

The University of Texas Rio Grande Valley

Contract Management Handbook



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I. Purpose

The purpose of this Contract Management Handbook (Handbook) is to guide contract managers, purchasing personnel and other administrators at The University of Texas Rio Grande Valley (“UTRGV” or “University”) through the contract management processes.

This Handbook does not govern real estate transaction contracts (even if the transaction is a lease under which UTRGV provides services in exchange for compensation), sponsorship agreements under which UTRGV receives compensation in exchange for recognition of the sponsor, or sponsored research contracts or other intellectual property agreements where UTRGV conveys an interest in intellectual property. Construction contracts are governed by separate statutory requirements and are also not addressed in this Handbook. However, this Handbook may provide helpful information useful in connection with contracts not expressly governed by the Handbook.

For purposes of this Handbook, contract management includes the coordination and administration of four core processes:

- Planning;
- Procurement of goods or services (including complying with HUB laws and policies);
- Contract Formation (including scope of work, specification of contract price or rate and other relevant terms and conditions) and
- Contract Administration.

The nature and level of risk associated with each of these contract management elements vary depending on the type of contract and the business relationship between the UTRGV and contractor. It is the responsibility of the Executive Vice President for Finance and Administration or designee of UTRGV to assign responsibilities, assure appropriate training and oversight, and monitor the processes.

Fully implemented contract management requires coordinating and administering the four core processes. However, contract management also involves coordination of a variety of distinct disciplines and roles, including:

- Executive Management;
- Project Management;
- Planning;
- Program Staff (subject matter experts and monitors);
- Contractor Interaction;
- Purchasers;
- Accounting and Budget;
- Legal;
- Audit; and
- Quality Control/Assurance.

The contract manager or lead for the contract management team assigned to any particular contract is responsible for assuring that all necessary and appropriate disciplines are engaged and their work with respect to the contract coordinated to assure compliance with this Handbook, including meeting legal contract requirements. Various types of contracts are subject to different statutory standards, practices, processes, and strategies for successful implementation. The suggestions, comments, techniques, examples and recommendations included in this Handbook are not appropriate for every type of contract.

This Handbook:

- *Summarizes certain mandatory statutory, regulatory and policy compliance requirements related to UTRGV contracting activities that are evidenced by Handbook references to the applicable statute, regulation, or policy.*
- Provides practical suggestions and best practices related to UTRGV contracting activities which are encouraged but not mandatory. Taking into consideration the complexity of the contract on which UTRGV is working, UTRGV should exercise reasonable business judgment when applying practical suggestions and best practices. Recognizing that the needs of UTRGV and the requirements of each contract are different, the information in this Handbook is intended to be applied *flexibly, not mechanically*. This Handbook provides a framework for making contracting decisions that are in the best interest of UTRGV.
- Describes the duties of the contract management team, including how to solicit and select a contractor, develop and negotiate a contract, and monitor contractor and subcontractor performance.
- Supplements (but does not replace) Applicable Laws and University Rules.
- Discusses many general legal principles; however, these general principles include many exceptions. This Handbook is not intended to be a manual on the law of contracts or constitute legal advice. Contract managers should consult with UTRGV's Office of Legal Affairs with regard to any legal questions that arise with respect to contracts.
- Includes model contract provisions and indicates whether each provision is essential or recommended.
- Addresses the permitted extent of contract changes that may be made before a new competitive solicitation may be needed.

This Handbook does not constitute specific legal advice on any particular issue that may arise. Feel free to consult with appropriate legal advisors as necessary.

II. Definitions

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

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.

Biennium: The two (2) year period in which the Texas Legislature appropriates funds. The biennium begins on September 1st of odd numbered years.

Board of Regents: The Board of Regents of The University of Texas 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 UTRGV, regardless of whether the entity is a for-profit or nonprofit entity.

Certificate of Filing: The disclosure acknowledgement issued by the Texas Ethics Commission to the filing Business Entity.

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

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

Contract: An agreement (including a purchase order) where a contractor provides goods/services to UTRGV and UTRGV pays for such goods/services in accordance with the established price, terms and conditions, as well as an agreement under which a contractor is given an opportunity to conduct a business enterprise on UTRGV's premises in exchange for compensation to UTRGV (i.e., auxiliary enterprise contracts).

Contract Administration: This generally refers to the processes that occur after a contract is signed and is explained in detail in Chapter 4.

Contract Administrator: A person who is employed by UTRGV and oversees a particular contract.

Contract Advisory Team: The team created to assist state agencies in improving contract management practices (ref. *Texas Government Code*, [Chapter 2262](#) Statewide Contract Management, Subchapter C Contract Advisory Team).

Contract Management: The entire contracting process from planning through contract administration, including contract closeout.

Contract Manager: A person who is employed by UTRGV and has significant contract management duties for UTRGV.

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

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

Handbook: The University of Texas Rio Grande Valley 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\(8\)](#).

Institution: UT System and the institutions comprising UT System as listed in [Regents' Rule 40601](#).

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.

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

Regents’ Rules: The *Rules and Regulations* of the Board of Regents of The University of Texas System.

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.

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).

Responsible: A respondent that is capable of fully performing and delivering goods/services in accordance with the contract requirements. UTRGV may include past performance, financial capabilities and business management as criteria for determining if a respondent is capable of satisfying the contract requirements.

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, UTRGV 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: (see Exclusive Acquisition)

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](#) (excluding Institutions).

Statute: A law enacted by a legislature.

Sub-recipient: A non-federal entity that expends federal awards received from a pass-through entity to carry out a federal program, but does not include an individual that is a beneficiary of such a program. A sub-recipient may also be a recipient of other federal awards directly from a federal awarding agency.

Surety: A person or entity providing a bond to a contractor to indemnify UTRGV 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.

University Rules: The Regents' Rules at <http://www.utsystem.edu/board-of-regents/rules>; the policies of UT System at <http://www.utsystem.edu/board-of-regents/policy-library>; and rules, regulations and policies of UTRGV.

UTRGV or University: The University of Texas Rio Grande Valley.

UT System: The University of Texas System.

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

III. Acronyms

CPA: State of Texas Comptroller of Public Accounts

DIR: State of Texas Department of Information Resources

EIR: Electronic and Information Resources

HSP: HUB Subcontracting Plan

HUB: Historically Underutilized Business

IFB: Best Value Invitation for Bid (also known as Invitation to Bid or ITB)

IHE: Institution of Higher Education

IR: Information Resources

LBB: Texas Legislative Budget Board

OGC: The University of Texas System Office of General Counsel

SAO: State of Texas Auditor's Office

SOW: Scope of Work

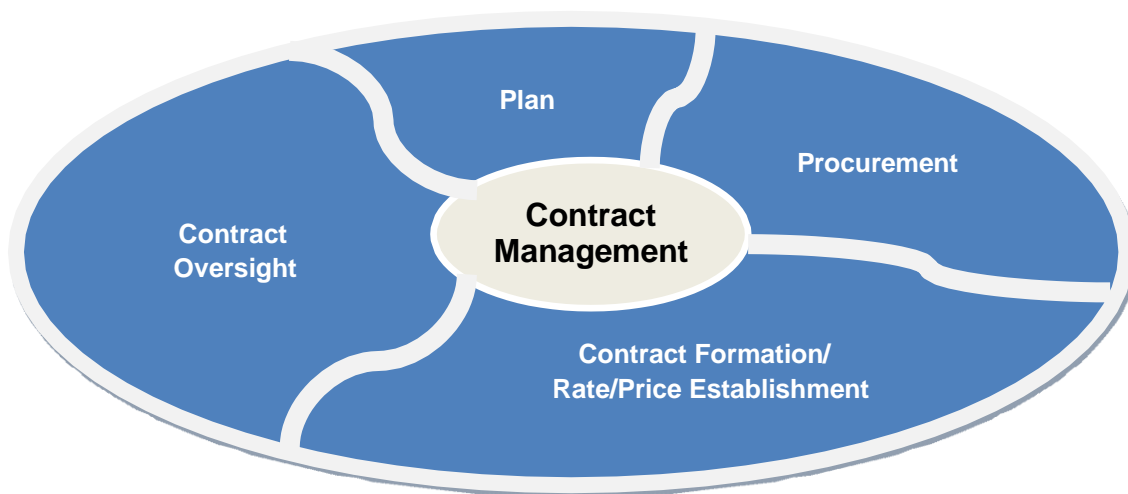
TAC: Texas Administrative Code

TPSS: Texas Procurement and Support Services Division of CPA

IV. Planning

The first step in contract management is planning. Planning is crucial to the successful outcome of any procurement. With proper planning, UTRGV is more likely to successfully achieve contracting objectives. Planning assists in determining and documenting need, preparing the SOW, choosing the appropriate procurement type, soliciting for responses, negotiating the terms of the responses, drafting the contract, administrating and overseeing the contract, and monitoring the contractor. If the procurement cannot be handled simply through the development of a straightforward 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:



Plan– Identify contracting objectives and contracting strategy.

Procurement– Fairly and objectively select the most qualified contractor(s).

Contract Formation/Rate/Price Establishment – Ensure the contract contains provisions that hold contractor(s) accountable for producing desired results, including all relevant terms and conditions as well as establishing processes that are cost-effective and aligned with the cost of providing the goods/services.

Contract Oversight– Monitor and enforce the terms of the contract.

The level of risk associated with each of these elements varies depending on the type of business relationship between UTRGV and the contractor. For example, the nature and extent of contract monitoring will vary considerably between fee for service and cost reimbursement types of relationships.

Contract planning includes several preliminary steps, including development of a contract management team, developing a communication plan, determining the procurement method, developing the specifications and SOW for the goods/services, assessing contracting risk and developing a cost estimate.

