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TO: Scott G. Davis, Director, Disaster Recovery and Special Issues Division, DGBD

FROM: *//signed//*
Gerald R. Kirkland
Regional Inspector General for Audit, Fort Worth Region, 6AGA

SUBJECT: The Texas Department of Housing and Community Affairs Did Not Fully Follow Requirements or Best Practices in the Acquisition of Its Disaster Recovery-Funded Program Management Firm

HIGHLIGHTS

What We Audited and Why

We audited the U. S. Department of Housing and Urban Development (HUD) Community Development Block Grant (CDBG), Supplemental II Disaster Recovery program, funds, administered by the Texas Department of Housing and Community Affairs (TDHCA). Specifically, we wanted to determine whether TDHCA followed Federal and State of Texas (State) regulations in procuring the program management firm to administer the Housing Assistance and Sabine Pass Restoration Programs. This is the third audit of the State of Texas Disaster Recovery funds conducted as part of the Office of Inspector General's (OIG) commitment to HUD to implement oversight of the Disaster Recovery funds to prevent fraud, waste, and abuse.

What We Found

TDHCA did not follow requirements or best practices in the acquisition of its Disaster Recovery-funded program management firm (Firm).¹ Specifically, it

¹ ACS State & Local Solutions, Inc. (ACS)

accepted and approved the only proposal received when the proposal's cost exceeded the request for proposals' specification by \$3.68 million. TDHCA made material changes to the contract that increased the maximum cost by \$1.99 million, budgeted \$210,000 in prohibited costs, and contracted to pay the Firm using multiple payment types including \$2.23 million for a cost plus a percentage of cost type, which is prohibited by Federal regulations. In addition, TDHCA's contract with the Firm lacked sufficient detail tying construction management services and oversight to the payment and budget section costs for the proper identification and allocation of \$14.33 million in costs. As a result, TDHCA cannot ensure it received the best value to the State, and its contract included ineligible and unsupported costs of almost \$18.76 million.

What We Recommend

We recommend that HUD's Disaster Recovery Assistance and Special Issues Division Director require TDHCA to (1) adopt sound agency business procedures for Disaster Recovery-funded procurements in accordance with State policy, (2) train its staff to ensure that they follow its policies, (3) reimburse its Disaster Recovery account for \$2.44 million in ineligible costs, (4) provide support for or reimburse \$16.32 million in unsupported costs, and (5) modify its contract language.

For each recommendation without a management decision, please respond and provide status reports in accordance with HUD Handbook 2000.06, REV-3. Please furnish us copies of any correspondence or directives issued because of the audit.

Auditee's Response

We provided TDHCA our draft report on June 11, 2010, and requested comments by June 28, 2010. TDHCA requested an extension until July 7, 2010, to provide comments, which we granted. We held an exit conference on June 21, 2010. TDHCA provided its response to the draft report on July 7, 2010. TDHCA generally agreed with the audit report. The complete text of the auditee's response, along with our evaluation of that response, can be found in appendix B of this report.

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BACKGROUND AND OBJECTIVE

Congress authorized two supplemental funding appropriations to assist the Gulf Coast States in recovering from the destruction of Hurricanes Katrina, Rita, and Wilma. Public Law 109-148 authorized \$11.5 billion (Supplemental I), and Public Law 109-234 (Supplemental II) authorized \$5.2 billion in Disaster Recovery program funding. Of the \$16.7 billion, the State of Texas (State) received \$503 million through the U. S. Department of Housing and Urban Development (HUD) Community Development Block Grant (CDBG) program to address areas most impacted by Hurricanes Rita and Katrina.

The Governor of Texas selected the Texas Department of Housing and Community Affairs (TDHCA) as the lead agency to administer the Disaster Recovery funds. TDHCA was established in 1991 as the State's primary agency to provide essential public service and housing needs for extremely low to moderate income individuals and families in Texas. TDHCA in conjunction with the State's Council of Governments distributed the Supplemental I funds for housing. The Supplemental II funds were distributed for housing using a procured program management firm (Firm).

In May 2007, TDHCA solicited through a competitive request for proposals (request) for a firm to administer the Housing Assistance Program (HAP) and the Sabine Pass Restoration Program (SPRP). The request and subsequent contract were an extremely large and complex procurement for TDHCA; normally State CDBG funds are not used directly to procure contracts. Further, the firm was to be responsible for the distribution of more than \$222 million in Supplemental II housing aid to homeowners affected by the hurricanes. The bidder's conference held by TDHCA attracted 34 representatives from 17 entities. Four entities, including ACS State and Local Solutions, Inc. (ACS), Shaw Environmental, Inc. (Shaw), and Reznick, Mississippi, L.L.C. (Reznick), combined to submit one proposal with ACS designated as "the Firm" in July 2007. In August 2007, TDHCA's board approved the Firm's proposal, which included three of the four proposed entities, and after several months of negotiations, TDHCA contracted with the Firm in December 2007. As of March 2010, TDHCA reported that the Firm had constructed or rehabilitated 1,129 homes with Supplemental II Disaster Recovery funds.

Our objective was to determine whether the TDHCA followed Federal and State of Texas regulations in the acquisition of the program management firm to administer the Housing Assistance and Sabine Pass Restoration Programs.

RESULTS OF AUDIT

Finding: TDHCA Did Not Fully Follow Requirements or Best Practices in the Acquisition of Its Disaster Recovery-Funded Program Management Firm

TDHCA did not always follow Federal or State requirements and best practices in the evaluation of the single proposal and subsequent contract award with the Firm. Specifically, it accepted and approved the only proposal received when the proposed cost exceeded the request for proposals' (request) specifications by \$3.68 million. In addition, it made material changes to the request's specifications during contract negotiations by increasing the maximum cost by \$1.99 million, budgeting \$210,000 in prohibited costs, and allowing multiple payment types. Further, TDHCA did not detect a \$2.23 million cost plus a percentage of cost payment type that is not allowed under Federal requirements.² TDHCA's contract with the Firm lacked sufficient detail describing and tying the construction management and oversight services to the payment and budget sections to allow for the proper identification and allocation of \$14.33 million in costs. As a result, TDHCA cannot ensure it received the best value to the State, and its contract included ineligible and unsupported costs of \$18.76 million. The lack of contract details also placed TDHCA at risk of paying unidentified, unallowable, or possible duplicate construction management and oversight costs.

TDHCA Needed Sound Business Procedures

HUD allowed States to follow their own procurement policies.³ The State of Texas follows the Texas Government Code, the Texas Administrative Code, the State's Procurement Manual, and the State's Contract Management Guide for procurements. TDHCA indicated it followed State policy; however, the Contract Management Guide stated that "each agency is independently responsible for developing sound business procedures in accordance with applicable federal and state laws, regulations, policies and procedures."⁴

TDHCA had general procurement standards,⁵ but it did not provide independent agency procurement business procedures. The lack of agency procedures had a negative impact, as there appeared to be confusion as to which procurement procedures to follow. In interviews, TDHCA stated that Federal procurement

² Appendix C, 24 CFR (Code of Federal Regulations) 570.489(g)

³ Appendix C, 24 CFR 570.489(d) and (g)

⁴ Appendix C, State of Texas Contract Management Guide, Version 1.6, Introduction, Purpose

⁵ Appendix C, Texas Administrative Code, title 10, chapter 5, rule 5.10, Procurement Standards

regulations⁶ did not apply, but in e-mails generated at the time of the procurement, its staff indicated that Federal procurement regulations⁷ applied. However, it included different Federal procurement requirements in the contract.⁸

TDHCA Properly Prepared and Advertised the Request

TDHCA properly coordinated with the Texas Building and Procurement (Commission) to prepare the request. The Commission delegated procurement authority to TDHCA, and TDHCA sent the request for review to the State’s Contract Advisory Team. In addition, TDHCA properly advertised the request on the State’s Web site, held a “Bidder’s Conference” to answer offerors’ questions, and properly followed bid-opening procedures.

