

TEXAS WORKFORCE COMMISSION LETTER

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To: Local Workforce Development Board Executive Directors
Commission Executive Offices
Integrated Service Area Managers



From: Laurence M. Jones, Director, Workforce Development Division

Subject: **Procurement of Workforce Services – Update**

PURPOSE:

To provide Local Workforce Development Boards (Boards) with **updated** clarification on the application of certain policies related to the procurement of one-stop and other workforce services, specifically:

- full and open competition;
- prohibition against direct delivery of services by Boards; ~~and~~
- bonding, insurance, and other methods of securing funds; **and**
- **assessment of risk and contingency plans to preclude interruption of services.**

CHANGES TO WD LETTER 02-07:

New information in this WD Letter is indicated by:

- A ~~strikethrough~~ of the original language, which indicates that language has been deleted; and
- **Bold** typeface, which indicates new or clarifying language.

BACKGROUND:

After 10 transformative years, Texas' workforce system has made great strides in the provision of workforce solutions. A vitally important aspect of that transformation is one-stop service delivery. As the framework for service delivery has matured, a number of innovative methods for service delivery have been developed. Several Boards, which are procuring new providers of workforce services, have indicated an interest in some of these new concepts.

Although a wide range of service delivery options satisfy state and federal requirements, some arrangements present increased legal and fiscal risks for Boards. Therefore, this WD Letter provides clarification on the application of certain laws, rules, and policies as they pertain to the procurement and delivery of workforce services.

Full and Open Competition

Competition exists when two or more responsible bidders are willing and able to compete effectively to provide a particular good or service. The **Texas Workforce Commission's (Commission)** Financial Manual for Grants and Contracts (FMGC) §14.3 states that (emphasis added):

The procurement of all goods and services shall be conducted, to the maximum extent practical, in a manner providing *full and open competition* consistent with applicable administrative requirements.

The FMGC also identifies activities that restrict competition, among them, “specifying a brand name product instead of allowing an equal product to be offered.” A solicitation for one-stop services that limits responsible bidders of workforce service delivery to only those who incorporate a particular management structure is synonymous with “specifying a brand name product.”

Limiting responsive offers to a single type of management structure or service delivery arrangement, without allowing a variety of marketplace options to be considered, unduly restricts competition, limits the range of potential service delivery alternatives, and restrains competitive assessments. Further, limiting solicitations narrows a Board's ability to evaluate the changing marketplace's innovative or creative arrangements.

Commission guidelines allow flexibility in the utilization of service delivery options—including turnkey, government-based, managing director, and other innovative service delivery approaches that conform to existing administrative standards. Allowing a full range of responsive offers promotes competition and supports Boards' goals of seeking the most efficient and cost-effective means of delivering workforce services in Texas Workforce Centers.

Prohibition against the Direct Delivery of Services

Direct Board control over Texas Workforce Center staff violates Texas Government Code §2308.264 and Commission rule §801.53, which prohibit the direct delivery of workforce training or one-stop services by a Board.

Furthermore, Texas Government Code §2308.267 stipulates that a Board's staff be “separate from and independent of” its contracted service provider, and Commission rule §801.53(d) specifies that a Board “shall ensure that the Board, its members, or its employees do not directly control the daily activities of its workforce service contractors.”

Some service delivery models may encompass greater risk of violating the prohibition of direct service delivery than others. For example, some Boards contract for the delivery of workforce services by entering into two separate contracts—one with a managing director and one with another entity such as a

professional employer organization (PEO) or staff leasing company for the delivery of services (see Diagram 1, Attachment 1). This arrangement potentially places the Board at risk of violating the law, for a variety of reasons. For one, if any agreement between the managing director and the other entity is dissolved, or if a managing director's contract is terminated or the director cannot fulfill his or her contractual obligations, the Board effectively has assumed control over the service contractor. Also to be considered in these situations is the Texas Labor Code §91.001(14) definition of "staff leasing services" (which includes PEOs), which provides that "employment responsibilities are in fact shared by the license holder and the client company." Given these various statutory and rule provisions, it is important that Boards avoid arrangements such as reflected in Diagram 1 in favor of those in which the Board is not the actual or potential employer or provider of workforce services (see Diagram 2, Attachment 1). Diagram 2 shows an arrangement in which a Board contracts with a managing director who then contracts with a third entity, such as a PEO.