V. Contract Management Team

For purchases requiring competitive procurement, each contract management initiative should include an executive sponsor, a contract manager, purchasing office staff, HUB office staff and program staff to assist in the contract management process.

The extent and degree of executive sponsorship and participation should be directly related to the level of risk associated with the procurement. For some contracts, written approval of the executive sponsor should be obtained.

The contract manager should be experienced with the proposed type and size of contract.

Certified purchasers will be familiar with this Handbook, even though the purchaser may not be the designated contract manager. Purchasing personnel will review all procurements above the competitive threshold to ensure that Applicable Laws and University Rules relating to procurement processes are followed and that the procurement method is appropriate.

The HUB office will review contracts that may exceed \$100,000 in value to ensure compliance with HUB laws and regulations.

The program staff will provide input as to the technical requirements and serve as the subject matter experts for the procurement. Often, program staff may be tasked with primary contract administration and any reporting or other necessary actions following contract formation.

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

a. Contract Risk Management

The contract manager will initiate the contract risk management process on procurements above the competitive threshold and determine the appropriate level of risk analysis for the procurement. 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.

There is not an objective or mathematical formula that can be used to identify or quantify the risk associated with a particular contract. Risk determination is based on subjective experience. Several factors that may be useful in identifying the level of risk may include:

- Whether vendor will create, receive from or on behalf of UTRGV, or have access to, UTRGV's records or record systems which will require compliance with UTS165 Information Resources Use and Security Policy;
- Whether vendor will provide electronic and information resources which will require compliance with UTS150 Access by Persons with Disabilities to Electronic and Information Resources Procured or Developed by The University of Texas System Administration and The University of Texas System Institutions;
- The complexity and subject matter of the procurement;
- The dollar amount of the procurement, and whether the procurement will result in a major contract;

- The anticipated payment methodology;
- The experience University staff have with the type of procurement;
- Whether the results of the procurement will impact the public or only impact UTRGV;
- Time constraints or the expected duration of the procurement; and
- The type, availability or experience of staff resources required to implement the objectives of the procurement.

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

CONTRACT FACTOR	LOW RISK	HIGH RISK
COMPLEXITY	Landscaping Services	Software Development Services implementing new financial system or <i>permitting vendor access to UTRGV records or record systems</i>
DOLLAR AMOUNT	\$500	\$5,000,000
PAYMENT METHODOLOGY	Firm Fixed Price	Cost plus % of savings
EXPERIENCE OF UNIVERSITY STAFF	Office Supplies	Outsourcing of Information Technology Functions
IMPACT TO PUBLIC OR UTRGV	Janitorial Services	Outsourcing of Debt Collection Services
TIME CONSTRAINTS OR CONTRACT DURATION	14 day delivery of paper	Implementation of new program to meet deadline of legislative mandate

At the beginning of the procurement phase, the contract manager will conduct a preliminary risk assessment to make an initial determination about the level, type and amount of management, oversight and resources required to plan and implement the procurement (including the contract) from beginning to end.

Simply put, as the risk associated with a particular procurement increases, the level and degree of executive management's sponsorship, participation and oversight should be increased by a corresponding level. High risk procurements (including a cost-plus percentage of savings, outsourcing and complex software development procurements) should involve significant UTRGV executive management sponsorship, participation and oversight. A low risk contract, such as routine purchases of goods/services, does not typically require the significant participation or sponsorship of UTRGV executive management.

Risk assessment is an ongoing process. For complex, long-term contracts, risk should be reviewed and re-evaluated by the contract manager on a continual basis until the contract is fully performed, final payment is made, and the contract is closed-out.

VI. Communications Plan

For significant contracts, the contract manager will develop a plan to manage and control internal and external communication. After identifying internal and external stakeholders (executive management, program staff and other subject matter experts, oversight entities, etc.), the contract manager, with the assistance of program staff and others, will determine the type, content and frequency for reporting status, and develop and report status according to a timetable with key decision points and milestones. The contract manager will also determine who, what, when, where and how information will be communicated to the contractor-community regarding the potential procurement opportunity. To determine competitive procurement method, reference Procurement Procedures Manual Section XIX.

VII. 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. University must carefully consider how the objectives, assumptions and constraints integrate into the larger organizational project. The contract manager will encourage program staff to identify and document potential integration risks so that a strategy for mitigating or managing those risks may be developed.

a. Needs Assessment

The purpose of the needs assessment is to ensure the contract management team plans for the correct contract objective. A clear definition provided by program staff of the contract objectives and purpose will assist the contract management team in developing the SOW, preparing the solicitation, negotiating and drafting contracting documents, and verifying the performance of the contractor. This assessment should incorporate the initial needs assessment conducted by program staff when the determination was made to contract out for the service.

If the contract purpose is to implement, change or support UTRGV's statutory duties, it is useful for program staff to identify Applicable Laws, University Rules and business processes that will be impacted by the contract. If business processes are not documented, it is often useful to document the business processes. After the legal requirements and business processes are clearly identified UTRGV can assess how these duties or processes will be changed or impacted. The contract manager, with the assistance of program staff, should document any concerns or risks identified by the assessment so that the changes and risks can be managed or mitigated in the contract documents.

The success of many contracts is dependent upon how well business requirements are documented, communicated and understood by the contractor. Do not assume that the contractor understands the business of UTRGV. Detailed UTRGV business processes are frequently incorporated into the SOW in a contract, so UTRGV program staff plays a key role in planning and developing the SOW and during contract administration (including acceptance of deliverables and contract closeout).

b. Well Formed Procurement Objectives and Purpose

A well-formed statement of the procurement objectives should provide a general understanding of what will be accomplished by the contractor. Well-formed objectives will

help guide the procurement and contracting process focused and on track.

c. Technique

Defining the procurement objectives, assumptions, and constraints may sound simple and straightforward, but this definition process can be complex. UTRGV may find that individuals on the contract management team hold different views as to the procurement's objectives. The following questions are intended to assist the team in clarifying and harmonizing potential divergent objectives and interests. Answering the following three questions will aid program staff in defining and refining the procurement objective:

- What goods/ services does UTRGV/program specifically need?
- What will fulfilling this need accomplish for UTRGV/program?
- How will UTRGV/program know when the need has been met?

Each procurement is different. The description of the objective, assumptions and constraints will vary. A good measure of the quality of the SOW is whether the procurement objectives, assumptions and constraints make sense and are readily understandable to an individual that is not familiar with the procurement.

d. Research

The contract manager may assist program staff in contacting and interviewing people within UTRGV and at other IHEs who have developed solicitations, drafted contracts and engaged in contract administration for similar procurements. For significant and high-risk procurements, document the strengths, weaknesses, problems and the lessons learned in the interviews. Program staff or the contract manager may use the Internet to search for copies of solicitations, contracts and oversight documents or products used by others, review websites for useful information, and check with trade associations and professional organizations to identify industry practices, methods, standards and rules that will deliver the goods or perform the services.

Another approach to identifying information regarding the availability, features or measures for the purchase of goods/services is to publish an RFI. Potential contractors may respond to the RFI with information that will assist the Institution during the contract management process.

While researching, program staff or the contract manager may wish to contact potential contractors to discuss the procurement. This is an acceptable practice as long as UTRGV solicits information from more than one contractor and advises prospective contractors up front that UTRGV's interest at this point is strictly for research purposes and that any formal requests for pricing or other information will be made through the IFB, RFQ or RFP process. The solicitation should not favor any potential respondents over others, but should identify UTRGV's needs.

e. Business Model

A business model should represent a high-level view of how a proposed significant or high-risk business transaction is expected to work. The business model may include plans relating to a contract strategy, contract administration (including the contractor performance monitoring approach), as well as financial assumptions and limitations. The business model, based on the needs and desired objectives of the program, should be reflected in the SOW.

f. Cost Estimates

During the planning stage of the procurement, program staff will develop an estimated cost of goods/services. The cost estimate will assist program staff and purchasing personnel in determining which type of procurement method to use. Even if limited by budget restraints, an estimated cost will provide an idea of the range and duration of services that the Institution can include in the SOW.

Program staff or purchasing personnel should contact someone within UTRGV who has knowledge in the subject area to assist with the cost estimate. However, if unable to find anyone with knowledge in the subject area, UTRGV may choose to contact several contractors to obtain pricing information. If contractors are contacted, be sure to advise them that you are obtaining price estimates for information purposes only and that the estimate is not a formal solicitation. In obtaining price estimates from potential contractors, great care should be taken to avoid sharing information that would provide any contractor with a competitive advantage.

g. Technology Contracts

Many of the IR projects initiated UTRGV involve procurement of technology-related goods/services. Technology-based procurement projects present a unique level of complexity that requires specific contract management practices, processes, and strategies.