The Proposal Did Not Comply with the Request’s Specifications

TDHCA did not follow State procurement requirements⁹ as it accepted the one proposal received even though the total cost of the Firm’s individual operating budgets exceeded the budget summary and the maximum administrative fees available in the request. TDHCA used the competitive request for proposal method of procurement¹⁰ to solicit a firm to administer the Housing Assistance and Sabine Pass Restoration Programs as a turnkey solution for homeowners affected by Hurricanes Rita and Katrina. The request stated that the selected firm was to receive a maximum of \$32.24 million¹¹ for administrative, planning, and project delivery costs. Although 17 bidders attended the pre-bidders conference, TDHCA received 1 proposal from the Firm to provide the required services. TDHCA did not check the mathematical accuracy of the budget summary amount by comparing it to the sum of the 11 individual operating budgets. Thus, it did not notice that the individual budgets totaled to more than the budget summary, as follows:

Compare Firm’s proposal amounts		
11 individual budgets	Project budget summary	Difference
\$35,933,105	\$32,190,453	\$3,742,652

⁶ Appendix C, 24 CFR 85.36(a), Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally Recognized Indian Tribal Governments

⁷ Appendix C, 24 CFR 85.36 Procurement, (f) Contract cost and price

⁸ The Firm’s contract references the Federal Acquisition Regulation at 48 CFR Part 31 for allowability of costs.

⁹ Appendix C, Texas Government Code, sections 2262.051 and 052 and 2155.074(a) and (b)

¹⁰ Appendix C, Request for Proposals, section 2.0, and Texas Government Code, chapter 2156, subchapter C

¹¹ Appendix C, Request for Proposals, section 4.4

In addition, the individual budgets' total exceeded the maximum administrative fee available in the request¹² by a material amount.

Compare individual budgets' total to request		
Firm's 11 individual budgets	TDHCA's request maximum	Difference
\$35,933,105	\$32,243,834	\$3,689,271

TDHCA contended that the request was only a guide, a nonbinding and nonlimiting solicitation for services when factors other than price were evaluated and when negotiations were contemplated. Therefore, the subsidiary budgets submitted by the Firm were not a firm offer. However, as the request contained an award all or none requirement¹³ and the State's policies required TDCHA to determine whether the response complied with specifications, which included the maximum administrative fee,¹⁴ TDHCA should have considered rejecting the proposal. Since it did not detect and address this error, it cannot ensure it received the best value for the services solicited.

Proposal Evaluations Were Not Independently Performed

TDHCA performed an evaluation of the Firm's proposal even though it only received the one response. However, rather than having each team evaluation member separately review the proposal as required by State policy,¹⁵ TDHCA's staff members assigned to scoring the proposal used the same application review sheet to score and review it. According to State policy, evaluation members are responsible for an independent and impartial evaluation of the submittals to maintain integrity in the evaluation process.¹⁶ TDHCA staff members explained that had they received more than one proposal, a formal evaluation and scoring process would have taken place, but since there was only one proposal, the evaluation team only focused on meeting the request's requirements. TDHCA further asserted that protocol would be followed in the future.

¹² Appendix C, Texas Contract Management Guide, chapter 5, Evaluation and Award, Responsive Proposals and the Texas Administrative Code, Title 34, Part I, Chapter 20, Subchapter C, Rule 20.36 (a)(7).

¹³ Appendix C, Request for Proposals, section 4.0

¹⁴ Appendix C, Texas Contract Management Guide, chapter 5, Evaluation and Award, Evaluation Teams, Responsive Proposals, and Proposal Evaluation

¹⁵ Appendix C, Texas Contract Management Guide, chapter 5, Evaluation and Award, Evaluation Teams

¹⁶ Appendix C, Texas Contract Management Guide, chapter 5, Evaluation and Award, Evaluation Teams, Proposal Evaluation, and appendix 6, Evaluation Team Briefing Instructions

Single Responses Requirements Were Not Followed

According to the State's policy, since TDHCA only received one response, it was required to review the solicitation for any unduly restrictive requirements and contact some potential respondents to determine why they did not submit a response. Further, it should have considered the reasons that other responses were not received and determined whether it was in the best interest of the State to make the award, to readvertise with revised specifications, or to determine whether a proprietary or single source justification was required.¹⁷ TDHCA's procurement policies indicated that this was a noncompetitive proposal, as its policies defined a noncompetitive proposal as one in which "after solicitation of a number of sources, competition is determined inadequate."¹⁸

TDHCA staff asserted in interviews that this policy was followed but could not document it. Instead, TDHCA provided a sole source justification memorandum, dated October 26, 2009, which was more than 2 years after it approved the proposal on August 28, 2007. According to TDHCA staff, this memorandum was generated for the State's independent auditors to explain the procurement and to apparently comply with the State's policy on proprietary purchases. Compliance with the State's policy did not occur. A memorandum should only be used for purchases under \$100,000; a formal letter to the State's Comptroller of Public Accounts was required for purchases greater than \$100,000.¹⁹

Material Changes Were Made to the Request's Specifications during Contract Negotiations

TDHCA made material changes to the request's specifications during contract negotiations by increasing the maximum cost for administration by \$1.99 million, budgeting \$210,000 in prohibited proposal preparation costs, and allowing multiple payment types. State policies allow the offeror to make changes during contract negotiations;²⁰ however, the State cannot make material changes to the advertised request specifications.²¹ These State policies ensure that contract objectives are not inadvertently changed during negotiations and ensure that adequate competition occurs, resulting in the best value to the State.

¹⁷ Appendix C, Texas Contract Management Guide, chapter 5, Evaluation and Award, Single Responses

¹⁸ Appendix C, Texas Administrative Code, title 10, chapter 5, rule 5.10(c)(4), Procurement Standards

¹⁹ Appendix C, Texas Procurement Manual, section 2.21, Proprietary Purchases

²⁰ Appendix C, Texas Government Code, section 2156.124(b)

²¹ Appendix C, Texas Administrative Code, Title 34, Part I, Ch 20, Subchapter C, Rule 20.31(b)(4)

The Contractor’s Amount Exceeded the Request’s Specifications

TDHCA did not follow the State’s best practices for contract management as the contract exceeded by more than \$1.99 million the maximum administrative fee it set in the request, as detailed below.²²

Administrative fee category	Request maximums	Contract amounts	Difference
Planning/project delivery costs	\$22,237,127	\$23,655,848	\$1,418,721
Program administrative costs	10,006,707	10,582,827	576,120
Totals	\$32,243,834	\$34,238,675	\$1,994,841

State policy allows negotiation; however, material changes to the request’s specifications cannot be made. TDHCA’s \$1.99 million increase in administrative fees was a material change to the request’s specifications. TDHCA did not provide justification or support for the increase in the administrative fees. It admitted that formal documentation to support cost reasonableness was not available; however, it asserted that the cost increase was well within the discretion and latitude outlined in the State’s action plan and did not conflict with Federal or State procurement requirements. Additionally, TDHCA did not make other potential contractors aware of the increase in administrative fees, which could have influenced their decision to submit a proposal. Therefore, it did not know whether it received the best value to the State for the award.