Insurance, Bonding, and Other Methods of Securing Funds to Cover Losses

Some individuals and organizations provide workforce services under contract to multiple Boards during the same period. Such arrangements are not prohibited. However, Texas Government Code §2308.264 and Commission rule §801.54 require that Boards:

ensure that at least 10 percent of the funds subject to the control of the workforce service contractors is protected through bonds, insurance, escrow accounts, cash on deposit, or other methods to secure the funds.

Moreover, Commission rule §801.54(b)(5) also requires:

A Board shall ensure ... that each of its workforce service contractors is required to verify that ... the method of securing the funds has not been ... obligated for another purpose.

The Commission has interpreted this provision to apply on a contract-by-contract basis, thereby requiring **each individual contract to be adequately protected by either a separate bond or through coverage under a contractor's umbrella policy** ~~a separate bond for each contract~~. This interpretation enables each Board to adequately secure its local workforce development area's (workforce area) funds and to act independently, as necessary, to protect its own interests.

PROCEDURES:

Boards must ensure that procurement solicitation documents (e.g., requests for proposals) are designed to:

- provide full and open competition to the range of marketplace bidders; and
- promote full and open competition to the range of marketplace alternatives available to bidders.

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Boards must be aware that solicitations that require a successful bidder to use the managing director approach for workforce service delivery restrict competition by excluding bidders who offer turnkey, government-based, or other approaches—a violation of FMGC requirements for full and open competition.

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Boards that currently have contracts containing one or both of the following attributes must **procure** ~~reprocure~~ for a workforce service contractor:

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- Contracts in which competition was unduly restricted by limiting selection of the successful bidder to only those entities operating under one particular or specified service delivery approach or method; or
- Contracts with a managing director in which the Board also directly contracts with a PEO or staff leasing company to staff the workforce area's Texas Workforce Centers.

In order not to disrupt the delivery of services, Boards' **procurement** ~~reprocurement~~ must result in a new contract after the earlier of either:

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- the next renewal option point; or
- the end of the current contract.

Boards must ensure that all relevant costs are considered when evaluating proposals.

NLF

Boards must ensure that procurement solicitation documents must require bidders to submit cost data that facilitates comparison of all relevant costs in a proposal when conducting a cost analysis and determining cost reasonableness. For example:

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- If a bidder proposes to use a managing director approach, Texas Workforce Center staffing and operation costs also must be considered when determining cost reasonableness.
- If a bidder proposes a turnkey approach, percentage bonuses, or other financial requirements must be evaluated when determining efficiency and cost-effectiveness.

If, as the result of the procurement evaluation process, a Board selects a bidder that proposes to use the managing director approach in conjunction with a PEO or staff leasing company, Boards must ensure that the managing director—not the Board—contracts with the PEO or staff leasing company (see Diagram 2, Attachment 1).

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Note: The restriction that a Board must not contract with a PEO or staff leasing company is limited to arrangements for workforce service delivery in which a PEO or staff leasing company staffs a workforce area's Texas Workforce Centers.

Boards must assess the risks associated with the service delivery model being considered for procurement. Boards selecting a provider of one-stop services,

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whether an individual or an organization, must ensure that sufficient insurance, bonding, and liability coverage for the overall financial security of its one-stop workforce services funds and operations is maintained. In addition, each Board must:

- objectively evaluate whether such arrangements provide full access to key personnel; and
- ensure compliance with the fiscal protections set forth in Commission rule §801.54.

Emergency Avoidance

To ensure the uninterrupted provision of workforce services, Boards must develop and maintain a detailed contingency plan, sufficient to mitigate risk in the event of unforeseen circumstances. The contingency plan must ensure that Texas Workforce Centers and workforce programs are continuously managed and operated in accordance with applicable laws, regulations, and Commission policies, regardless of the management model in use.

