure**.
- In connection with contracts for the purchase of goods/services with a value exceeding \$5 million, [Texas Government Code, Section 2261.255](#) requires the procurement director to verify in writing that the solicitation event process complies with state law and TSTC policy and submit to the Board of Regents information on any potential issue that may arise in the solicitation, purchasing or contractor selection process.

To comply with these requirements, TSTC's Chief Procurement Officer shall prepare a report and submit to the Chief Financial Officer for Contracts for the purchase or sale of goods or services with a total value exceeding \$5 million, and Contracts where a vendor is substantially failing to meet their obligations.

The Chief Financial Officer will submit this report to the Board of Regents if the Chief Procurement Officer reports any potential issue that may arise in the solicitation, purchasing, or contractor selection process. The report shall be updated during the term and upon close-out of the contract if the reported information changes. The form of this report is included as **Appendix H – Contract Reporting Form**.

If a contract is deemed high-risk after a risk assessment is completed by The Office of Contract Administration, the Department Contract Administrator will perform enhanced contract monitoring. Examples of enhance contract monitoring may include, but are not limited to, the following procedures:

- Payments to vendor coincide with acceptable completion of objectives and/or milestones as deemed acceptable by TSTC
- Vendor performance is regularly reviewed and discussed
- Phased objectives are reviewed regularly for target date completion
- Site visits are conducted as deemed appropriate to ensure vendor performance
- Desk reviews of the project are regularly conducted
- If applicable, data security reviews are conducted

If appropriate or required by Texas Government Code, Section 2261.253, the TSTC CFO shall be notified and shall work with the Chancellor’s Office and the Office of General Counsel (OGC) to ensure that the BOR is aware of all high-risk contracts and any serious issues that arise during performance of the contract.

## 6. Reporting

Reports are used by the contracting parties to monitor the progress of contract compliance. Reporting requirements must be clearly defined in the solicitation event document providing for the frequency, content, format, and recipients of each report. Below is a listing of contract reports that may be utilized by the parties. The DCA, in consultation with the Office of Contract Administration, will determine what reports are effective monitoring tools for each contract.

- **Service Level Reports** are used to document the performance of a contractor. These reports may provide information on backorders, product returns, and fulfillment cycles.
- **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.
- **Subcontractor Reports** document the activity of subcontractors. Often, these reports are required by statute or other governmental regulation.
- **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.
- **Ordering Activity Reports** provide information to the institution on spend trends. An example would include a report on the number of orders less than \$50. This information can be used to negotiate improved shipping prices for the institution.
- **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.
- **Asset Reports** may be required by the institution to document assets being purchased on behalf of the institution by the contractor. This would assist the institution in identifying any asset that would necessitate inventory tracking.
- **Revenue Reports** are often required on auxiliary contracts that provides revenue for the institution. The report should clearly detail the net sales received by the contractor, the formula used to calculate the revenue, and the revenue amount payable to the institution.

- **Statutory Reports** are required by Statute and the requirements should be clearly defined in the SOW. This may include HUB Subcontracting reported information.
- **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.
- **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.

## 7. Payment Approval

Any costs incurred by a contractor are to be in accordance with the Contract terms. Payments must be reviewed by the DCA or his or her designee for compliance with the contract pricing terms. Payment review shall include, but is not limited to:

- Reviewing that the contractor is billing only for goods or services received by an institution;
- Ensuring that the goods or services have been inspected and accepted;
- Making sure the invoice is correct and complies with the pricing, terms and conditions of the contract; and
- Confirming that the total payments do not exceed the contract limits.

If the DCA disputes a payment, the Accounts Payable Office should be notified and payment withheld until the DCA 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 Procurement. Advance payments are permissible for:

- Books and library materials for an institution;
- Cost savings (significant cost savings would result from making payment in advance)
- Expedited delivery;
- Lease costs;
- Penalties;
- Purchase of real property;
- Specialized goods or services;
- Subscriptions.

## 8. Withholding Payment

The Procurement Office is responsible for protecting the interests of TSTC 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:

- There is a material breach of the contract by a contractor;
- Errors in the invoice;
- Unsupported or undocumented costs;
- To remedy previous overpayments on the same contract; and
- Contractor's performance is non-conforming or unacceptable.

## 9. Contract Change Methods

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

There are basically two ways to change a Contract:

- 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.
- 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:

- Formal, written approval by all parties of contracts changes prior to the change taking place;
- Evaluation of the impact of each change to the contract objective;
- If the contract contains a contingency allowance, a plan for deductions against this allowance will be requested and approved in writing;
- Formal documentation of all changes in compliance with TSTC's policies and procedures; and
- Procurement Office review and authorization of any formal change order document.