The Contract Budget Included Costs Prohibited in the Request

TDHCA’s contract with the Firm included \$210,000 in the budget for “Pre Award Costs.”²³ A review of the contract’s budgets and a few invoices showed that the Firm billed proposal preparation costs as “Pre Award Costs,” which were described as “RFP [request for proposals] Response and Prep.” However, TDHCA’s request specifically stated, “the offeror shall bear all costs related to the preparation and submittal of their proposals.”²⁴ As a result, the \$210,000 was an ineligible cost. TDHCA stated that this was an error as it never intended to pay bid preparation costs. TDHCA staff agreed that if these costs were incurred before acceptance of the Firm’s proposal, they were ineligible and steps would be taken to recover the funds.

²² Appendix C, Request for Proposals, section 4.4

²³ Contract between TDHCA and the Firm, exhibit 4.1, Requirements for Payment and Reimbursement of Program Administrative, Planning and Project Delivery and Pass-Through Funds, attachment 1 and section 2

²⁴ Appendix C, Request for Proposals, section 3.8

The Contract Included Multiple Payment Types

TDHCA's request stated that the Firm would receive a cost reimbursement contract.²⁵ The contract with the Firm included a budget that indicated it would be reimbursed for costs plus profit. The contract also stated the Firm would be paid a per transaction rate (the "Per Home Rate") for construction management and oversight services on each home constructed or rehabilitated. The budget in the contract also contained a "Construction Mgmt Fee," which was calculated as a cost plus a percentage of cost.²⁶

According to State policy, TDHCA's contract with the Firm contained three State contract payment types,²⁷ one of which was a cost plus a percentage of cost method that was not allowed by Federal regulations.²⁸ Further, two payment types, cost plus a percentage of cost and cost plus a fixed fee, appeared to be an improper combination because the State's policy allowed for a cost plus a percentage of cost "or" cost plus a fixed fee.²⁹ The change from a cost reimbursement type to multiple payment types was a material change and should not have occurred. TDHCA indicated it was working with the Firm to define construction categories, identify specific activities for each category, and provide documents to support each activity.

The Contract Included an Ineligible Payment Type

TDHCA's contract with the Firm included a budget category for a "Construction Mgmt Fee," which totaled \$2.23 million.³⁰ A review of the contract's budget showed that it calculated this fee by multiplying a "7.5% Supplier Subcontractor Markup" against project delivery costs.³¹ Although State policy allowed cost plus type payment methods, HUD's State CDBG program regulations did not allow a cost plus a percentage of cost method of contracting. Further, TDHCA's procurement policy stated that in the case of any conflict between the Office of Management and Budget (OMB) Circulars or Federal laws and State laws involving Federal funds, the OMB Circular or Federal law would prevail.³² As both the Firm and its subcontractor agreed to follow HUD's requirements,³³ the \$2.23 million in "Construction Mgmt Fee" costs were ineligible. TDHCA stated it was taking steps to amend the contract to remove the cost plus a percentage of cost payment type.

²⁵ Appendix C, Request for Proposals, section 1.5.2

²⁶ Contract between TDHCA and the Firm, exhibit 4.1, attachment 1, Subcontractor Cost Budget

²⁷ Appendix C, Texas Contract Management Guide, chapter 3, Preparing the Solicitation, Payment Types

²⁸ Appendix C, 24 CFR 570.489(g)

²⁹ Appendix C, Texas Contract Management Guide, chapter 3, Preparing the Solicitation, Payment Types

³⁰ Contract between TDHCA and the Firm, exhibit 4.1, section 2, and attachment 1

³¹ Contract between TDHCA and the Firm, exhibit 4.1, attachment 1

³² Appendix C, Texas Administrative Code, title 10, chapter 5, rule 5.10(b), Procurement Standards

³³ Contract between TDHCA and the Firm and subcontractors, section 6.3, Certifications

The Contract Included Budgeted Costs That Did Not Tie to Deliverables

TDHCA’s contract with the Firm lacked sufficient detail describing and tying the amounts in the payment and reimbursement section to the scope of services section. The scope of services section of the contract described construction administration, contract management of subcontractors, construction management, and construction oversight. However these terms were not clearly tied to the payment section, which included these terms in more than one budget cost category. TDHCA also did not approve a final budget³⁴ that separately allocated all costs by program, Housing Assistance or Sabine Pass Restoration Program. As a result, it cannot support \$4.28 million³⁵ in budgeted costs.

The contract’s payment and reimbursement section defined costs, included a budget detailing the maximum reimbursable amounts, and outlined reimbursement procedures. Costs included program administration costs, planning costs, project delivery costs, supplier profit, and direct costs that would be paid through “Pass-Through Funds.”³⁶ The contract budget summary contained three categories under project delivery costs, all of which involved construction management, as detailed in the following table.

Budget summary description	Amount
“PMO Total-Shaw” ³⁷	\$1,422,128
“Construction Mgmt”	2,856,620
“Construction Mgmt Fee”	2,231,365
Total	\$6,510,113

The detailed budget provided little additional language other than to briefly explain the various categories. The contract’s scope of service’s section included the services to be provided by the Firm and its subcontractors. Comparing the language in the contract’s payment section to the scope of services showed that the terms used did not tie and were used interchangeably for the various budget categories and services. For example, the scope of services section detailed construction management of subcontractors, construction management of rehabilitation, and construction oversight for new homes, but the budget summary had three categories, all of which contained construction management without detailing for what service the budgeted cost was paying. Further, salary

³⁴ Contract between TDHCA and the Firm exhibit 4.1, section 3

³⁵ The actual amount of unsupported project delivery costs is \$6.51million; however, \$2.23 million was previously questioned in the finding as ineligible (\$6.51-\$2.23=\$4.28 million).

³⁶ Contract between TDHCA and the Firm, exhibit 4.1, “Pass-Through Funds: Direct costs incurred in the performance of home rehabilitation and reconstruction activities...”

³⁷ Contract between TDHCA and the Firm, exhibit 4.1, section 2, and attachment 1, Subcontractor Cost Budget

information provided with the detailed budget was not sufficient to tie positions to the scope of services section. In addition, as discussed further below, the “Per Home Rate” was also for construction management and oversight. As the scope of services included deliverables, all of which generally fell under construction management and oversight, TDHCA lacked clear terminology that tied services to the costs.