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In developing the contingency plan, Boards must:

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- follow all applicable state and federal procurement guidance; and
- be mindful of the time frames associated with the Request for Proposals (RFP) process and plan accordingly.

It is recommended that Boards consider including the following risk mitigation strategies:

LF

- **Maintain contact with procurement solicitation respondents not initially selected. These entities may be best positioned to respond to an accelerated procurement, thereby averting potential discontinuation of services in the event of unforeseen circumstances; and**
- **Regularly update procurement solicitation instruments to allow for 24–48 hour rerelease in response to potential disruptions to service delivery.**

If a Board finds itself in an emergency situation in which a lapse or potential lapse in service provision is anticipated and an interim, immediate procurement of services is required, the Board must accomplish the following steps:

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1. **Notify the Commission’s Workforce Development Division Director, in writing, of the circumstances of the emergency and how the Board plans to ensure that workforce services to employers and job seekers are not interrupted;**
2. **Determine a temporary interim solution that includes a sole-source provider and/or a Request for Qualifications process; and**
3. **Develop a permanent solution through a fair and open RFP process.**

The Workforce Development Division Director will consider the circumstances and, if appropriate, authorize emergency procurement activities for a short duration to alleviate actual or anticipated interruptions

in workforce services as a temporary, interim solution prior to the long-term fair and open RFP process.

Boards must be aware that any emergency procurement of services in response to a potential service interruption is a temporary, interim solution. When taking interim emergency procurement actions, Boards must follow all procurement guidance, including the requirements of FMGC §14.13, Procurement, Noncompetitive Method. However, an interim emergency procurement can be limited to the current management structure. Boards must ensure that such procurement is of limited duration. After procurement addresses the immediate risk of service interruption, Boards must begin the regular RFP procurement process for a more permanent solution.

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Boards may contract with a workforce service contractor to serve as that contractor's fiscal agent, providing that the Board does not engage in the direct delivery of services as described in Chapter 2308, Texas Government Code, and Commission rules, Chapter 801, Subpart C.

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ATTACHMENT:

Attachment 1: Contractual Relationships of Boards and Professional Employment Organizations under the Managing Director Approach

INQUIRIES:

Direct inquiries regarding this WD Letter to wfpolicy.clarifications@twc.state.tx.us.

RESCISSIONS:

WD Letter 02-07

REFERENCE:

Texas Government Code §2308.264(a) (e); §2308.265; §2308.267(b); §2308.303(5); §2308.312; and §2308.304(c)

Texas Labor Code §91.001(14)

Texas Workforce Commission Local Workforce Development Boards Rules: 40 TAC §801.51–801.54

Financial Manual for Grants and Contracts §14.3 **and §14.13**

FLEXIBILITY RATINGS:

No Local Flexibility (NLF): This rating indicates that Boards must comply with the federal and state laws, rules, policies, and required procedures set forth in this WD Letter and have no local flexibility in determining whether and/or how to comply. Federal and state laws, rules, policies, and required procedures with a “No Local Flexibility” rating are indicated by the acronym, **NLF**, in the margin to the right of the applicable paragraph. Additionally, all information with a “No Local Flexibility” rating is indicated by “must” or “shall.”

Failure to comply with the federal and state laws, rules, policies, and required procedures with a “No Local Flexibility” rating may result in corrective action, up to and including sanction and penalty.

Local Flexibility (LF): This rating indicates that Boards have local flexibility in determining whether and/or how to implement guidance or recommended practices set forth in this WD Letter. All guidance or recommended practices with a “Local Flexibility” rating are indicated by the acronym, **LF**, located in the margin to the right of the applicable paragraph. Additionally, guidance or recommended practices with a “Local Flexibility” rating are indicated by “may” or “recommend.”

Boards are not subject to corrective action for failure to comply with guidance or recommended practices with a “Local Flexibility” rating.