1. Project Management Practices

As required by *Texas Government Code*, Chapter 2054, Subchapter G, UTRGV must manage IR projects based on project management practices that are consistent with DIR guidelines set forth in *Texas Administrative Code*, Title 1, Chapter 216, Subchapter C. DIR guidelines require UTRGV to:

- implement, approve, and publish an operating procedure that communicates a University-wide approach for project management practices that at a minimum will:
 - identify components and general use of project management practices, citing sources of reusable components adopted from a state agency or another institution of higher education that satisfy requirements specified under 1 TAC §216.21; and
 - be approved by the President of UTRGV or designee.
- manage IR projects based on project management practices that meet the following criteria:
 - include a method for delivery of IR projects that solve business problems;
 - include a method for governing application of project management practices;
 - be documented, repeatable, and include a single reference source (e.g., handbook, guide, repository) that communicates how to effectively apply use of the project management practices components;
 - include a project classification method developed by DIR (ref. http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Project_Classification_Method.pdf), UTRGV, or another source that:
 - Distinguishes and categorizes projects according to level of complexity and risk (e.g., technology, size, budget, time to

- deliver); and
 - Defines how to use the project classification method to establish, scale, and execute the appropriate level of processes;
 - include a method to periodically review, assess, monitor, and measure the impact of project management practices on UTRGV's ability to achieve its core mission;
 - accommodate use of other practices and methods that intersect with application of project management practices; and
 - be reviewed and updated at least annually to help ensure continuous process improvement.
- identify and adopt one or more standards as a basis for project management practices to meet project requirements in a minimum of the following knowledge areas:
 - integration management;
 - scope management;
 - schedule management;
 - cost management;
 - quality management;
 - resources management;
 - communications management;
 - risk management;
 - procurement (acquisition) management; and
 - stakeholder management

2. Texas Project Delivery Framework

UTRGV must comply with the Texas Project Delivery Framework (Framework) set forth in *Texas Government Code*, Chapter 2054, Subchapter J, when procuring either of the following types of technology contracts:

- a major IR project, as defined in *Texas Government Code* §2054.003(10) to mean:
 - any IR technology project whose development costs exceed \$1 million and that:
 - requires one year or longer to reach operations status;
 - involves more than one state agency; or
 - substantially alters work methods of state agency personnel or the delivery of services to clients; and
 - any IR technology project designated by the legislature in the General Appropriations Act as a major IR project; or
 - a major contract, defined by *Texas Government Code* §2054.301(b), to mean a contract that has a value of at least \$1 million under which a vendor will perform or manage an outsourced function or process.
- If necessary, UTRGV may contact the Chief Information Officer on the applicability of Framework requirements to a specific major contract. Refer to [this page](#) on the DIR website for detailed information regarding the Framework, including guidance and tools.

3. Special Procurement Considerations for Technology Contracts

UTRGV must comply with the following specific legal and regulatory requirements for technology contracts:

UTRGV must comply with the following specific legal and regulatory requirements for technology contracts:

- Please be aware that temporary information technology (IT) staffing services and certain IT goods (e.g., printer paper) may be available through TIBH Industries. If so, Texas law may require UTRGV to procure such services or goods from TIBH Industries. For more information, please see Procurement Office Procedures Manual.
- Other best practices and legal requirements applicable to the procurement of IT are set forth in the “Software Procurement Issues” guide available as one of the training presentations available from the UT Purchasing Council website.
- Before procuring IR technologies under an interagency contract with another state agency or IHE, UTRGV needs to ensure that it has complied with specific legal requirements which may require UTRGV to first conduct an RFP or IFB for those technologies. These legal requirements are set forth in Section 2054.119, *Texas Government Code*, and 1 TAC Chapter 204. Such requirements are addressed in more detail in the “Software Procurement Issues” guide identified in the preceding paragraph.
- When procuring EIR, UTRGV is required to ensure compliance with state EIR accessibility requirements set forth in Title 1, Section 206.70 and Chapter 213, Subchapter C of the *Texas Administrative Code*. For more information, see OGC Bulletin 2006-1 for procured EIR (including outsourcing) on the UT Purchasing Council website. (Please note that when procuring EIR, UTRGV must require the vendor to provide applicable accessibility information, as set forth in 1 TAC §213.38(b)).
- If purchasing or leasing computer equipment (defined to include desktop or notebook computers, as well as computer monitors or other display devices that do not contain a tuner), then pursuant to Section 361.965, *Texas Health and Safety Code*:
 - (1) UTRGV must require each prospective respondent that offers to sell or lease computer equipment to certify the respondent's compliance with the Computer Equipment Recycling Program set forth in Chapter 361, Subchapter Y, *Texas Health and Safety Code* (a prospective respondent's failure to provide the certification renders that respondent ineligible to participate in the procurement process);
 - (2) in considering responses to solicitations for computer equipment, UTRGV must, in addition to any other preferences provided under Texas law, give special preference to a manufacturer that has a program to recycle the computer equipment of other manufacturers, including collection events and manufacturer initiatives to accept computer equipment labeled with another manufacturer's brand; and
 - (3) UTRGV must require contractors from which UTRGV buys or leases computer equipment to include the following state Computer Equipment Recycling Program Certification in the contract between the contractor and UTRGV:

State of Texas Computer Equipment Recycling Program Certification. Pursuant to Section 361.965, *Texas Health and Safety Code*, Contractor certifies that it is in full compliance with the *State of Texas Manufacturer Responsibility and Consumer Convenience Computer Equipment Collection and Recovery Act* set forth in Chapter 361, Subchapter 7, *Texas Health and Safety*

Code, and the rules adopted by the Texas Commission on Environmental Quality under that Act as set forth in Title 30, Chapter 328, Subchapter I, *Texas Administrative Code*. Contractor acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

- Similar requirements apply if UTRGV purchases or leases covered television equipment, which is defined as the following equipment marketed to and intended for consumers: (a) a direct view or projection television with a viewable screen of nine inches or larger whose display technology is based on cathode ray tube, plasma, liquid crystal, digital light processing, liquid crystal on silicon, silicon crystal reflective display, light-emitting diode, or similar technology; or (b) a display device that is peripheral to a computer that contains a television tuner.

Specifically, pursuant to Section 361.991, *Texas Health and Safety Code*:

- (1) UTRGV must require each respondent offering to sell or lease covered television equipment to certify the respondent's compliance with the Television Equipment Recycling Program set forth in Chapter 361, Subchapter Z, *Texas Health and Safety Code*, before UTRGV may accept the respondent's proposal;
- (2) In considering proposals for television equipment, UTRGV must, in addition to any other preferences provided under Texas law, give special preference to a television manufacturer that (1) through its recovery plan collects more than its market share allocation; or (2) provides collection sites or recycling events in any county located in a council of governments region in which there are fewer than six permanent collection sites open at least twice each month; and
- (3) UTRGV must require a contractor selling or leasing covered television equipment to agree to include the following state Television Equipment Recycling Program Certification in its contract with the Institution:

State of Texas Television Equipment Recycling Program Certification. Pursuant to Section 361.991, *Texas Health and Safety Code*, Contractor certifies that it is full compliance with the Television Equipment Recycling Program set forth in Chapter 361, Subchapter Z, *Texas Health and Safety Code*, and the rules adopted by the Texas Commission on Environmental Quality under that Act as set forth in 30 TAC Chapter 328, Subchapter J. Contractor acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

As required by Section 2054.130, *Texas Government Code*, UTRGV must permanently remove data from data processing equipment before disposing of or otherwise transferring the equipment to a person who is not a state agency or other agent of the state. This requirement applies only to equipment that will not be owned by the state after the disposal or other transfer. To comply with this requirement, UTRGV should follow (1) DIR's *Security Controls Standards* *Catalog*

[http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Security_Control_Standards_Catalog.docx] established under 1 TAC 202.76; and (2) UTS165 Information Resources Use and Security Policy.

Both the DIR *Security Controls Standards Catalog* and UTS165 set forth requirements for the removal of data from data processing equipment that exceed the requirements of Section 2054.130, *Texas Government Code*.

- h. Exempt from Contract Advisory Team
UTRGV is exempt from statutes related to contract advisory team review of procurement solicitations and contracts.

VIII. Information Security; Access to Electronic and Information Resources

Contracts of any kind (including purchase orders, memoranda of understanding, letters of agreement or other legally binding agreements) that involve current or future third-party access to, or creation of, UTRGV information resources or data, must comply with UTS165 Information Resources Use and Security Policy (*see link below*).

In addition contracts of any kind that relate to electronic and information resources must comply with UTS150 Access by Persons with Disabilities to Electronic and Information Resources Procured or Developed by The University of Texas System Administration and The University of Texas System Institutions.

IX. Record Retention

UTRGV must retain in its records each contract entered into by UTRGV and all contract solicitation documents related to the contract. UTRGV may destroy the contract and solicitation documents only after the seventh (7th) anniversary of the date: (a) the contract is completed or expires; or (b) all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents are resolved.

X. Contract Formation

The information in this Handbook is not intended to provide specific legal advice. This Handbook addresses general rules regarding contract formation.

Texas courts define a contract as a promise or a set of promises to which the law attaches legal obligation. The law regards the performance of these promises as a duty and provides a remedy for the breach of that duty.

Contracts that deviate substantially from the UTRGV's requirements and specifications defined in the solicitation are subject to protest by unsuccessful respondents.

XI. 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 the University does not include all necessary terms and conditions in the contract.

Creating contracts for the University is an exercise in balancing potentially conflicting interests. These interests include (1) the University'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 University as a whole, or more specifically, the taxpayers of the state.

Negotiating the best contract for the University 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 University 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 University again, thus limiting future competition on University contracts. In addition, contractors who have been informed by other contractors of bad experiences with the University, may demand more money on future contracts to do the same work to offset that perceived risk.

XII. Legal Elements of a Contract

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

- An Offer;
- An Acceptance (in strict compliance with the terms of the offer);
- Legal Purpose/Objective;
- Mutuality of Obligation (also known as the "meeting of the minds");
- Consideration; and
- Competent Parties.

a. 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.

b. 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 has 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.

c. Legal Purpose

The objective of the contract must be for a legal purpose. A contract for an illegal purpose is not binding. For example, a contract for illegal distribution of drugs is not a binding contract because the purpose of the contract is illegal.

d. 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.

e. 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 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.

f. 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.

g. 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.