The Contract Included a Poorly Defined, Unbudgeted, and Unsupported “Per Home Rate”

TDHCA included a “Per Home Rate” in the payment section of the contract. The “Per Home Rate” was for construction management and oversight services related to home rehabilitation and new construction, as follows:

- Homes for rehabilitation (general contractor comprehensive service construction management) - \$5,044/home;
- New “Stick-Built” home construction (construction oversight) - \$1,510/home; and
- New manufactured home construction (construction oversight) - \$800/Home³⁸

According to the Firm, the “Per Home Rate” was estimated to cost \$10.05 million.³⁹ However, TDHCA’s contract did not clearly specify in the contract language where the “Per Home Rate” would be allocated or whether a maximum existed for this rate. Further, the “Per Home Rate” was not included in the budget, and the contract also did not clearly specify whether the “Per Home Rate” costs would be project delivery costs, paid through the administrative fee, or paid with “Pass-Through Funds” as a direct cost. The contract stated that the rate would be paid according to section 2B,⁴⁰ which did not exist. However, section 3B of the contract stated that all costs paid would “be on a reimbursement basis” and “Pass-Through Funds” draws shall be sufficiently detailed and paid according to milestones with percentage payments being made based on the amount of milestone work completed.⁴¹

TDHCA's lack of a clear definition of the “Per Home Rate” impacted its ability to oversee this contract item. Various TDHCA staff members provided conflicting

³⁸ Contract between TDHCA and the Firm, exhibit 4.1, section 2

³⁹ Contract between TDHCA and the Firm, exhibit 4.1, attachment 1, Unit Pricing Budget, showed a \$5,044 rate applied to 739 homes to be rehabilitated ($\$5,044 \times 739 = \$3,727,516$) and rate of \$1,510 applied to 4,186 new homes ($\$1,510 \times 4,186 = \$6,320,860$). Thus, the estimated “Per Home Rate” totaled \$10,048,376 ($\$3,727,516 + \$6,320,860 = \$10,048,376$).

⁴⁰ Contract between TDHCA and the Firm, exhibit 4.1, section 2

⁴¹ Contract between TDHCA and the Firm, exhibit 4.1, section 3

definitions and explanations of the “Per Home Rate.” In one explanation, the “Per Home Rate” was described as a part of the budgeted line item “Construction Mgmt Fee.” In another, it was detailed as hard costs directly charged through “Pass-Through Funds” for home inspections. In an e-mail generated at the time of the procurement, it appeared that the “Per Home Rate” was to replace the budgeted “Construction Mgmt” and the “Construction Mgmt Fee,” but that did not occur.

A few invoices were reviewed in an attempt to determine what costs and services TDHCA paid for with the “Per Home Rate.” The review showed the “Per Home Rate” (1) involved inspections, (2) was paid in full even though homes had not been completed, and (3) was paid with “Pass-Through Funds,” indicating a direct cost. TDHCA cannot support that the rate was solely a direct cost, as it had no cost detail. Additionally, costs associated with home inspections like the inspector’s salaries, vehicle expenses, and other miscellaneous costs were invoiced and paid from “Construction Mgmt,” which indicated that the rate may not have been supported as a direct inspection cost.

Since TDHCA did not specify where the ‘Per Home Rate’ would be paid from and it allowed the rate to be charged to “Pass-Through Funds,” it effectively increased the total cost of the contract from \$34.24 million to almost \$44.29 million.⁴² Decreasing the amount of “Pass-Through Funds” reduced the amount available to rehabilitate and construct homes. The lack of sufficient contract detail tying the budget cost items to specific deliverables in the scope of services placed TDHCA at risk of paying unidentified, unallowable, or possibly duplicate construction management and oversight costs, making the entire estimated \$10.05 million “Per Home Rate” unsupported. In addition, the invoice review showed TDHCA did not ensure that the Firm billed the “Per Home Rate” according to contract terms, which resulted in its paying the full fee for more than 600 homes when only 4 had been completed. Further, as TDHCA did not set a maximum amount for the “Per Home Rate” in the contract, the Firm had no incentive to minimize costs.

TDHCA agreed that the contract did not clearly detail the activities involved in construction management, inspections, and construction fees. It stated it had undertaken a preliminary review of costs and there was no indication of comingling of fees. As a review of the costs was outside the scope of this audit, testing was not performed to confirm this statement; however, the contract needs modification to ensure that proper identification of costs and billing occurs.

⁴² The original contract price of \$34,238,676 will increase by the \$10,048,376 estimated cost for the “Per Home Rate” ($\$34,238,676 + \$10,048,376 = \$44,287,052$).

Conclusion

TDHCA did not always follow Federal and State requirements and best practice procedures in the evaluation of the single proposal and subsequent award of the contract to the Firm. Consequently, it accepted a proposal that materially did not meet specifications, made material changes to the request's specifications during contract negotiations, included prohibited costs and ineligible payment types, and did not include language in the contract adequately tying the budgeted costs to service deliverables. As a result, TDHCA cannot support budgeted costs and it included ineligible costs, as follows.

Cost category	Unsupported	Ineligible	Totals
Contract exceeded specifications	\$ 1,994,841		\$1,994,841
Proposal preparation costs		\$ 210,000	210,000
“Construction Mgmt Fee”		2,231,365	2,231,365
“PMO Total-Shaw”	1,422,128		1,422,128
“Construction Mgmt”	2,856,620		2,856,620
“Per Home Rate”	10,048,376		10,048,376
Totals	\$16,321,965	\$2,441,365	\$18,763,330

Recommendations

We recommend that HUD's Disaster Recovery Assistance and Special Issues Division require TDHCA to

- 1A. Adopt sound agency business procedures for Disaster Recovery-funded procurements in accordance with State policy.
- 1B. Train staff to adequately follow State and Federal procurement requirements in the evaluation and acceptance of proposals and contract negotiations and contract formation. Further, if staff fail to follow requirements, TDHCA should have procedures in place to address noncompliance.
- 1C. Reimburse the HUD funded Disaster Recovery program \$210,000 for any ineligible proposal preparation costs.
- 1D. Provide support for the \$1,994,841 material increase to the administrative fees or repay its HUD funded Disaster Recovery program.

- 1E. Modify its contract to correct the \$2,231,365 cost plus a percentage of cost “Construction Mgmt Fee.” Any payments made to the Firm under this payment type must be repaid to its HUD funded Disaster Recovery program.
- 1F. Modify the contract language to include sufficient detail to allow for the proper tying of budgeted costs to the scope of services and approve a final budget that properly identifies and allocates all costs to support \$14,327,124 in questioned costs: \$10,048,376 in estimated “Per Home Rate” costs, \$2,856,620 for budgeted “Construction Mgmt,” and \$1,422,128 for “PMO-Shaw Labor” costs.

SCOPE AND METHODOLOGY

We conducted our audit at the Texas Department of Housing and Community Affairs' office in Austin, TX, and the HUD Office of the Inspector General (OIG) office in San Antonio, TX. We performed our audit work between November 2009 and May 2010. To accomplish our objective, we

- Reviewed Federal and State procurement policy, regulations, and practices.
- Reviewed HUD and State Disaster Recovery grant agreements and the State's HUD-approved action plan.
- Reviewed TDHCA's request for proposals, the Firm's proposal, the contract between TDHCA and the Firm, the two subcontracts, and other procurement information concerning this procurement maintained by TDHCA.
- Reviewed HUD's monitoring reports, the Texas State Office of Audit reports, and documentation regarding the Disaster Recovery funds.
- Interviewed HUD Office of Community Planning and Development management and staff.
- Interviewed TDHCA Disaster Recovery Division executives, managers, and staff.
- Interviewed the Texas State Comptroller of Public Accounts⁴³ manager and staff.
- Obtained and reviewed some voucher payments for reasonableness, eligibility, and evidential support.

