

Internal Compliance Review of TEA's Contract Development and Administration Manual

To: Mike Morath, Commissioner of Education

From: Bill Wilson, Director, Internal Audit Division

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cc: Kara Belew, Deputy Commissioner of Finance
Cory Green, Director of Contracts, Grants, & Finance Administration
Von Byer, General Counsel

Subject: Internal Audit's Compliance Review of the Agency's Contract Development and Administration Manual to the Comptroller's State of Texas Contract Management Guide

The objective of this review was to determine if the Agency's Contract Development and Administration Manual (Agency's Contract Manual) complied with the basic statewide contracting requirements and practices outlined in the Comptroller's Contract Management Guide (CPA Guide).

All state agencies are required to publish a contract management handbook that establishes contracting policies and practices that are consistent with the CPA Guide (**TGC 2261.256**). The CPA Guide divides contract coordination and management into four core processes: planning; procurement; contract formation/rate/price/establishment and other terms and conditions; and contract administration. It should be noted that the CPA Guide states that *"The agency's contract management handbook will be a guide for agency personnel involved in the development and management of contracts that commit the agency. It does not attempt to address all issues that may need to be considered in a particular circumstance."*

Conclusion:

Overall, the review found that the Agency's Contract Manual basically follows the contracting components outlined in the CPA Guide for issuing and managing TEA's contracts.

In performing this review, Internal Audit identified areas where some requirements and practices could be further developed and/or clarified in the Agency's Contract Manual. As a result, the following recommendations are offered to reinforce best practices established in the Agency's Contract Manual:

1. **CPA Guide (Pages 31-35) Risk Assessment and Risk Management:** The CPA Guide expands on risk assessment and managing risk around performance of the contractor, including seeking legal guidance as needed, throughout the term of a contract. The CPA Guide also defines past performance and experience levels of contractors (in addition to dollar amounts) as triggers for ongoing performance monitoring. Last, the CPA Guide requires that the agency post procedures on its website for 1) identifying contracts that require enhanced contract monitoring or the immediate attention of contract management staff and 2) establishing clear levels of purchasing accountability and staff responsibilities related to purchasing. The Comptroller is required to post the agency's link to this information (TGC 2261.256 pg. 32) on their website.

Agency's Contract Manual:

The Agency's manual requires program staff to complete a Contract Risk Assessment Worksheet and forward to the contract staff liaison (pg. 22) at the beginning of the contract. In addition, the manual states that "*the Contract Risk Assessment Worksheet may be revised at any time and should be reviewed when renewing or amending a contract*". The Agency's manual also requires program staff to complete a Contract Monitoring Plan (Appendix 35 pg. 227) to be used by program staff for contracts over \$1 million dollars which includes some components of performance.

Recommendation: Add additional procedures that outline the criteria for risk assessment and risk management of contracts including enhanced contract monitoring plans and documenting performance of contractors. Ensure that procedures are posted on the agency's website with a link provided to the Comptroller's office.

2. **CPA Guide (Page 39) Proprietary Purchases:** The CPA Guide provides under the paragraph Proprietary Purchases that "*When the specification requirement limits consideration to one manufacturer, one product, or one service provider, a written justification must be provided and is subject to review by the CPA*". TGC 2155.067 provides that the written justification must: (1) explain the need for the specifications; (2) state the reason competing products are not satisfactory; and (3) provide other information requested by the CPA.

Agency's Contract Manual: The Agency's contract manual (page 65) does not require a written justification for a proprietary purchase to be provided to the CPA in accordance with TGC 2155.067. The Agency's manual only provides that the written justification be kept on file and is subject to audit review by the CPA. In addition, there are no guidelines in the manual on (1) who is responsible for making the justification; (2) the type and extent of research that should be performed to support that other vendors could not perform similar type of services or are not satisfactory; and (3) the approval level before the justification is sent to the CPA.

Recommendation: Update the section on "Proprietary Purchase" requiring submitting written justification to the CPA in accordance with TGC 2155.067 a certain number of days before extending the contract. Outline steps necessary to be performed in concluding that no other vendor could perform similar services and the approval level of the justification.