XIII. Drafting the Contract

The contract should fully describe the actual agreement of the parties. Except for contract terms that are contrary to public policy (that may be void, voidable or severable from a contract), the types of contract terms that may be included in a contract are only limited by the creativity of the drafter. There are several types of provisions that are usually included in contracts, including:

- Administrative provisions;
- Financial provisions;
- Risk allocation provisions;
- Scope of work (including deliverables);
- Contract term, termination and dispute resolution provisions; and
- Work product and intellectual property ownership and rights provisions

When drafting a contract, consider using an [OGC Standard Contracts](#) if available and appropriate. Using a suitable OGC Standard Contract will usually expedite legal review and reduce the number of legal changes to the contract because the Standard Contracts contain the applicable Essential Provisions and Recommended Provisions discussed in [Section 3.6](#) of this Handbook. If an OGC Standard Contract is not available or appropriate, please consider using one of OGC's [Model Contracts and Agreements](#), if suitable. OGC's Model Contracts and Agreements also include the applicable Essential Provisions and Recommended Provisions.

When drafting a contract, also consider the [OGC General Procedures Contract Checklist](#) that provides information regarding topics like compliance with purchasing laws, policies and procedures; form of the agreement; parties to the agreement; effective date, term and termination; consideration and payment terms; representations, warranties, duties and obligations; insurance; remedies; software and database licenses; compliance with privacy laws, policies and procedures; and statutory contract provisions.

XIV. Planning for Contract Preparation

Just like other contract management processes, UTRGV should plan for drafting of the contract. A common practice is to include a draft of the applicable OGC (or UTRGV) contract template in the solicitation or to use an OGC solicitation template that includes UT standard terms and conditions. This allows a respondent to make an offer with knowledge of the proposed contractual terms and conditions.

During the procurement process always allow adequate time to draft, review and negotiate the final contract. In addition, be sure to include sufficient time for HUB compliance and legal review of the contract.

UTRGV should begin its contract planning effort by collecting and reviewing OGC or UTRGV contract templates, as well as similar contracts that have been previously approved by OGC, if any. UTRGV may also want to review 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.

UTRGV may also want to prepare (and compare to the appropriate OGC contract templates and OGC-approved samples) an outline containing headings for the major terms, conditions and

provisions. This makes it easier to group related terms and conditions. An outline will also illustrate gaps in the structure of the contract.

XV. Form of the Contract

Evidence of an agreement or a contract may be documented in different formats, including a “four-corner” contract, a purchase order, or an exchange of correspondence. The term “four-corner” contract means a single document that includes all of the terms and conditions within the four-corners of a single document.

Each form of contract has advantages and disadvantages. Determining which form to use should be based on an assessment of the risks involving contract construction or interpretation.

1. “Four-corner” Contracts

A “four-corner” contract offers the greatest opportunity to avoid conflicting provisions, because all of the provisions are contained in one document. Contract management is sometimes easier when all of the provisions regarding the duties, obligations and responsibilities of each party are logically organized and easily found. On the other hand, “four-corner” contracts require more time to plan and prepare. Notwithstanding the additional time required, in a major or complex transaction, a “four-corner” contract is the best format to clearly document an agreement.

2. Purchase Orders

Purchase orders are also contracts. For example, Contractor delivers an offer, in a form requested by UTRGV, and UTRGV indicates acceptance of the offer by issuing a purchase order. The documents that comprise the offer and acceptance are the evidence of the contractual agreement. In addition, a contract may be formed if UTRGV issues a purchase order and Contractor accepts that offer through performance.

A purchase order uses a layered approach (i.e., the purchase order usually relies on a number of documents that in combination, comprise the contract). UTRGV may publish a solicitation that includes product specifications, contractor qualifications and other terms and conditions. Contractor’s response may condition the offer on terms and conditions that are different from or in conflict with the solicitation. When using a purchase order, UTRGV should take care that contractor’s terms and conditions do not become the basis of the 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, UTRGV should insure the inclusion of the UTRGV’s standard 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.

XVI. Contract Terms

Contracts include a variety of routine terms and conditions often referred to as ‘boilerplate’ or ‘standard’ terms and conditions. Generally accepted terms and conditions for use by all Institutions are provided on the UT System Purchasing Council web site. These are recommended terms and conditions. Unless required by Applicable Laws or University Rules, the recommended terms and conditions may be modified to meet the UTRGV’s needs.

During the development of the contract, devote careful attention to the details. Below is a list of certain provisions that are essential and should be included in all contracts as well as some provisions that are recommended for inclusion in some contracts depending on specific facts and circumstances. *Sample Contract Terms* are attached in APPENDIX 1.

Consult with UTRGV's Office of Legal Affairs regarding additional contract terms that may be required by Applicable Laws and University Rules for particular situations.

Essential Provisions:

Scope of Work	Payment Terms
Schedule	Ownership and Use of Work Material
Term of Contract	Default and Termination
Contractor's Obligations	Indemnification
HUB Requirements	Relationship of the Parties
Contract Amount	Insurance
Assignment and Subcontracting	Undocumented Workers
<i>Texas Family Code</i> Child Support Certification	Limitations
No Boycotting Israel Certification	Ethics Matters; No Financial Interest
Contractor Certification regarding	State of Texas Computer Equipment
Business with Certain	Recycling Program Certification
Countries and Organizations	Enforcement
Loss of Funding	Access by Individuals with Disabilities
Entire Agreement; Modifications	HIPAA Compliance
Force Majeure	HUB Subcontracting Plan
Governing Law	Responsibility for Individuals Performing Work;
Waivers	Criminal Background Checks
Confidentiality and Safeguarding of	Quality Assurance
University Records; Press Releases;	EIR Environment Specifications
Public Information	Security Characteristics and Functionality of
Binding Effect	Proposer's Information Resources
Records	Payment Card Industry Standards
Notices	External Terms
State Auditor's Office	FERPA Compliance
Limitation of Liability	Group Purchasing Organization (GPO)
Survival of Provisions	
Breach of Contract Claims	

Recommended Provisions:

Use of Marks

Tax Certification

Payment of Debt or Delinquency to the State

Captions

Severability

Drug Free Workplace Policy

Order of Precedence of Contract Documents

Security/Parking Access

Smoking Policy

XVII. State Contracting Standards/Oversight

UTRGV is subject to *Texas Government Code*, Chapter 2261, Subchapter F Ethics, Reporting, and Approval Requirements for Certain Contracts, *except to the extent that Subchapter F conflicts with Texas Education Code, §51.9337 Purchasing Authority Conditional; Required Standards*. UTRGV is not subject to other Subchapters of Chapter 2261.

To the extent applicable, *Texas Government Code*, Chapter 2261, Subchapter F, provides UTRGV guidance regarding multiple contract matters including Internet posting (see [Section 3.7.1](#) of this Handbook), monitoring (see [Section 3.7.3](#) and Chapter 4 of this Handbook), reporting (see [Section 3.7.4](#) of this Handbook), risk analysis (see [Section 4.1.6](#) of this Handbook), and management (see Chapter 4 of this Handbook).

a. Enhanced Transparency

Except with regard to memoranda of understanding, interagency/interlocal contracts or contracts for which there is not a cost, UTRGV must post on the Internet (until the contract expires or is completed) (a) a summary of each contract (including purchase orders) the agency enters for the purchase of goods/services from a private vendor (including “sole source” contracts), (b) statutory or other authority for exclusive acquisition purchases, and (c) the RFP related to competitively bid contracts (ref. *Texas Government Code*, Section 2261.253).

b. Enhanced Management

UTRGV must (1) publish a contract management handbook that is *consistent with Rule 20901, the UT System Sample Contract Management Handbook, and CPA’s contract management guide*, (2) post the UTRGV’s handbook on UTRGV’s Internet and (3) submit the UTRGV’s handbook link to CPA for re-posting on CPA’s web page.

c. Enhanced Monitoring

Except with regard to memoranda of understanding, interagency/interlocal contracts or contracts for which there is not a cost, UTRGV 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 (ref. *Texas Government Code*, Section 2261.254).

In addition, UTRGV 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 (ref. *Texas Government Code*, Section 2261.256).

In connection with contracts for the purchase of goods/services with a value exceeding \$5 million, *Texas Government Code*, Section 2261.255 requires the contract management office or procurement director to verify in writing that the solicitation process complies with state law and UTRGV policy and submit to the Board of Regents information on any potential issue that may arise in the solicitation, purchasing or contractor selection process.

d. Enhanced Reporting

UTRGV must develop contract reporting requirements for contracts for the purchase of goods/services with a value exceeding \$1 million (ref. *Texas Government Code*, Section 2261.254).

In addition, *among other statutory and regulatory reporting requirements*, UTRGV must provide notice including the nature of the goods or services, the term, amount and vendor name, to the LBB 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. UTRGV must also provide an attestation to the LBB on this [form](#) consistent with the specific requirements of Section 7.12 of HB 1 (2015). *These requirements apply without regard to source of funds or type of contract or purchase order.*

XVIII. Authority to Sign Contracts

a. Actual Authority, not Apparent Authority

As a state agency, UTRGV only has the power and authority that is granted by law or that may be reasonably inferred from law. UTRGV, just like a corporation or other business entity, acts through its officers and employees. In the case of a private business, an officer or employee with apparent authority may commit the business to legal obligations. Actual authority is not required.

On the contrary, only UTRGV representatives *with actual authority* may commit the UTRGV to legal obligations, including contracts. It is important for UTRGV officers and employees to know whether they have delegated authority to act on behalf of UTRGV because Institutions cannot legally perform obligations that are agreed to by representatives who do not have actual authority to do so. For example, if an invoice is submitted to UTRGV under a contract that is signed by an employee who lacks actual authority, UTRGV may not pay the invoice. This situation may embarrass UTRGV and damage UTRGV's business reputation. In addition, UTRGV representatives who enter into obligations on behalf of UTRGV, but do not have actual authority to do so, may be personally responsible for those obligations.