To accomplish our objective related to procurement, we compared TDHCA's procurement information to the Comptroller of Public Accounts' files to verify the data's completeness and accuracy. We used the HUD State CDBG program regulations and the State's Government Code, Procurement Manual, and Contract Management Guide to verify all requirements were implemented and documented as required. TDHCA's evaluation documentation was reviewed for adequate evaluation team composition, team independence, and the responsiveness of the Firm's proposal. TDHCA's contract with the Firm was evaluated against its threshold criteria in the request. We obtained from TDHCA the Firm's payment requests and draws from January 2008 through November 2009. A few of the payment requests and draws were matched to the contract's described services to validate whether budgeted costs were tied to the scope of services.

We conducted the audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

⁴³ The Comptroller of Public Accounts, Contract Advisory Team Review and Delegation (CATRAD), procedures require major contracts over \$1 million to be reviewed by the CATRAD.

INTERNAL CONTROLS

Internal control is a process adopted by those charged with governance and management, designed to provide reasonable assurance about the achievement of the organization's mission, goals, and objectives with regards to

- Effectiveness and efficiency of operations,
- Reliability of financial reporting, and
- Compliance with applicable laws and regulations.

Internal controls comprise the plans, policies, methods, and procedures used to meet the organization's mission, goals and objectives. Internal controls include the processes and procedures for planning, organizing, directing, and controlling program operations as well as the systems for measuring, reporting, and monitoring program performance.

Relevant Internal Controls

We determined that the following internal controls were relevant to our audit objective:

- Policies and procedures established and/or followed by TDHCA regarding procurement, including the request, the proposal evaluation, and the contract award.

We assessed the relevant controls identified above.

A deficiency in internal control exists when the design or operation of the control does not allow management or employees, in the normal course of performing their assigned functions, the reasonable opportunity to prevent, detect, or correct (1) impairments to effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations on a timely basis.

Significant Deficiencies

Based on our review, we believe that the following item is a significant deficiency:

- TDHCA did not follow requirements or best practices in the acquisition of its Disaster Recovery-funded contract with the Firm (see finding).

FOLLOW-UP ON PRIOR AUDITS

**The Texas Department of
Housing and Community
Affair's Disaster Recovery
Action Plan Needs
Improvement, 2009-FW-1016**

We issued an audit report on the CDBG Supplemental I and II Disaster Recovery program funds in September 2009 with the following recommendation: HUD should request that TDHCA modify its action plan to either provide homeowner's insurance for a reasonable period to all newly reconstructed or repaired homes for a period equitable to the amount of funds invested and the life of the asset, or request the homeowner to obtain homeowner's insurance as a prerequisite to obtaining assistance for a period equitable to the amount of funds invested and the life of the asset, or prohibit the homeowner from being able to receive future Disaster Recovery assistance if an insurance policy is not maintained on a newly reconstructed or repaired home, which will result in \$60.2 million in funds to be put to better use. HUD agreed to request that TDHCA modify its procedures. The recommendation is in an open status.

APPENDIXES

Appendix A

SCHEDULE OF QUESTIONED COSTS

Recommendation number	Ineligible <u>1/</u>	Unsupported <u>2/</u>
1C	\$ 210,000	
1D		\$ 1,994,841
1E	<u>2,231,365</u>	
1F		<u>14,327,124</u>
Totals	<u>\$2,441,365</u>	<u>\$16,321,965</u>

1/ Ineligible costs are costs charged to a HUD-financed or HUD-insured program or activity that the auditor believes are not allowable by law; contract; or Federal, State, or local policies or regulations.

2/ Unsupported costs are those costs charged to a HUD-financed or HUD-insured program or activity when we cannot determine eligibility at the time of the audit. Unsupported costs require a decision by HUD program officials. This decision, in addition to obtaining supporting documentation, might involve a legal interpretation or clarification of departmental policies and procedures.

Appendix B

AUDITEE COMMENTS AND OIG'S EVALUATION

Ref to OIG Evaluation

Auditee Comments

 TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS <hr/> <small>www.tdhca.state.tx.us</small>	
<small>Rick Perry GOVERNOR Michael Gerber EXECUTIVE DIRECTOR</small>	<small>BOARD MEMBERS C. Kent Comine, <i>Chair</i> Gloria Ray, <i>Vice Chair</i> Leslie Bingham Escareño Tom H. Gann Lowell A. Keig Juan S. Muñoz, Ph.D.</small>
<p>July 6, 2010</p> <p>Mr. Gerald R. Kirkland Regional Inspector General for Audit HUD Office of Inspector General, Region VI 819 Taylor Street, Suite 13A09 Fort Worth, TX 76102</p> <p>Re: TDHCA Response to Draft Audit Report regarding the CDBG Disaster Recovery Grant— outsource contracting for Hurricane Rita Round II</p> <p>Dear Mr. Kirkland:</p> <p>The Texas Department of Housing and Community Affairs reviewed the entire audit report referenced above including the recommendations made by HUD OIG staff. Let me reiterate that the State of Texas appreciates the thorough and thoughtful approach undertaken in this process. In any large program, especially those where they are first time programs given the scope and tasks involved, the Department recognizes that there is potential for improvement.</p> <p>While we do not necessarily agree with every item referenced in the body of the finding, we have elected instead not to address those issues, but rather concentrate on the recommendations and our responses to the suggestions offered.</p> <p>If you have any questions about either the general approach or the specific responses, please do not hesitate to let me know.</p> <p>Sincerely,</p> <p></p> <p>Michael Gerber Executive Director</p> <p style="text-align: center;"><small>221 East 11th - P.O. Box 13941 - Austin, Texas 78711-3941 - (800) 525-0657 - (512) 475-3800</small></p>	

Ref to OIG Evaluation

Auditee Comments

Comment 1

HUD OIG RECOMMENDATION 1A: Adopt sound agency business procedures for Disaster Recovery-funded procurements in accordance with State policy.

TDHCA Response: TDHCA has a very long history of complying with state procurement policies in the many reviews we have with state reviewers and discussions with the agencies directing the contracting process. Even with the excellent working relationships with external departments in our procurement process, we do believe that we can clarify the process and will review and either alter as necessary an internal Standard Operating Procedure for procurement (SOP 1210.03) or draft a specific SOP to reflect processes for procurements that involve limited bidders.

HUD OIG RECOMMENDATION 1B: Train staff to adequately follow State and Federal procurement requirements in the evaluation and acceptance of proposals and contract negotiations and contract formation. Further, if staff fails to follow requirements, TDHCA should have procedures in place to address noncompliance.

Comment 2

TDHCA Response: TDHCA took several steps to ensure a quality procurement in this contract process recognizing the difficulty that could be ahead. TDHCA hired the nationally respected law firm of Vinson and Elkins to work with the drafting of a comprehensive and complete Request for Proposals. TDHCA worked with the Texas Comptroller's Office to meet the state standards and to have additional procurement expertise provide guidance on the process. TDHCA acknowledges that additional training as part of the development of the new or revised SOP discussed in Recommendation 1A., will be needed and TDHCA commits to that training.

The recommendation also references the contract negotiation process. After the award process, TDHCA received approval by the Office of the Attorney General to employ the nationally respected government contract outsourcing legal firm of Hunton & Williams for the development of the Master Services Agreement. TDHCA is in agreement that one key exhibit to the contract will need to be addressed in relation to Recommendations 1D., 1E., and 1F. to provide greater clarity. That particular exhibit included a comprehensive program development and budget which attempted to forecast a new and previously unknown method of delivery of disaster recovery services.

HUD OIG RECOMMENDATION 1C.: Reimbursement from non-federal funds, the Disaster Recovery Program \$210,000 for any ineligible proposal preparation costs.

