

TEXAS A&M UNIVERSITY-KINGSVILLE

Title: Use of Private Consultants

Procedure No.: PP-505

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I. Purpose

To define the parameters and procedures for use of Private Consultants.

II. Scope

This procedure applies University wide.

III. General

The procurement procedures for private consulting services are codified in Government Code, Chapter 2254, Subchapter B. The procedures apply to State-Appropriated, Federal and Non-Appropriated funds, including Local funds.

Private/outside consultants may be used if there is a substantial need and such services cannot be adequately performed by A&M System personnel or through contract with another state agency. Such contracts may be entered into by following normal contracting procedures. (Note: all agreements with Private Consultants must be documented by a formal contract.) See APRM C20 for exemptions, requirements, and procedures related to the contracting process.

State agencies are exempt from paying Social Security, deducting income tax, reporting earnings to the Texas Employment Commission, and providing employee benefits to bona fide independent contractors or outside consultants. However, if an individual is incorrectly classified as an independent contractor, the state agency may be in violation of one or more federal and state laws including the Federal Unemployment Tax Act, the Texas Unemployment Compensation Act, and the Texas Workers' Compensation Insurance Law.

Penalties for violating these laws can include payment of back wages plus liquidated damages, court costs and attorney's fees, declaratory injunctive relief as defined by a court, and other monetary penalties. The U.S. Department of Labor has stressed the following six factors as the criteria to be used in determining whether an individual is an employee or independent contractor: (See Procedure PP-590 for more clarification).

- The extent to which the services provided are an integral part of the contractor's business;
- The permanency of the employment relationship;
- The amount of the contractor's investment in facilities and equipment;
- The nature and degree of control and supervision by the employer;
- The contractor's opportunities for profit and loss; and
- The amount of initiative, judgement, or foresight in open market competition with others required for the success of the claimed independent enterprise.

If an individual is employed to perform unskilled labor, is paid an hourly rate, and is closely supervised, he/she probably would not meet the test of an independent contractor and, therefore, should be treated as an employee.

Funds may not be used, regardless of source, to enter into a consultant contract with any individual who is currently employed by an A&M System Member or who has been employed by an A&M System Member within the past 12 months.

In the event payment is requested to an outside attorney, the invoice must be forwarded to the Office of System General Counsel, accompanied by the current Outside Counsel agreement previously approved by the Attorney General's office. Please contact System General Counsel for additional information.

Consulting Contracts Less than \$25,000

Consulting Services under \$25,000.00 may be contracted through the Office of Procurement and General Services. A consultant is one who conducts a study, performs an analysis, and submits a report with recommendations for problem resolution. A contract for Consultant Services must address the following:

1. The parties to the contract.
2. A full description of the matter to be studied (Statement of Work).
3. A full description of the submittals to be provided by consultant.
4. The time table for completion of the project.
5. The amount and schedule of payments to the consultant.

All contracts must be routed according to the rules maintained by General Counsel for review and approval.

Upon establishing a contract with a Consultant, a Purchase Order will be issued to encumber the funds and establish the transaction records.

Consulting Contracts Greater than \$25,000

Consultant contracts greater than \$25,000.00 require the agency to notify, in writing, the Legislative Budget Board, and the appropriate House Committee and State Committee. The letter must state terms, cost, and recipient of the consultant contract. The voucher must contain this statement:

"This payment complies with Article V Section 71 of the Current General Appropriation Act (S.B. 222)."

The following five oversight requirements must be followed when the entire cost of a consulting service contract exceeds \$25,000.

1. Notification
2. 30-Day RFP Publication
3. Finding of Fact
4. 10-Day Selection Publication
5. Final Reporting

The Office of Procurement and General Services will assist departments in complying with the oversight requirements detailed below.

1. NOTIFICATION REQUIREMENTS

Government code, Chapter 2254, Subchapter B states that agencies may use private consultants only if:

- (1) there is a substantial need for the services; and
- (2) the agency cannot adequately perform the services with its own personnel or through an interagency contract.

The notification requirements are intended to demonstrate compliance with these conditions and the other policies of this section

The Governor's Budget and Planning Office (GBPO) and the Legislative Budget Board (LBB) must be notified when an agency is planning the use of a consultant. The proof of substantial need is central to GBPO's fact-finding responsibilities.

2. 30-DAY RFP PUBLICATION

Publication requirements are the responsibility of the Secretary of State's Texas Register Section. The RFP outlining the consulting services requirements must be published in the Texas Register at least 30 days prior to the award of a contract.

3. FINDING OF FACT

The GBPO will review the consulting services requirements and must certify that the need meets the finding of fact requirements before a contract can be executed.

4. 10-DAY PUBLICATION/NOTIFICATION

Within 10 days after agencies engage a consultant under contract, the following information should be published in the Texas Register, according to Government Code, Section 2254.030:

a description of the work to be performed under contract; name and address of the consultant selected; the amount of the contract; and dates of completion of work to be performed.

5. FINAL REPORTING

Requirements regarding the filing of all consultant reports are the responsibility of the Texas State Library. A copy of the final consultant report shall be filed with the Texas State Library and shall be addressed as follows:

Texas State Library
Publications Clearinghouse
P.O.Box 12927
Austin, Texas 78711

DEFINITIONS

The definitions provided below are those found in statutes which determine the review requirements for consultant contracts.

Consulting Service means the practice of studying and advising a state agency in a manner not involving the traditional employer/employee relationship (Government Code, Section 2254.021). GBPO will review all such contracts over \$25,000, except for services specifically exempted.

Professional Services are those services directly related to the professional practices as defined by the Professional Services Procurement Act, (Government Code, Section 2254.002). These include services within the scope of the practices of: accounting, architecture, optometry, medicine, land surveying, and professional engineering. Services provided by professionals outside the scope of their profession, e.g. management consulting services provided by accounting firms, are not considered professional services for the purposes of this document.

Mixed Services When a contract involves both consulting services and one or more type of other services, an agency must comply with the consultant service requirements when the primary objective of the contract is the purchase of consulting services. For instance, if a contractor will be required to analyze and prepare a study of an agency's information systems needs as well as develop and implement a data system, the primary objective of the contract is not the analysis or advice provided, but is the delivery of a data information system. Therefore, the contract is not subject to consultant contract requirements, and the agency must comply with the bid purchasing procedures under Article 601b, V.A.C.S. administered by the General Services Commission.