Consideration should be given to establish an Agency policy for posting a competitive solicitation even though it is evident that in the procurement process that a contract would possibly be proprietary. This would preclude any criticism that the Agency did not make a due diligence effort to determine if other vendors could provide similar services.

3. **CPA Guide (Chapter 1) Contract Advisory Team (CAT) Reviews:** The CPA Guide references a statutory requirement (TGC 2262.101) where agencies must submit solicitation and contract documents to the external appointed six-member CAT team for contracts that have a value of at least \$10 million dollars for the full term of the contract, including any extension or renewal periods authorized under the contract. The CAT has 20 business days to respond to the submission with recommendations. In addition, CAT review is required if a solicitation change causes the estimated value for the original term of the contract (not including renewal periods) to increase by 25 percent or more, or there are significant revisions, deletions, and/or additions to the specifications, statement of work (SOW), set(s) of deliverables, performance measures, payment methodology, etc.

State agencies are required under TGC 2262.101 (d) to comply with the CAT's recommendations on solicitation and contract documents submitted for mandatory CAT review or submit a written explanation to the CAT regarding why a specific CAT recommendation is not applicable to the contract under review.

Agency's Contract Manual:

The manual makes a reference (page 33, Conducting Supplemental Reviews) stating "*that contracts for services over \$10M require (30-day review) by the Contract Advisory Team (CATRAD)*". The manual also makes a reference to submitting the original solicitation document with the proposed changes to the CPA CAT review team under Changes to Contracts (page 30) in which the dollar amount exceeds \$10 million dollars and a substantial change caused the estimated value for the original term of the contract, not including renewal periods, to increase by 20% or there are significant revisions or additions to the specification, statement of work (SOW), deliverables, performance measures, or the payment methodology that was not identified in the original solicitation.

References to the CAT review are also made (page 45 Renewal of Contract) if changes to a contract increase by 25%; and in Appendix 16: Sample Competitive Solicitation Schedule and Template- CAT review for contracts over \$1 million dollars. The corresponding process flow charts do not clearly reference the CAT review, and inconsistencies were noted in the manual as referenced above for the number of days allowed, the dollar amount requiring a CAT review, and percentage of change for CAT review. In addition, the manual does not clearly reference implementation or response to the CAT recommendations for contracts over \$10 million dollars as required by statute.

Recommendation: Establish procedures similar to the CPA Guide for CAT reviews and responding to recommendations for contracts with a value of at least \$10 million dollars in the planning section of the manual and align other sections and process flowcharts. Update templates to reflect the correct amount and timeline for CAT reviews if required for all procurement methods.

- 4. CPA Guide (Page 67 and 68) Posting the Solicitation:** The CPA Guide contains a chart for showing the posting requirements of the various types of procurements. The chart clearly shows that Professional & Consulting Services should be posted to the Electronic State Business Daily and the Texas Register.

Agency's Contract Manual: Procurement posting requirements in the Agency's manual is mainly outlined on pages 34 and 74 and on page 66 for proprietary purchases. The requirements for posting consulting and professional services in the Texas Register on page 74 is vague and could lead to a misunderstanding. Following is an excerpt:

"An RFP is not required to be published in the *Texas Register* unless the procurement falls under the TGC, Chapter 2254, which is specific to acquiring professional and consulting services. The TEA rarely obtains the types of services specified in this chapter. Because a contractor considers itself a *consultant* does not mean its services fall under those specified in the TGC, Chapter 2254".

Recommendation: Outline posting requirements for all types of procurements in one chart along with the related statutes and requirements. Eliminate the above paragraph on Page 74 as it is vague and does not provide any clear guidance for posting professional and consulting services.