Comment 3

TDHCA Response: It is important to note that TDHCA's limitations in the Request for Proposals to eliminate the use of taxpayer funds for development costs for submissions seeking this business is the basis for this recommendation. Sufficient documentation existed to justify the reimbursement of these expenses, but in drafting the RFP TDHCA did not believe that taxpayers should pay for the costs of private businesses to seek state contracts and did not allow RFP response costs. Unfortunately, there was an error made in allowing this type of expense to be paid in conflict with the RFP. TDHCA agrees with this finding and will recapture \$210,000 in disallowed costs from the contractor and return it to the program for eligible costs.

Ref to OIG Evaluation

Auditee Comments

HUD OIG RECOMMENDATION 1D.: Provide support for the \$1,994,841 material increase to the administrative fees. If TDHCA cannot justify the increase in the contract price, it should reimburse the Disaster Recovery program from non-federal funds.

HUD OIG RECOMMENDATION 1E.: Modify its contract to correct the \$2,231,365 cost plus a percentage of cost "Construction Mgmt Fee." Either any payments that have been made to the Firm under this payment type will have to be repaid from non-federal funds or TDHCA must provide eligible and supported construction management service costs.

HUD OIG RECOMMENDATION 1F.: Modify the contract language to include sufficient detail to allow for the proper tying of budgeted costs to the scope of services and approve a final budget that properly identifies and allocates all costs to support \$14,327,124 in questioned costs: \$10,048,376 in estimated "per Home Rate" costs, \$2,856,620 for budgeted "Construction Mgmt," and \$1,422,128 for "PMO-Shaw Labor" costs.

TDHCA Response: TDHCA has combined Recommendations 1D., 1E., and 1F. because of the similar treatment in addressing the recommendations. TDHCA believes that it is important to note that all funds expended to date have gone to develop more than 1600 homes in the Hurricane Rita impacted areas—at this point the largest housing recovery effort in Texas history. In addition, the method of delivery using the outsource mechanism has drawn support at congressional hearings from public advocates (including at two different congressional hearings) as being “. . . in many respects [is] superior to our initial idea. Given the difficulty of hiring contractors, ensuring the quality of their work and holding them accountable, it is better to have the State overseeing the contracting rather than to place the responsibility on elderly or low income homeowners.” Texas’ desire to provide safe, decent and affordable housing rather than a compensation program has taken time and placed many unknowns in the process. In fact, the concern identified about the difficulty with contractors has been borne out to be true given the challenge of finding qualified contractors that slow program progress. TDHCA wishes the entire process could have gone more quickly, but there are several hurdles that do slow down the process, including the time to procure and contract with needed resources to rebuild communities.

The Department has verified that even with all the houses we have already completed, no funds referred to in Recommendation 1.D have been spent and therefore no recapture will be necessary for any previously expended funds. Our preliminary testing of existing files also allows us to be confident that there is adequate support for the funds referenced in Recommendation 1F so that no repayment would be anticipated due to an inability to tie expenditures to eligible activities.

Even though progress is being made more quickly now and TDHCA is satisfied based on our experience that proper cost controls are in place, TDHCA agrees in general that we should modify Exhibit 4.1 which includes the budget and the general structure of reimbursements to increase clarity. TDHCA has begun discussions and negotiations with

Ref to OIG Evaluation

Auditee Comments

Comment 4

our contractor to amend the contract by redrafting Exhibit 4.1 including a new budget, based on our current operations. During this amendment process, we will also address the cost increase of the original contract over the amount stated in the RFP and modify the contract to be generally compliant with the HUD OIG recommendations. At the end of the day, we expect amended Exhibit 4.1 and any other amendments to address the concerns raised within this finding related to clarity, type of payment, and mischaracterization of administrative payments above the RFP amount. We expect this amendment to be completed not later than August 15, 2010.

OIG Evaluation of Auditee Comments

- Comment 1** We are in agreement with TDHCA either altering its current standard operating procedures or issuing standard operating procedures to reflect the process for procurements that involve limited bidders.
- Comment 2** We agree that TDHCA should include additional procurement training as part of its new or revised internal standard operating procedures and that it should remain committed to the training.
- Comment 3** TDHCA agreed to recapture \$210,000 in disallowed proposal preparation costs from the contractor and use the recovered funds on other eligible program costs. Because TDHCA made the ineligible payment, it is TDHCA's responsibility to repay the funds irrespective of whether it recaptures the funds from the contractor.
- Comment 4** We agree that TDHCA should amend the contract and Exhibit 4.1 to include a new budget. TDHCA stated it expects that the contract amendments will address the \$1,994,841 contract price increase over the request for proposal and address other finding issues related to adding clarity to cost classifications and payment types. TDHCA will need to provide adequate support/justifications to HUD to address each of the issues in recommendations 1D, 1E, and 1F.

Appendix C

CRITERIA

Code of Federal Regulations

24 CFR 570.489(d), Fiscal controls and accounting procedures. (1) A state shall have fiscal and administrative requirements for expending and accounting for all funds received under this subpart. These requirements must be available for Federal inspection and must: (i) Be sufficiently specific to ensure that funds received under this subpart are used in compliance with all applicable statutory and regulatory provisions; (ii) Ensure that funds received under this subpart are only spent for reasonable and necessary costs of operating programs under this subpart; and (iii) Ensure that funds received under this subpart are not used for general expenses required to carry out other responsibilities of state and local governments. (2) **A state may satisfy this requirement by: (i) Using fiscal and administrative requirements applicable to the use of its own funds; (ii) Adopting new fiscal and administrative requirements; or (iii) Applying the provisions in 24 CFR part 85 ``Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.''** (*emphasis added*)

24 CFR 570.489(g), Procurement. When procuring property or services to be paid for in whole or in part with CDBG funds, the state shall follow its procurement policies and procedures. The state shall establish requirements for procurement policies and procedures for units of general local government, based on full and open competition. Methods of procurement (e.g., small purchase, sealed bids/formal advertising, competitive proposals, and noncompetitive proposals) and their applicability shall be specified by the state. Cost plus a percentage of cost and percentage of construction costs methods of contracting shall not be used.

24 CFR 85.36(a), Procurement. States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section

24 CFR 85.36(f), Contract and price (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in

substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price. (2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. (3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see Sec. 85.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles. (4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

Texas Government Code

Section 2155.074 (a) For a purchase of goods and services under this chapter, each state agency, including the commission, shall purchase goods and services that provide the best value for the state. (b) In determining the best value for the state, the purchase price and whether the goods or services meet specifications are the most important considerations. However, the commission or other state agency may, subject to Subsection (c) and Section 2155.075, consider other relevant factors...

Section 2156.124, Discussion and Revision of Proposals. (a) As provided in a request for proposals and under rules adopted by the commission, the commission or other state agency may discuss acceptable or potentially acceptable proposals with offerors to assess an offeror's ability to meet the solicitation requirements. When the commission is managing the request for proposals process, it shall invite a requisitioning agency to participate in discussions conducted under this section. (b) After receiving a proposal but before making an award, the commission or other state agency may permit the offeror to revise the proposal to obtain the best final offer. (c) The commission or other state agency may not disclose information derived from proposals submitted from competing offerors in conducting discussions under this section. (d) The commission or other state agency shall provide each offeror an equal opportunity to discuss and revise proposals.