## 10. Contract Change Types

### Material Contract Changes

Whether or not a change is considered a material change to the contract depends upon the solicitation event process and the contract. The contract and any amendments must be consistent with the specifications, the procurement cooperative program requirements, or be allowed by TSTC's policies and procedures. If a change is needed to a contract that was competitively solicited, the change must be within the terms of the solicitation.

Procurement, in coordination with the department contract administrator, 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 and the terms of the solicitation event are unclear if the changes are allowable, the Chief Procurement Officer may need to evaluate the changes and determine if there is a need to resolicit to allow for fair competition.

### Administrative Changes

These are changes that are within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed via a unilateral amendment. Examples of administrative changes include:

- 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 College personnel assigned to the contract.

### Substantive Changes

These are changes to a contract that affect the rights of both parties. Such changes generally require bilateral Amendments. Examples of substantive changes include:

- Change in the price of the contract;
- Change in the delivery schedule;
- Change in the quantity;
- Change or 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).

### Constructive Changes

If a contractor perceives that work beyond the scope of the contract was ordered by the College, the contractor may claim that the Contract was "constructively" changed, and the contractor may be entitled to additional



compensation for the changes. A constructive change will require a bilateral amendment or change order. Constructive changes may occur when TSTC personnel:

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

The department contract administrator is responsible for managing the performance of a contract and is charged with managing the contract in a way to prevent constructive changes.

### **11. Dispute Resolution**

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

- Identify the problem - many times what may appear to be a problem can be resolved by providing a contractor with information or clarification.
- Report – a department contract administrator shall report the issue to Procurement even in cases where action may not be required from Procurement.
- 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.
- Evaluation – review the facts in conjunction with the requirements and terms and conditions of the contract. The Office of Contract Administration, in consultation with Office of General Counsel and appropriate department contract administrator, will then determine an appropriate course of action.

### **12. Termination for Default Notifications**

Prior to terminating a contract for default, a cure notice should be sent to the contractor if the parties so agreed in the contract. A cure notice letter allows a contractor to have a defined period of time to “cure” the deficiency or violation. The department contract administrator and the Office of Contract Administration shall consult with the Office of General Counsel for 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:

- The contract number or Purchase Order number;
- The date of contract or Purchase Order;
- The effective date of termination;
- Reference to the clause under which the contract is being terminated;
- A concise, accurate statement of the facts justifying the termination; and
- 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).

### **13. 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 TSTC to terminate a contract, in whole or in part, at any time in its sole discretion, if it is determined that such termination is in the best interest of the College.

Procurement shall provide contractor with written notice specifying whether TSTC is terminating all or part of the contract. The notice of termination shall give the effective date of termination. If the contract is being selectively terminated, the notice shall specify which part(s) of the contract are being terminated.

It is recommended that TSTC include a no-fault termination clause in the solicitation event documents and the contract. There may be circumstances in which TSTC should not enter into a contract with a no-fault termination clause. If TSTC includes a no-fault cancellation clause, it is important to include language that TSTC 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 TSTC concludes that a contractor has failed to perform, make progress, or has otherwise breached the contract. TSTC is not required to terminate a contract even though the circumstances permit such action. Procurement may determine that it is in the college’s best interest to pursue other alternatives. Examples of such alternatives include extending the delivery or completion date, allowing a contractor to continue performance, or working with a contractor’s surety to complete the outstanding work.

Conversely, a contractor may also have the right to terminate a contract for default if TSTC fails to perform.

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

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

- Has TSTC done everything within reason to assist the contractor in curing any default?
- The provisions of the contract and applicable regulations.
- The specific contractual failure(s) and the explanation provided for the failures.
- The urgency of the need for the contracted goods or services. TSTC may need to weigh the respective benefits or disadvantages of allowing a delinquent contractor to continue performance or re-soliciting a new contractor.
- 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).
- 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, TSTC is within its rights to demand additional costs from the defaulting contractor. Nevertheless, a contractor may not be financially capable to finance the costs or such demand may result in protracted legal action.

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

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

- Acts of God or a public enemy
- Acts of TSTC
- Fire
- Floods
- Epidemics/Pandemics
- Strikes
- Freight embargos

- Unusually severe weather

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

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

#### **14. Institution Reporting of Contracting Information**

Contracts that have a dollar amount that exceeds Legislative Budget Board (LBB) thresholds must be reported to the LBB. These reporting requirements are fulfilled through the LBB Contract Database which is located on the LBB website.

In accordance with [Texas Government Code, Section 2261.254](#), TSTC may enter into a contract for the purchase of goods or services that has a value exceeding \$1 million only if TSTC’s Board of Regents approves the contract and the approved contract is signed by the presiding officer of the Board. The approval and signature authority for contracts with a value exceeding one million dollars may be delegated by the Board of Regents to the Chancellor or his designee.