The Texas Education Code gives the Board of Regents the authority to govern and operate the UT System. The Texas Education Code also authorizes the Board of Regents to delegate any power or duty to a committee, officer, or employee. In many instances, the Board of Regents

has delegated its authority to officers pursuant to the Regents' Rules. Subject matter generally determines which officer receives delegated authority from the Board of Regents to bind an Institution. It is not the purpose of this overview to cover all delegations; however, UTRGV may refer to the OGC Delegations of Authority web page (<http://www.utsystem.edu/ogc/contracts/delegation.htm>) for charts summarizing current delegations at Institutions.

Pursuant to Rule 10501, Section 2.1, the Board conditions its delegation of authority to sign contracts on the delegate's compliance with applicable laws and special instructions or guidelines issued by the Board, the Chancellor, the Deputy Chancellor, an Executive Vice Chancellor and/or the Vice Chancellor and General Counsel. As an example, special instructions or guidelines issued by the Vice Chancellor and General Counsel include the [OGC Contract Review Procedures](#) posted on the OGC website.

b. Authority to Sign Contracts

Two important types of delegations to be aware of are: (1) the authority to sign contracts, and (2) the authority to approve the expenditure of funds from budget accounts. *It is important to note that authority to authorize the expenditure of funds does not authorize an employee to sign contracts.*

With regard to authority to sign contracts, the Board of Regents delegates (through the Regents' Rules and Board of Regents meeting minute orders) to the Chancellor, Institution presidents, and certain other officers, the authority to sign certain contracts so long as those contracts conform to the requirements of UTS145 Processing of Contracts. *UTS145 includes a flowchart that details the nine (9) steps of required contract review established by UTS145, including:*

- Step 1: System Approval Required before Legal Review;
- Step 2: Determine if Contract is on Standard Contract Form;
- Step 3: Determine if Contract is a Special Procedure Contract;
- Step 4: Determine Value of Contract;
- Step 5: Legal Review by OGC;
- Step 6: System Approvals Required after Legal Review;
- Step 7: Determine whether Contract must be listed on the Consent Agenda;
- Step 8: Follow Proper Consent Agenda Procedures; and
- Step 9: Execution of Contract.

In conjunction with UTS145, OGC has developed the [OGC General Procedure Contract Checklist](#) that must be used to review certain contracts as indicated in UTS145. The OGC General Procedure Contract Checklist covers topics including compliance with purchasing laws; policies and procedures; form of the agreement; parties to the agreement; effective date, term and termination; consideration and payment terms; representations, warranties, duties and obligations; insurance; remedies; software and database licenses; compliance with privacy laws, policies and procedures; and statutory contract provisions.

1. Primary and Secondary Delegates

Only officers who receive authority to sign contracts directly from the Board of Regents (Primary Delegates), including the Chancellor and Institution presidents, may further delegate their authority to sign contracts to other Institution employees (Secondary Delegates). In some cases, Primary Delegates have further delegated authority to sign contracts to Secondary Delegates. Secondary Delegates may not further delegate their authority. All delegations of authority must be in writing.

Before signing a contract, Primary Delegates and Secondary Delegates must process that contract in accordance with UTS145 Processing of Contracts (including the OGC Contract Review Procedures). UTS145 helps Institutions evaluate contracts that will be signed on behalf of the Board of Regents. [UTRGV Delegation of Authority](#) is available on UT System's website.

2. OGC Contract Review Procedures

UTS145 includes the required OGC Contract Review Procedures. Those procedures are a way for OGC to provide Institutions, including UTRGV, with general information about contracts. However, those procedures cannot provide specific legal advice for any particular situation. As a result, UTRGV must not rely on that information as a substitute for obtaining legal advice from UTRGV's Office of Legal Affairs, if needed. Use of the OGC Contract Review Procedures means that UTRGV complied with OGC's requirements for review of the contract, but it does not mean that OGC has "approved" the contract in the same way OGC would approve a contract if OGC actually reviewed the contract. If UTRGV feels the OGC Contract Review Procedures are not adequate for UTRGV's needs, consult UTRGV's Office of Legal Affairs directly.

3. Verification of Delegated Authority

Before taking any action on behalf of UTRGV or signing any contract or other document that would bind UTRGV, UTRGV employees must verify that (1) they have received a written delegation of authority to do so, and (2) the University has complied with the requirements of UTS145 Contract Review Procedures.

Neither Primary Delegates nor Secondary Delegates should sign a contract unless UTRGV has complied with UTS145 Contract Review Procedures in connection with the specific contract to be signed.

XIX. Required Check of Vendor Hold Status

Not earlier than the seventh (7th) day before and not later than the date of entering into the contract, UTRGV must determine whether a payment law prohibits CPA from issuing a warrant or initiating an electronic funds transfer to the vendor ("vendor hold status"). The determination must be made in accordance with the comptroller's requirements no later than the date UTRGV signs the contract. (ref. Section 2252.903, *Texas Government Code*)

UTRGV must also check the vendor hold status before making each payment under the contract. (See Section [4.4](#) of this Handbook; ref. Section 2107.008, *Texas Government Code*)

XX. Execution of University Contracts

Signatures of Primary Delegates or Secondary Delegates with written authority to bind UTRGV are the way through which a contract usually becomes a binding obligation of UTRGV. See [Section 3.8.2](#) *Authority to Sign Contracts in this Handbook for more information regarding delegated authority to bind UTRGV to a contract.*

Only contractor's employees authorized to bind the contractor to contract terms may sign the contract on behalf of the contractor.

XXI. Contract Administration

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

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

The primary tasks of contract administration include:

- Verifying contractor performance for purposes of payment;
- Identifying any material breaches of the contract by assessing the difference between contractor's actual performance and contract requirements;
- Determining if corrective action is necessary and taking action, if required; and
- Developing a completion plan for contractor exit requirements, including acceptance of the goods/services, final payment, and contract close-out.

a. Communication

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

b. Familiarity with Contracting Principles

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

c. Central Contract Repository

UTRGV should maintain a copy of all contracts on file in a central repository, which may be an electronic repository. A central repository will facilitate reporting, audits and responses to requests for public information, as well as allow contract managers access to useful information in past and present contracts.

d. Master Contract Administration File

Ideally, UTRGV should keep one complete master contract administration file. That file will provide a basis for responding to questions and resolving contract issues, if any. Throughout the life of the contract, the contract administration file should include the following:

- A copy of the current contract and all amendments (including amendments made by letter) ;
- A copy of all specifications, drawings, manuals, terms posted on the Internet or other documents incorporated into the contract by reference;
- A list of all prior contracts with the same contractor (if those contracts offer valuable historical data);
- If the goods/services were competitively procured, documentation evidencing the University's need for the goods/services, documentation evidencing the University's need for the goods/services, 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 the University's need for the goods/services, the exclusive acquisition justification, the best value justification for the procurement;
- A list of contractor work product submittal requirements and deliverables;
- An inventory of University furnished property or services;
- An inventory of all University information furnished to contractor;
- A copy of the post-award conference summary, if conducted;
- A copy of the compliance review schedule, if applicable;
- A copy of all correspondence related to the contract;
- The originals of all contractor work product data and report submittals;
- A copy of all routine reports required by the contract, including sales reports, pricing schedules, approval requests, and inspection reports;
- A copy of all notices to proceed, to stop work, to correct deficiencies and other notices;
- A copy of all University approvals, including approvals of contractor's materials, quality control program and work schedules;
- The minutes of all meetings with contractor, including sign-in sheet, agenda and handouts;
- The minutes of all University internal meetings related to the contract, including sign-in sheet, agenda and handouts;
- A copy of all contractor invoices and supporting documentation, including information regarding prompt payment discounts, contract deductions and fee adjustments;
- Copies of any contract audits;
- Copies of original HSP and revisions, if any; and
- Copies of HUB Progress Assessment Reports.

e. Risk Management

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

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

1. Assessment of Contract Risk

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

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

2. Risk Factors, Weights and Rating

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

- Contractor's past performance (and past performance of similar contractors);
- Contractor's turnover in key personnel;
- Dollar value of the contract;
- Information obtained from contract monitoring, such as the variance between contractor's expected and actual performance;
- Significant problems with contractor's invoices;
- Results of previous contractor monitoring site visits;
- Results of site visits completed by other divisions within the University or by other state agencies or Institutions, that contract with the same Contractor;
- Length of time since the last site visit; and
- Contractor's experience performing the specific work.

Once the risk factors are identified, assign weights to each factor. Weights indicate how significant each factor is in identifying contractors who should be monitored. However, weights can also be designed to ensure statutory or policy requirements. For example, if a policy requires a site visit every three years, the assigned weight would be indicative of the period since the last site visit.

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

f. Contract Specialist Responsibilities

The primary responsibilities of the Contract Specialist include:

- Drafting the contract.
- Consulting with legal counsel to address any legal issues related to the contract.
- Serving as contractor's official point of contact with UTRGV for the contract.
- Receiving and responding to communications between contractor and UTRGV.
- Consulting with the HUB office regarding HSP changes, Progress Assessment Report submissions and HUB reporting.
- The following responsibilities are delegated to the Contract Administration: Managing, approving, and documenting all amendments to the contract.
- Managing any UTRGV property (including computers, telephones, equipment, furniture, and identification badges) used by contractor when performing its duties and obligations under the contract.
- Identifying and resolving issues and disputes with contractor in a timely manner.
- Implementing a quality assurance process.
- Maintaining appropriate contract records (see [Section 2.5](#) of this Handbook).
- Documenting significant contract events.
- Monitoring contractor's progress and performance of the SOW to ensure goods/services conform to contract requirements.
- Exercising appropriate UTRGV contract remedies when contractor's performance is deficient.
- Inspecting and approving the final goods/services. Approval should be documented in writing.
- Monitoring the University budgeting and accounting process to ensure sufficient funds are available to pay contractor.
- Verifying accuracy of invoices and authorizing payments consistent with contract terms.
- Performing contract closeout process, including ensuring the contract file contains all necessary contract documentation, formal acceptance documentation, and documented lessons learned.

g. Designating the Contract Administrator

The Contract Administrator is responsible for coordination of the following activities:

- Determining the sequence of activities, dependencies, required or desired outcomes, and acceptable performance levels.
- Developing a timetable (with start and end dates) for each performance component, including milestones with accompanying timeframes, and monitoring and reporting

requirements.