Section 2262.051 (a) In consultation with the attorney general, the Department of Information Resources, the comptroller, and the state auditor, the commission shall develop or periodically update a contract management guide for use by state agencies...(g) The guide must establish procedures under which a state agency is required to solicit explanations from qualified potential respondents who did not respond to a competitive solicitation for a contract on which fewer than two qualified bids were received by the agency.

Section 2262.052 (a) Each state agency shall comply with the contract management guide.

Texas Administrative Code, Title 10, Part 1, Chapter 5, Subchapter A, General Provisions

Rule 5.10 (a)-(c)(4) Procurement Standards (a) Procurement procedures must meet minimum guidelines, according to Office of Management and Budget (OMB) Circulars A-87, A-102, A-110, A-122 (as applicable), the Uniform Grant Management Common Rule, Texas Government Code, Chapter 783, and 10 CFR Part 600 (Financial Assistance Rule). (b) All subrecipients including non-profits must comply with all of the referenced statutes and regulations listed in subsection (a) of this section. **In case of any conflict between the OMB Circulars or federal laws and state laws involving federal funds, the federal law or OMB Circulars will prevail.** (c) Additional Department requirements are: (1) Small purchase procedures: (A) This procedure may be used only on those services, supplies, or equipment costing in the aggregate of \$25,000 or less. For Emergency Shelter Grant Program (ESGP), the threshold is \$500 and more per unit; (B) Subrecipient must establish a clear, accurate description of the specifications for the technical requirements of the material, equipment, or services to be procured; and (C) Subrecipient must obtain a written price or documented rate quotation from an adequate number of qualified sources. An adequate number is, at a minimum, three different sources. (2) Sealed bids: (A) Subrecipient must formally advertise, for a minimum of three (3) days, in newspapers or through notices posted in public buildings throughout the service area. Advertising beyond the subrecipient's service area is allowable and recommended by the Department. The advertisement should include, at a minimum, a response time of fourteen (14) days prior to the closing date of the bid request. Cities and counties must comply with the statutorily imposed publication requirements in addition to those requirements stated herein; and (B) When advertising for material or labor services, subrecipient shall indicate a period for which the materials or services are sought (e.g. for a one-year contract with an option to renew for an additional four (4) years). This advertised time period shall determine the length of time which may elapse before re-advertising for material or labor services, except that advertising for labor services must occur at least every five (5) years. (3) **Competitive proposals:** (A) The Request for Proposal (RFP) must be publicized. The preferred method of advertising is the local service area newspapers. This advertisement should, at a minimum, allow fourteen (14) days before the RFP is due. The due date must be stated in the advertisement; and (B) The time period for services shall be one year, plus four (4) additional years at a maximum. (4) **Non-competitive proposals:** (A) The service, supply, or equipment is available only from a single source; (B) A public emergency exists preventing the time required for competitive solicitation; and (C) **After solicitation of a number of sources, competition is determined inadequate.** (*emphasis added*)

Texas Administrative Code, Title 34, Part 1, Chapter 20, Subchapter C

Rule 20.31(b)(4) (a) The commission purchases supplies, materials, services, and equipment for the State of Texas. (b) Whenever possible, purchases are based on competitive bids. Negotiation of contracts is permitted for: (1) emergency purchases when there is insufficient time to solicit bids; (2) proprietary purchases or purchases of items for which there is only one source of supply; (3) purchases by means of competitive sealed proposals; and (4) **proposed purchases in circumstances where competitive specifications have been advertised but the commission has received only one**

acceptable bid, or no acceptable bids; provided, however, such negotiation may not result in a material change to the advertised specifications. (emphasis added)

Rule 20.36(a)(1-7) (a) Bid evaluation. (1) The commission may accept or reject any bid or any part of a bid or waive minor technicalities in a bid, if doing so would be in the state's best interest. (2) A bid price may not be altered or amended after bids are opened except to correct mathematical errors in extension. (3) No increase in price will be considered after a bid is opened. A bidder may reduce its price provided it is the lowest and best bidder and is otherwise entitled to the award. (4) Bid prices are considered firm for acceptance for 30 days from the bid opening date for open market purchases and 60 days for term contracts, unless otherwise specified in the invitation for bids. (5) A bid containing a self-evident error may be withdrawn by the bidder prior to an award. (6) Bid prices which are subject to unlimited escalation will not be considered. A bidder may offer a predetermined limit of escalation in his bid and the bid will be evaluated on the basis of the full amount of the escalation. (7) **A bid containing a material failure to comply with the advertised specifications shall be rejected. (emphasis added)**

State of Texas Contract Management Guide, Version 1.6

Section - Introduction

Purpose “...Each agency is independently responsible for developing sound business procedures in accordance with applicable federal and state laws, regulations, policies and procedures.”

Chapter 3 – Preparing the Solicitation

Payment Types. The method of payment has a direct impact on how the statement of work is written and how the contract is managed. As with specification types, there are also many payment types. The payments should be consistent with the type of product or service delivered. Payments should be structured to fairly compensate the contractor and encourage timely and complete performance of work. As a general rule, payment should be approximately equal to the value of the completed work.

COMMON TYPES OF PAYMENT		
Payment Type	Commonly used for:	Payment based on:
Cost Reimbursement	Client services contracts, usually associated with state and federal grants Example: Contracts for services in remote areas	Reimbursement of allowable costs in accordance with the approved budget.
Cost Plus Incentives	Materials contracts wherein the materials are unknown at the time of contract award. Example: Construction Contract	Contractor’s cost plus a percentage of cost or cost plus a fixed fee. This type of payment is usually discouraged as there is no incentive for the contractor to minimize the cost to the State.
Fee for Service	Contract wherein a fee can be established for a unit of service. Example: Providing flu shots to patients. Unit of service is one flu shot	A specific fee for a unit of service. Payments are made for each unit of service completed.

Chapter 5 - Evaluation and Award

Evaluation Teams. Each proposal must be evaluated individually against the requirements of the RFP. Each RFP response is considered independently of all other RFP responses.

Single Responses. To determine why an agency receives only one (1) response to a competitive solicitation, the following actions should be taken:

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

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

Responsive Proposals. After all proposals are opened and recorded, the Purchasing Department determines if the proposals submitted are responsive... In addition, the Purchasing Department will review the proposals to ensure that minimum qualifications are met.

Proposal Evaluation. Once the proposals have been reviewed and deemed responsive, the evaluation team may begin the evaluation process. The recommended method for evaluation is to have all team members in the same room evaluating the proposals at the same time... The team leader must be present during these discussions to ensure that no team member tries to influence the decision of other team members. Under no circumstances should any team member attempt to pressure other members to change evaluation scores.

Negotiations. State agencies may negotiate terms and conditions in some solicitations and not in others... A bidding process cannot be competitive unless each respondent is bidding on like items. If the negotiation changes or modifies the specification or any other term or condition, each respondent is not afforded the same opportunity to bid upon the like items... Competitive proposal and qualification processes generally contemplate and allow a certain amount of negotiation. The best practice is to read the requirements of the applicable procurement procedure to verify that negotiation is permissible. Even in competitive proposal or qualification processes, care should be taken to avoid inadvertently changing the stated contracting objectives. If the contracting objectives are changed through the negotiation process, each potential contractor is not placed on an equal level to propose an offer. Similarly, care should be taken when determining negotiation strategy whether to include, as a part of that strategy, giving the vendors a cost or price that must be met to obtain further consideration. Suggesting a cost or price could deprive the competitive process from generating the cost or price that is the best value to the state. Also, be mindful that the above prohibitions still apply, i.e., disclosing competing respondents' costs or prices is not allowed, even if done without tying the cost or price to the specific vendor; and respondent cannot be told its price standing relative to other respondents. Negotiation

strategy should be tailored to suit the particular facts and circumstances of the specific competition.