In connection with contracts for the purchase of goods/services with a value exceeding \$5 million, [Texas Government Code, Section 2261.255](#) requires the Office of Contract Administration or Chief Procurement Officer to verify in writing that the solicitation event process complies with state law and TSTC policy and submit to the Board of Regents through the Chief Financial Officer information on any potential issue that may arise in the solicitation, purchasing or contractor selection process.

TSTC must also provide an attestation to the LBB, on a form consistent with the specific requirements of Section 7.12 of HB 1 (2015), for all contracts (a) with a maximum value over \$10 million, and (b) contracts with a value over \$1 million that are not competitively procured. These requirements apply without regard to source of funds or type of contract or purchase order.

#### **15. Contract File**

Under [Texas Government Code, 441.1855](#), TSTC is required to maintain documentation related to each contract. To comply with this requirement, TSTC:

- shall retain records of each contract entered into and all related contract solicitation event documents; and
- may destroy the contract and supporting documentation only after the **seventh anniversary** of the date:
  - the contract is completed or expires; or
  - 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 TSTC’s retention schedule.

#### **16. Documentation File**

Generally, it is recommended that the following documents are retained in a central repository under the supervision of the Procurement Office:

- A copy of the current contract and all amendments.

- If the goods/services were competitively procured, the solicitation, contractor’s proposal, the proposal scoring sheet summarizing the scores for all proposals, the best value justification for the successful proposal, and the notice of award;
- If the goods/services were not competitively procured, documentation evidencing TSTC’s need for the goods/services, and the Procurement Justification Form;
- A list of Institutional furnished property or services.
- A copy of the pre-award conference summary, if conducted.
- A copy of all general correspondence related to the contract;
- A copy of all routine reports required by the contract.
- A copy of all notices to proceed, stop work orders, deficiency notices, or change orders.
- The records and minutes of all meetings, both internal and external. Include sign-in sheets and agendas.
- A copy of all contractor invoices, credit memos, information relative to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments; a copy of all backup documentation for contractor payment or progress payment.
- Copies of original Hub Subcontracting Plan (HSP) and revisions, if any, and if applicable; and
- Copies of HUB Progress Assessment Reports if applicable
- Copies of any audit documentation.

Because of limited storage resources, the following contract documentation may be retained in the department contract administrator’s office or stored electronically as resources allow:

- A copy of all specifications, drawings or manuals incorporated into the contract by reference;
- A list of contractor submittal requirements;
- A schedule of compliance review, internal correspondence, if applicable;
- A copy of all general correspondence related to the contract issued from the department contract administrator;
- The originals of all contractor data or report submittals;
- A copy of all routine reports required by the contract;
- A copy of all letters of approval pertaining to such matters as materials, the contractor’s quality control program, prospective employees, and work schedules;
- The records and minutes of all meetings, both internal and external. Include sign-in sheets or agendas;

## **17. Cybersecurity Training Program**

[Texas Government Code 2054.5192](#) requires any TSTC contractor, who has access to a TSTC computer system or database, to complete a cybersecurity training program certified by the Department of Information Resources. The cybersecurity training includes the contractor’s employees, officers, and subcontractors. The training must be completed by a contractor during the term of the contract and during any renewal period. The process is managed by the Office of Contract Administration.

## **I. CONTRACT CLOSEOUT**

### **1. Close-Out Process**

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.

To initiate the close-out process, TSTC should first determine that a contractor has substantially performed all required contractual obligations. A contract is completed when all goods or services have been received and accepted; all deliverables have been accepted; all administrative actions have been accomplished; and all institutional furnished equipment and materials have been returned.

Upon confirmation of completion, TSTC shall make final payment to the Contractor. Final payment shall not be made until all compliance and corrective actions have been successfully completed and the department contract administrator or his or her designee has provided final acceptance.

### **2. Reporting Contractor Performance**

Best practice suggests that upon termination or expiration of a contract, an Institution should complete a Vendor Performance Report as permitted by CPA in accordance with [34 TAC §20.108\(b\)](#). A Vendor Performance Report may be completed and submitted to the Comptroller's web portal. Reporting contractor performance may facilitate resolution of contract dispute issues between TSTC and contractor. In addition, the Vendor Performance Report database provides a resource for all state agencies when reviewing proposals submitted in connection with subsequent solicitations. The vendor performance reporting process is managed by Procurement.

## **J. APPENDICES**

A – [Pre-Solicitation Conference Agenda](#)

B – [Pre-Solicitation Conference Guidelines](#)

C – [Evaluation Team Guidelines](#)

D – [Reference Check Guideline](#)

E – [TSTC's Standard Contract Addendum](#)

F – [Delegation of Authority](#)

G - [Nepotism Disclosure Form Instructions](#)

H – [Contract Reporting Form](#)

I – [Contract Review Checklist](#)

J – [Purchasing Accountability and Risk Analysis Procedure](#)