- Monitoring and documenting contractor activity on a specified frequency to identify any problem areas.
- Meeting with contractor on a regular basis to review progress, discuss problems and consider necessary changes.
- Providing access to state facilities, equipment, data, staff, materials and information.
- Contacting other staff as necessary to obtain equipment and data.
- Establishing scope of authority, clear lines of communication and reporting protocol for individuals who will interact directly with contractor.
- Establishing control of correspondence, data and reports.
- Identifying potential problems and solutions.
- Defining terms or conditions of default.
- Establishing a procedure, identifying a responsible person and establishing for handling noncompliance.
- Establishing a procedure and timeframe and identifying a responsible person for making necessary contract decisions, amendments, modifications, and changes.

NOTE: Most contract administrators do *not* have authority to:

- Instruct contractor to start work before the contract is fully executed (signed by both parties);
- Change the terms or scope of the contract without a formal written amendment;
- Direct contractor to perform work that is not specifically described in the SOW and funded by the contract;
- Extend the term of the contract without a formal written amendment; or
- Allow contractor to incur costs in excess of the cap or limit set by the contract.

Generally, contract administrators who take those actions are acting outside the course and scope of their employment.

XXII. Performance Monitoring

Performance monitoring is a key function of proper contract administration that helps UTRGV (1) confirm that contractor is performing all of its duties and obligations in accordance with the terms of the contract, and (2) identify and address any developing problems or issues. Contract monitoring may be viewed as:

- A preventive function;
- An opportunity to determine contractor's need for technical assistance; and
- A valuable source for information concerning the effectiveness and quality of goods/services being provided.

Performance monitoring tools should be included in the contract. Reporting and testing are examples of contract monitoring tools. Institutions may not be able to enforce reporting or testing requirements that are not adequately documented in the contract.

A *Sample Contract Monitoring Worksheet* is attached as **APPENDIX 2**.

a. Monitoring Program

Not all contracts will require extensive monitoring. The level of monitoring will depend on many factors including the dollar value of the contract, the complexity of the goods/services, the level of contract risk, and UTRGV's experience with contractor.

b. Determining What to Monitor

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

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

Review the SOW and other contract terms, including contractor compliance requirements. Design the monitoring program to focus on contract requirements that are most important to UTRGV. Generally, this means monitoring contractor's progress on the SOW, including deliverables. For example, include monitoring tools that will identify the following issues:

- Whether UTRGV is receiving the goods/services as required by the contract, including:
 - Confirming UTRGV does not receive less goods/services than required by the contract; and
 - Confirming UTRGV does not receive the wrong goods/services.
- Whether UTRGV is accurately charged for the goods/services, including:
 - Confirming allowable contractor expenses are not used for non-allowable costs (i.e. gifts, etc.); and
 - Confirming contractor accurately reports its progress on providing the goods/services.
- Whether contractor makes satisfactory corrections to goods/services identified as not meeting contract requirements.
- Whether contractor protects UTRGV assets.

Also, consider the impact the contract payment methodology will have on the monitoring program. For example, if payment is based on a firm fixed-price (a specific amount of money for a unit of the goods/services), it is not necessary to verify contractor's expenses since contractor's expenses are not relevant to this type of contract. For example, if UTRGV is buying a box of pencils, UTRGV knows what they are buying and the cost per pencil. It is irrelevant what contractor pays for travel or advertising because UTRGV pays a firm fixed price for the pencils regardless of contractor's expenses.

Under a firm fixed-price contract, UTRGV should ensure that:

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

If the contract is a cost reimbursement contract (UTRGV pays contractor's cost *plus* a percentage of overhead and profit), UTRGV should consider including in its monitoring

program tools to monitor the following:

- Were the invoiced goods/services actually purchased by contractor?
- Were the invoiced good/services used by contractor to fulfil the contract?
- Were the goods/services necessary and reasonable to fulfil the contract?
- Did the goods/services meet contract quality and quantity specifications?
- Was UTRGV charged for the goods/services more than one time (for example, in both overhead and profit)?
- Were the goods/services included in contractor's UTRGV-approved budget?

UTRGV should review the contract to see how the costs are reimbursed. Many contracts require that all costs be included in the original budget provided by contractor and approved by UTRGV in writing. In some cases, the contract may specify that certain costs (such as the purchase of a vehicle or use of a subcontractor) require approval by UTRGV *prior to* purchase.

NOTE: If UTRGV receives grant money to pay for goods/services, UTRGV must consider the nature of the relationship with contractor. Is the relationship a vendor relationship or a sub-recipient relationship? See OMB Circular A-133, Section 210, posted at <https://www.whitehouse.gov/omb/circulars/default> for guidance on this relationship determination. If the relationship is that of a sub-recipient, then federal guidelines and cost principles must be followed. The Uniform Grant Management Standards published by CPA at <http://comptroller.texas.gov/procurement/catrad/ugms.pdf> provides additional guidance.

c. Monitoring Tools

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

Monitoring tools include:

1 Site Visit

Contracts that are complex or have a high degree of risk may require visits to contractor's facilities. Site visits may be used to verify that contractor's performance complies with the contract schedule and other contract requirements (for example, dedication of sufficient resources and appropriately qualified personnel to performance of the work). Site visits help emphasize to contractor the importance the Institution places on the contract. Site visits also provide enhanced communication between UTRGV and contractor.

Site visits may be comprehensive (full scope) or limited to particular issues (limited scope). Full scope site visits are typically scheduled visits to contractor's place of business. They are based on risk assessment and cover a broad range of contract compliance and performance issues. Limited scope site visits typically focus on a specific problem. Examples of some typical reasons for considering a limited scope site visit include the following:

- Contractor is responsible for administering funds from two sources and one funding source has noted serious problems with the way contractor used the funds.

- Other contractors have failed to comply with a particular contract requirement and there is an indication this contractor might also have failed to comply.
- Inconsistencies in invoices are identified and clarification from supporting documents is necessary.
- Contractor has proposed a corrective action plan for a contract compliance problem, but the University is not certain the proposed solution will resolve the problem.

To perform a site visit, UTRGV should:

- Develop a comprehensive and objective site monitoring checklist that:
 - Focuses on desired contract outcomes, but also includes contract compliance requirements. Site monitoring criteria should reference the applicable contract requirement.
 - Assists UTRGV in assessing contractor performance consistently. For example, minor or inconsequential noncompliance should be identified. List contractor noncompliance and errors that will be considered minor or inconsequential. Also, identify contract compliance areas where monitors may exercise judgment.
 - Specifies the number of items or documents that will be reviewed to evaluate each element of the monitoring checklist. Do not disclose specifics of sample sizes or the monitoring checklist to contractor. For example, the University may indicate it will review invoices and supporting documents those invoices, but should not disclose the University will review invoices and supporting documents for December 2015.
 - Allows the site monitor to focus on the highest risk areas of the monitoring checklist.
- Establish standards, procedures and documentation requirements. For example:
 - Describe the standards, procedures and documentation required for the site monitor to bypass an area of the monitoring checklist. For instance, the checklist may specify that if the site monitor determines that no errors in contract reporting have been noted for the past two years, then, with concurrence from the contract manager, the site monitor may omit the contract reporting portion of the monitoring checklist for the current site visit. The site monitor must document the justification for omitting the contract reporting portion of the checklist on the site-monitoring checklist by including the following note “No problems identified prior two years - not monitored this year.”
 - Allow space on the checklist (or on a separate document) to record results of the site visit. For instance, if the monitoring checklist requires review of invoices for five months, then the documentation should include the identification of the months monitored and the results of the review for each month.
- Sampling and Population:
 - Ensure the population is complete by including all files relevant to the contract. Contractor should never be the one to select the samples

for review.

- If contractor submits the names of the clients as part of the normal expenditure draw, then the sample can be selected from the client list. Ensure that the clients on the list are paid for by UTRGV.
- If contractor cannot locate the sample item selected, it may or may not indicate a problem. Before agreeing to substitute an alternate file, consider the circumstances of the “lost” sample item and determine if the explanation is reasonable or if the site monitor suspects that contractor did not want the site monitor to see the file.
- Tailor the site-monitoring checklist for each contractor and each contract. While there will be standard items UTRGV will review for all contractors, each contractor and contract should be reviewed for specific site monitoring requirements unique to that contract or contractor. In addition, consider the following:
 - Review specific contract requirements to determine if these merit site monitoring.
 - Look for items that fall just below an amount requiring additional approval.
 - Consider problems contractor has had in the past or what is likely to cause problems for this contractor. Are parts of the contract new to contractor? For example, contractor may be providing the same services but to a different population during this contract.
 - What types of items do not need to be monitored and why? For example, if contractor uses an information database UTRGV tested under previous contracts, then the risk associated with that database may be low and may not need to be reviewed this year.
 - Has another UTRGV department or another Institution conducted a site visit? If so, the UTRGV departments or Institutions could coordinate and conduct only one site visit instead of two.
- Site Visit Reports. The site visit report is a written record of the site visit work and should be retained in UTRGV’s contract file. A copy of the report or a summary may be sent to contractor.