Appendix 6 – Evaluation Team Briefing Instructions

Member Responsibilities.

- Sign Non-Disclosure Forms. This form states that you will not divulge any information concerning this submittal/evaluation to anyone who is not part of the team.
- Evaluate submittals independently and impartially.
- If a respondent/contractor contacts you, refer them to the purchaser
- If a team member has questions on the submittal, submit in writing to the purchaser. The purchaser will contact the respondent, obtain an explanation and prepare a written response. All members will be provided a copy of the response.
- Please safeguard the submittal when not evaluating.
- Purchasing Department will score pricing and tabulate total scores.
- Questions between team members are allowed, but team members should respond only with technical information. Do not give individual opinions about respondents and/or the content of their responses.

State of Texas Procurement Manual

Section 1. Purpose. The State of Texas Procurement Manual serves as the guide for purchasing in the State of Texas. It contains standard procedures for implementing the requirements of Texas statutes and delegated purchasing authority. The manual is a necessary resource to ensure the application of consistent and sound business practices in state purchasing and demonstrates CPA's [Comptroller of Public Accounts] ongoing commitment to increasing communication among agencies involved in state procurement.

State of Texas employees involved in the procurement of goods and services have a responsibility to uphold Texas procurement laws and to serve the best interests of the state. This responsibility requires a thorough knowledge of the Tex. Gov't Code, Title 10, Subtitle D and Texas Administrative Code (TAC), Title 34, Part 1 as well as the procedures in the Procurement Manual.

Section 1. Statutory Purchasing Authority. To support state operations and shorten the procurement cycle for purchasers, state law grants purchasing authority to CPA, the Council of Competitive Governments (CCG), and the Department of Information Resources (DIR) to establish contracts for commonly used goods/services for state agency and local government use. Statewide contracts include Go DIReCT contracts for IT/IS goods and services and CPA Term and TXMAS contracts for other goods/services.

For items not on an existing statewide contract, Government Code Chapters 2155-2161 and CPA 34 TAC Ch 20 provide additional detail on CPA purchasing oversight and contract responsibilities as well as the purchasing authority delegated to state agencies.

Section 2.10 Request For Proposal (RFP). In accordance with Texas Government Code, Title 10, Subtitle D, Section 2156.121 the CPA is authorized to determine whether to delegate sole oversight of the use of the Competitive Sealed Proposal or Request for Proposal (RFP) method of procurement to a state agency or to retain oversight of such procurement. A Request For Proposal (RFP) is a written request for proposals concerning goods or services the state intends to acquire by means of the competitive sealed proposal procedure. This procedure is similar to the open market procurement process; however, instead of sealed competitive bids, a negotiation phase is included and a best and final offer is permitted. Specific guidelines concerning documentation, procedures, and handling requirements for using the competitive sealed proposal procedures are addressed in the Texas Comptroller of Public Accounts (CPA) Contract Management Guide. Texas Government Code, Title 10, Subtitle D, Sections 2156.121 - 2156.125, 2157.121 - 2157.125, and the CPA Contract Management Guide should be reviewed before submitting the RFP to the CPA's Procurement Operations and Customer Service Division.

Section 2.21 Proprietary Purchases. A **proprietary** product or service has a distinctive characteristic that is not shared by competing products or services. When the specification limits consideration to one manufacturer, one product or one service provider, you must include a written **Proprietary Purchase Justification**, signed by the Agency head or designee, in the procurement file. A formal letter should be submitted to the Comptroller of Public Accounts for services \$100,000 or greater. (*emphasis added*)

Request for Proposals – RFP # 332-RFP7-7005

Part I. Statement of Objective and General Requirements.

1.5 Scope of Project Management Firm Constraints

1.5.2 The successful PM [project management firm] will receive a cost reimbursement contract and may expend funds in accordance with the administrative expense categories defined in Section 4.4-Administrative Fee and the terms specified in Section 2.7-Federal Contract Terms and Conditions. The Department [TDHCA] will establish reasonable drawdown thresholds for administrative expenses that are commensurate with the progress of the project and the associated administrative duties. The PM will ensure that expenditure of funds submitted to the Department is for eligible program costs. If the persons to benefit from the Programs are not receiving the service or benefit, the PM is liable to repay to the Department any associated disallowed costs.

1.5.3 All CDBG rules and regulations must be followed as they apply to the Program.

Part II. Contract Terms and Conditions

2.0 Type of Contract. This RFP for Management Services is solicited under Texas Code, Chapter 2156, Subchapter C.

Part III. Preparation and Submission of Offers

3.8 Proposal Costs. Offerors shall bear all costs related to the preparation and submittal of their proposal.

Part VI. Evaluation of Offers and Award

4.0 Award all or None Basis

TDHCA intends to make one award to the offeror whose proposal is determine to offer the best value to the government. The Government intends to award one contract as the result of this RFP. TDHCA reserves the right not to award any contract as a result of this RFP if it determines that none of the submitted proposals would adequately satisfy the requirements of the Plan. TDHCA also reserves the right to reopen the procurement to seek additional offers or to amend the RFP at any time prior to award if it is determine by TDHCA to be in the best interests of the Government.

4.4 Administrative Fee

Up to 10 percent of the \$210,371,273 available under the HAP [Housing Assistance Program] and \$12,000,000 available under the SPRP [Sabine Pass Restoration Program] may be used for administrative expenses related to planning and/or project delivery costs under this RFP. Therefore, up to \$21,037,127 is allowable for HAP planning and/or project delivery costs and \$1,200,000 is allowable for SPRP planning and/or project delivery costs. Project delivery costs are costs that can be attributed directly to housing activities. Examples of project delivery costs include procurement of services or goods, contract preparation related to subcontracted activities, compliance reviews, such as environmental review records directly related to housing activities, reviewing applications submitted for assistance, preparing reports and record keeping specifically for housing activities. Planning costs are associated with activities conducted for the common good of the affected region and for the overall benefit of the public and not linked to a specific project or activity. An inclusive list of planning costs can be found at 24 CFR 570.205(a)(6).

Separately, if all milestones identified under Section 4.3.1 are met, a maximum of \$9,466,707 is allowable for eligible HAP program administrative costs and a maximum of \$540,000 is available for eligible SPRP program administrative costs. These program administrative costs are separate from the \$210,371,273 available under HAP and \$12,000,000 available under the SPRP. Therefore, the total funds available for HAP is \$219,837,980, and the total funds available for SPRP is \$12,540,000. Specifically, program administrative costs are defined as those services that are being completed on behalf of TDHCA primarily that are not specifically linked to housing activities. An inclusive list of program administrative costs can be found at 24 CFR 570.206(a)(I).

As part of its proposal, the offeror will prepare a project budget tied into project deliverables and a proposed timeline which shall reflect milestones identified under Section 4.3.1 and shall contain sufficient cost detail to support its proposed Administrative Fee and to permit TDHCA to determine if the proposed fee is fair and reasonable. The offeror must also outline voluntary Administrative Fee penalties for not meeting milestones identified under Section 4.3.1.