5. **CPA Guide (Page 71) Consulting Services:** The CPA Guide has a section on “Consulting Services” that outlines the definition of consulting services and the requirements prior to entering into a major consulting services contract. Prior to entering into a major consulting services, a state agency is required to notify the LBB and Governor’s Office of Budget, Planning, and Policy of its intent to contract with a consultant. The requirements in notifying are: (TGC 2254.028) *“The agency shall give information to the LBB and the Governor’s Budget and Planning Office to demonstrate the agency has complied or will comply with TGC 2254.027 and obtain a “finding of fact” from the Governor’s Budget and Planning Office that the consulting services are necessary”*. Also, TGC 2254.029 requires publication in the Texas Register before entering into a major consulting services contract.

Agency’s Contract Manual: The Agency’s manual does not have any specific guidelines that outline the requirements in issuing a consulting services contract.

Recommendation: Incorporate a “Consulting Services” section in the Agency’s manual that provides a clear definition of consulting services and the statutory requirements to be followed prior to entering into a major consulting services contract.

6. **CPA Guide (Page 78) Single Responses:** The CPA Guide outlines steps to be taken if an agency receives only one response to a competitive solicitation. These steps include (1) Re-review the solicitation for any unduly restrictive requirements; and (2) contact some potential respondents to determine why they did not submit a response. If it is determining the solicitation contained unduly restrictive requirements, the agency may decide to re-advertise with a revised solicitation, determine if it is in the best interest to make the award, or determine if a proprietary purchasing justification is required.

Agency’s Contract Manual: The Agency’s manual does not address actions to be taken if a single response is received to a competitive solicitation.

Recommendation: Consider establishing procedures similar to the CPA Contract Management Guide in evaluating why only one response was received for a competitive solicitation.

7. **CPA Guide (Page 81- 83) Negotiations:** The CPA Guide outlines situations where agencies may negotiate terms and conditions in some solicitations and not in others. Negotiation strategies are also outlined.

Agency’s Contract Manual:
Page 68 of the Agency’s manual has the one bullet:

“Contract negotiation – The length of the negotiation process varies depending on the number of items to be negotiated”.

Recommendation: Establish guidelines similar to the CPA Guide for negotiating terms and conditions in solicitations.

8. **Processing Amendments to the Contract**

Agency’s Contract Manual: Page 30 of the Agency’s Contract Manual provides under *Changes to Contracts* and states that *“Any extension, renewal, amendment to a contract, including a change order, is subject to the same approval processes as the contract...”* However, procedures were not outlined for determining if changes or amendments result in a

material or substantial change in the original scope of services outlined in the original solicitation. If a change is needed to a contract, the change has to be within the scope, or range, of what was provided in the solicitation (Page 113 of the CPA Guide). A significant difference might require a competitive process.

Recommendation: Update the Agency’s Contract Manual to outline processes for determining if amendments or changes to a contract result in a material change in the original scope of services, such as an amendment resulting in consulting services being provided. Procedures should include requirements for referring contracts and amendments to the legal department for review and guidance when a substantive change to the contract occurs.

9. **Establishing Guidelines for Legal Review of Contracts**

Agency’s Contract Manual: The Agency’s manual (Page 86) provides that changes to the general provisions of the contract must be approved by legal counsel, but it does not include procedures for seeking legal advice on the procurement method and contract development for consulting and higher risk contracts, or when any substantial change occurs in the contract.

Recommendation: Establish guidelines that outline the criteria for legal review of contracts. For example, the criteria could be legal review of contracts over a certain dollar amount, the type of contract (e.g. consulting and proprietary, etc.) and risk (e.g. size, complexity and performance, etc.) of the contract.

10. **Posting Contracts to the Agency’s Website and the LBB Website for Contracts over \$1M.**

Agency’s Contract Manual: The Agency’s Contract Manual does not reference the posting of contracts to the Agency’s website (Page 68 of the CPA Guide) or the posting of contracts or purchases over \$1M on the LBB Website in accordance with the General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 7.12.

Recommendation: Outline the requirements in the Agency’s Contract Manual for posting contracts to the Agency’s Website and the posting requirements of contracts or purchases over \$1M on the LBB Website. These requirements could be posted in the chart mentioned above in Item 4.