Even if contractor corrects a problem detected during the site visit while the site monitor is at contractor’s facilities, the site monitor is obligated to include the problem in the site visit report. The notation in the site visit report will remind the site monitor to follow up on the problem on future visits to confirm the problem has been corrected.

Include what has been learned during this site visit in the risk assessment and contract requirements in the next procurement. If the site monitor or contractor recommends changes for the next procurement, include the recommendations in the site monitoring reports.

2 Desk Review

A desk review includes a review of reports submitted by contractor to the University. A desk review should include:

- Comparison of contractor’s actual performance against contract requirements

to confirm contractor is performing in accordance with the contract requirements.

- Comparison of contractor's actual expenditures to the UTRGV-approved budget to confirm contractor is complying with the approved budget.
- Comparison of the current reporting period to prior reporting periods to identify any unexplained trends and determine whether contractor is performing work significantly different during this reporting period than during the prior reporting period.
- Comparison of contractor's reports to reports from other contractors performing similar work.
- Comparison of relationships between key components of the reports such as:
 - Cost per unit of goods/services against percentage of fees charged to the contract;
 - Change in variable costs for each unit of goods/services; and Reported salaries against the contract staffing plan.
- Comparison of the report to known elements of contractor's operating environment to determine, for example, if a weather emergency in contractor's geographic area increased the cost of supplies or caused a temporary reduction in units of goods/services provided.

3 Expenditure Document Review

An expenditure document review includes analysis of contractor invoices (including fees for goods/services and expenses) to determine (1) if the fee rates and expenditure items are permitted under the terms of the contract, and (2) if the supporting documentation (including cost reports, third party receipts for expenses, and detailed client information) adequately support the invoice. *If contractor consistently provides improper invoices or supporting documentation is insufficient to support the invoices, consider implementing additional monitoring such as site visits.*

d. Use of Contract Monitoring Findings

UTRGV should design the monitoring program to include appropriate follow up on contract monitoring findings. Monitoring reviews, audits, and investigations should be routinely used to:

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

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

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

e. Monitoring by Third Parties

In some instances, the obligation of monitoring the progress of a contract is assigned to another contractor. This is also known as independent oversight. For highly technical work, third-party subject matter experts may perform monitoring services independently or in

conjunction with University staff.

XXIII. Contract Reporting Obligations

Contract reporting obligations include (1) contractor reports to the UTRGV contract administrator, (2) UTRGV contract administrator reports to executive management, and (3) UTRGV reports to other state agencies.

There are generally three report types: Status Reports, Activity Reports, and Vendor Performance Reports. All serve useful functions.

a. Status Reports

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

If the contract does not require contractor to provide periodic status reports, UTRGV should routinely confirm that sufficient progress on the work is being made by contractor. Confirmation of work status may be accomplished by requesting a status update from contractor or scheduling a site visit to review progress.

b. Activity Reports

Activity reports describe all activity on the project. Project activity is not the same as a work status. A project may have a great deal of activity without making substantive progress. Note that activity reporting may also be a core feature of managing certain contracts. For example, contractor payments for outsourcing contracts may be based on the number of completed transactions. In that situation, activity reporting would be critical to contract administration of University payments under the contract.

c. Vendor Performance Reports

Best practice suggests that upon termination or expiration of a contract, UTRGV should file 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 TPSS web portal. Reporting contractor performance may facilitate resolution of contract dispute issues between UTRGV 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.

XXIV. Invoices and Payments

a. Invoices

Invoices submitted by contractor must comply with the contract rate schedule. Invoices should be reviewed to ensure that contractor's invoices correspond with contractor's

progress on the work. Contractor's progress should be measurable because cost incurred or invoices submitted, in and of themselves, are insufficient indicators of contractor's progress.

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

All invoices should be reviewed to ensure:

- Contractor is billing UTRGV only for goods/services actually received by UTRGV;
- Goods/services have been inspected and accepted by the UTRGV;
- The invoice is correct and complies with the pricing terms and other contract requirements; and
- Total payments by UTRGV to contractor do not exceed the contract cap or fee limit.
- UTRGV has received HSP Progress Assessment Reports, if required.

UTRGV should give contractor written notice of invoice deficiencies not later than 21 days after receipt by UTRGV as required by the Texas Prompt Payment Act, Section 2251.042(a), Government Code.

b. Payments

Payments must be made in accordance with Applicable Laws, including the Texas Prompt Payment Act, Chapter 2251, Texas Government Code, the vendor hold requirements of [Section 3.9](#) of this Handbook, and University Rules. The Texas Prompt Payment Act requires that correct invoices be paid within 30 days after the date the correct invoice was received or services were performed and goods received, whichever is later. Under some circumstances, UTRGV may be obligated to pay contractor interest on late payments.

c. UTRGV Contracts providing Services to Third Parties

Contracts under which contractor provides goods/services to a third party (not UTRGV) are unique in that acceptance of goods/services by the third party is not an indicator that an invoice should be paid. Problems with third party goods/services contracts generally surface after invoices are paid. Contract administrators handling third party goods/services contracts should incorporate contract mechanisms that ensure UTRGV is able to exercise remedies against contractors for poor performance and withhold future payments until performance deficiencies are corrected.

d. Withholding Payment

UTRGV employees must protect the interests of UTRGV. Under appropriate circumstances, it may be necessary for UTRGV to withhold payments from contractors. Such circumstances include:

- Material breach of the contract by contractor;
- Invoicing errors;
- Invoices that lack sufficient supporting documentation, including an HSP Progress Assessment Report (if required);
- Offset for prior overpayments to contractor under the same contract; and

- Contractor performance does not comply with contract requirements.

XXV. Change Management Process

During the term of the contract it may be necessary to amend the contract. Possible modifications include changes to notice addresses, pricing or delivery schedule.

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

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

An effective change management process includes:

- Procedures to avoid an informal undocumented change process;
- Documentation of all proposed changes and approval/disapproval;
- Evaluation of the impact of each change to contracting objectives, deliverables, schedule, cost, overhead, work-in-progress, completed work, standards, and acceptance criteria;
- Planning for requests and approvals of draws against any contingency allowance;
- Single point of contact for recommendation and authorization of all changes;
- Formal, written approval of all changes prior to contract amendment.;
- Monitoring of the HSP;
- Documentation of all changes, no matter how small;
- Documentation of impact of changes on the contract (including the HSP); and
- Notification of contract amendment.

NOTE: UTRGV should not verbally authorize contractor to alter performance under the contract before the formal change management process is complete, including full analysis of the change, written approval of the change, and documentation of the change through a written contract amendment.

a. Impact of Substantial Changes to Solicited Scope of Work

The contract resulting from a solicitation issued by UTRGV must be consistent with the specifications and requirements of that solicitation. Contracts that are not consistent with the related solicitation may violate competitive procurement principles, Applicable Laws and University Rules.

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

subjected to fair competition. To permit such a change would go against the ideas of competition and a fair playing field for all vendors. Transparency in government procurement is a key government responsibility. As a result, Applicable Laws require that UTRGV conduct a competitive procurement process before making substantial contract changes. The specific method of competition may vary based on the type of goods/services needed.

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

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

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

Materially changing solicitation specifications after receipt of responses denies an opportunity to all vendors that might have been interested in the changed specifications to participate in the solicitation. As a result, all contract amendments are required to be within the scope of the solicitation underlying the original contract.

It is important to remember that application of the above principles will depend upon your particular facts and circumstances.

Before proceeding with a contract amendment, consult UTRGV's Office of Legal Affairs for more information regarding the extent to which a contract may be changed.

b. Administrative Changes

Administrative changes to a contract are changes that are within the scope of the contract and do not affect or alter the rights of the parties. Examples of administrative changes include:

- Changes in billing instructions or contact information;
- Corrections of typographical errors not affecting the substance of the contract;
- Changes permitted by the specific contract language; and
- Changes in UTRGV or contractor representatives assigned to the contract.

c. Substantive Changes

Substantive changes are contractual changes that affect the rights of both parties.

Examples of substantive changes may include:

- Change in the price of goods/services under the contract;
- Change in the delivery schedule;
- Change in the quantity of goods/services;
- Change in specifications for goods/services;
- Change in the HSP
- Change of key personnel assigned to work on the contract; and
- Change of any terms and conditions.

d. Constructive Changes

Constructive changes to the contract may occur if UTRGV directs contractor to perform in a manner that differs from the terms of the contract. For example, if contractor perceives that work that exceeds the scope of the contract was ordered by UTRGV, contractor may claim that the contract was “constructively” changed. Contractor may be entitled to additional compensation as a result of constructive changes. Constructive changes may occur when Institution personnel:

- Provide suggestions to a contractor;
- Accelerate the delivery schedule;
- Direct that the work under the contract be performed in a manner that differs from the contract requirements;
- Change the sequencing of the work;
- Delay accepting or rejecting deliverables;
- Delay reviewing invoices and approving payment; and
- Interfere with or hinder contractor’s performance.

XXVI. Dispute Resolution Process

Appropriate dispute resolution is an essential contract management skill. Early identification of issues, effective communication with contractor, and providing contractor with written notice of issues raised by UTRGV (including a formal request to cure or a less formal written process) is crucial.

The goal of the dispute resolution process is to resolve contract issues through direct negotiation of UTRGV and contractor representatives, before the issues need third party resolution. To avoid escalation of contract issues and to ensure UTRGV does not alienate contractor representatives, it is imperative that UTRGV personnel respond promptly to all contractor inquiries.

Initial steps to be taken are:

1. Identify the Issue. Many times what appears to be an issue can be resolved before the issue becomes a problem by providing contractor with information or clarification.
2. Research Facts. When investigating contract issues, UTRGV should obtain as much factual information as possible from as many relevant sources as possible, including the project manager and contractor.
3. Evaluation. UTRGV should review all of the factual information and the contract requirements. After discussing with all decision makers, UTRGV should determine an appropriate course of action.

XXVII. Termination

Contract termination should be the last resort and should be rare. Contract termination reflects a failure by all parties to the contract.

When the contract terms permit termination, the parties are no longer obligated to continue performance of their duties and obligations under the contract. Depending on the specific contract terms, parties may terminate without cause (Termination for Convenience), with cause (Termination for Default) or for force majeure.

a. Termination for Convenience

If the contract permits UTRGV to terminate for convenience (also known as no-fault termination), UTRGV may terminate the contract at any time in its sole discretion, if termination is in the best interest of UTRGV.

1. Notice

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

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

In accordance with this Notice of Termination, Contractor must:

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

2. Final Payment

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

When UTRGV receives the final invoice from contractor for work performed prior to the termination date, UTRGV should thoroughly review the invoice to ensure that all charges are appropriate and comply with the terms of the contract as altered by notice

of termination.

b. Termination for Cause

UTRGV may be able to terminate a contract for cause if contractor failed to perform its duties and obligations under the contract and did not cure the failure within any cure period specified by the contract. A failure to perform may also be referred to as a breach or a default. If program staff consider terminating the contract for cause, the contract manager will contact UTRGV's Office of Legal Affairs for guidance and assistance.

UTRGV is not required to terminate a contract even though the circumstances permit termination. UTRGV may determine that it is in UTRGV's best interest to pursue an alternate resolution. Examples of alternatives may include extending contractor's delivery or completion date, allowing contractor to continue working, or working with contractor's surety (company that issued contractor's performance bond) to complete the outstanding work.

Termination for cause should be used only to protect the interests of UTRGV and should be used only as a last resort. Factors to consider prior to terminating for cause include:

- Has UTRGV done everything within reason to assist contractor in curing the contractual failure?
- The specifications, terms and conditions of the contract, Applicable Laws and University Rules.
- The nature of the contractual failure and the explanation provided by contractor for the failure.
- The urgency of UTRGV's need for the goods/services.
- The advantages and disadvantages of allowing contractor to continue performance.
- The availability of the goods/services from other sources.
- The time required to obtain the goods/services from another source (including the solicitation process) as compared to the additional time the current contractor needs to complete the work.
- The availability of funds to re-purchase the goods/services.

1. Potential for Damages

If a contract is terminated for failure to perform, contractor may be liable for damages. However, the contract may limit the damages UTRGV may recover. UTRGV may attempt to include re-procurement costs and other expenses in the calculation of damages it seeks to recover from contractor. However, obtaining an award of damages may require protracted legal action. If UTRGV is awarded damages, contractor may not be financially capable of paying and UTRGV may never recover the damages.

2. Cure Notice

When terminating for cause, UTRGV must comply with applicable contract terms. In most situations, the contract will require UTRGV to provide contractor written notice (1) specifying contractor's default that authorizes the Institution to terminate the contract, and (2) indicating that if contractor does not cure the default within the cure period specified by the contract, UTRGV intends to terminate the contract. This notice is sometimes referred to as a cure notice.

The format for a cure notice may be as follows:

Contractor is notified that the University believes contractor breached the contract as follows: [specify failures of contractor to perform its duties and obligations under the contract].

Unless contractor cures [this/these] breach(es) within _____ days after the date of this letter, the University may exercise its rights under the contract and applicable laws, including termination of the contract for cause in accordance with Section _____.

Another format for a cure notice is:

Because contractor failed to perform its duties and obligations under the contract within the time required by the contract terms, the University is considering terminating the contract under Section(s) _____.

Pending a final decision, the University is asking contractor to submit written information, if any, regarding whether contractor's failure to perform was the result of force majeure or other excusable causes. Please submit this information to the University within _____ days after the date of this notice. If contractor fails to submit this information within _____ days, University may exercise its remedies under the contract and applicable laws, including termination of the contract.

Any assistance provided to contractor by the University in connection with the contract or any acceptance by the University of goods/services that do not comply with contract requirements will be solely for the purpose of mitigating damages. It is not the intention of the University to condone any delinquency or to waive any rights the University may have under the contract.

3. Notice of Termination

If contractor fails to cure the default or provide a satisfactory explanation as requested, the contract may be terminated. The Notice of Termination should contain the following:

- Contract number, if any;
- Contract date;
- Effective date of termination;
- Reference to the contract Section under which the contract is being terminated;
- Statement of the facts justifying the termination; and
- Statement indicating that UTRGV may pursue all remedies available under Applicable Laws.

c. Force Majeure or Other Excusable Causes for Failure to Perform

UTRGV may not be able to terminate a contract for cause when contractor's failure to perform is the result of force majeure or other excusable causes. In order to qualify as an excusable cause, the cause must be beyond the control of and without the fault or negligence of contractor. Excusable causes for failure to perform duties and obligations under a contract generally include:

- Acts of God or of the public enemy;
- Acts of the Board of Regents;
- Fires;
- Floods;
- Epidemics;
- Strikes;
- Freight embargoes;
- *Unusually severe weather.**

**Severe weather, although beyond contractor's control, may not generally constitute an excusable delay if it is not considered "unusually severe weather." For example, a snow storm in Amarillo in February would not be considered unusual, while it would be considered unusual in Austin. On the other hand, a snow storm in Amarillo in June would indeed be unusual.*

If 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 contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the goods/services to be provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.

XXVIII. Contract Close-Out

A contract is completed when all goods/services have been received and accepted; all reports have been delivered and accepted; all administrative actions have been accomplished; all UTRGV-furnished equipment and material have been returned; and final payment has been made to contractor.

The contract closeout process is usually a simple but detailed administrative procedure. Purposes of the closeout process include (1) verification that all parties to the contract have fulfilled their contractual duties and obligations and there are no remaining unperformed duties or obligations; and (2) assessment of the success of the contract and lessons learned for use in future contracting.

A contract is ready for close out when:

- All deliverables (including reports) have been delivered to and accepted by UTRGV. The contract manager should compare actual performance against contractual performance measures, goals and objectives to determine whether all required work has been completed;
- Final payment has been made;
- All monitoring issues have been resolved;
- All property inventory and ownership issues are resolved, including disposition of any equipment or licenses purchased under the contract;

- UTRGV has acceptance all of the work;
- UTRGV has advised contractor of, and contractor is in compliance with, records retention requirements (see [Section 2.5](#) of this Handbook);
- UTRGV's plan for contract file maintenance is in place; and
- Deficiencies noted during the contract close-out process are documented and communicated to all appropriate parties.

A sample Contract Close-Out Checklist is attached as APPENDIX 2.

APPENDIX 1 Sample Contract Terms

OGC's *Agreement between University and Contractor Template* includes OGC's suggested terms and conditions that should be included in most Institution contracts.

OGC's *Agreement between University and Contractor Template* is posted at: <https://www.utsystem.edu/ogcprotected/sampledocs.htm> [UT Authentication Required].

UTRGV must consider whether these terms and conditions are appropriate and sufficient based on the particular circumstances related to the contract or whether additional terms and conditions are necessary. Please consult UTRGV's Office of Legal Affairs with questions regarding applicability of any of the sample terms and conditions.

If the goods and services being procured will be funded with federal money or included in the calculation of overhead charged to federal projects, consult with UTRGV's Office of Legal Affairs or the Office of Sponsored Research regarding the need for additional contract provisions required by federal law or the specific terms of the grant or sponsored research contract.

APPENDIX 2 Sample Contract Monitoring Worksheet

DRAFT – SAMPLE CONTRACT MONITORING WORKSHEET <i>To be Included in Contract Monitoring Binder; References to Tabs are to Location in Binder</i>			Division: Information Services Division						
Contractor Type of Contract	Specific Monitoring Activities to Be Performed	Performance Method including information sources to be used	Responsible Individual for Each Monitoring Activity	Monitoring Activity Frequency	Monitoring Activity Documentation Method	Results of Monitoring Activity Communicated to	Results of Monitoring Uses (include follow up requirements)	Communicated to	Use
Acme Consultants, PC; Consulting Services									
	Review of Consultant's Quarterly Draft Reports for Contract Compliance [this is <i>only one example of what will be many monitoring activities</i>]	Compare Draft Report to Contract Requirements	Jane Doe	Quarterly	E-mail Report	Betty Jo, IT Division Manager	Routine status reports by Betty Jo, IT Division Manager, to Exec Management; acceptance or rejection of draft report deliverables as provided in Contract; Review milestone invoices prior to approval for payment; Require redelivery of draft report deliverables; Terminate contractor for nonperformance; Solicit replacement services	Board of Regents, Office of Finance	Reallocate funds

APPENDIX 3 Sample Contract Close-Out Checklist

Project Name	
Prepared by (Print)	Date Prepared
Customer	Contract
Contract Telephone/E-mail	
yes no n/a	All products and services required were provided to the buyer
yes no n/a	Documentation adequately shows receipt and formal acceptance of all contract terms.
yes no n/a	No claims or investigations are pending on this contract.
yes no n/a	Any buyer furnished property or information was returned to the buyer.
yes no n/a	All actions related to contract price revisions and changes are concluded.
yes no n/a	All outstanding subcontracting issues are settled.
yes no n/a	If a partial or complete termination was involved, action is complete.
yes no n/a	Any required contract audit is now complete.
Notes:	