



An Audit Report on

Selected Contracts at the Texas Education Agency

August 2018
Report No. 18-044



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Overall Conclusion

The Texas Education Agency's (Agency) planning and procurement of the two contracts audited had significant weaknesses that affected the award outcomes. In both cases, management did not follow processes designed to maintain the integrity of those procurements.

Tembo Contract

Agency management overrode controls in its procurement of Web page design services in order to award a contract to its preferred vendor, Tembo, Inc. The Agency also made errors in its planning and procurement of that contract. Collectively, those management actions and errors affected the award outcome. Specifically, the Agency:

- **Inappropriately requalified Tembo's proposal** after it originally disqualified that proposal for not meeting minimum requirements.
- **Incorrectly advanced Tembo's proposal to the final round** over a higher scoring proposal.
- Awarded Tembo the contract over another vendor with the same final score without an explanation for that decision.

In executing and overseeing its contract with Tembo, the Agency followed its contract formation processes, **properly approved payments, and monitored Tembo's progress** during the initial design phase of the contract.

SPEDx Contract

For the Agency's contract for data mining analytics with AvenirEducation, Inc., doing business as SPEDx, significant weaknesses in the **Agency's control** environment allowed Agency management to direct the procurement without following required steps, which are designed to safeguard the integrity of the procurement process. For example, the Agency did not:

- Perform a needs assessment for the procurement prior to selecting SPEDx.

Background Information

Auditors selected two Texas Education Agency (Agency) contracts to audit for this report:

- **Tembo contract.** **The Agency's** contract with Tembo, Inc. was for the design and creation of multiple Web pages for the Performance Reporting program area (the Agency also awarded Tembo work outlined in the Finance program area). The contract began in January 2018 and it is scheduled to end in August 2019. The total contract amount was \$2.9 million, and as of May 2018, the Agency had paid Tembo \$298,280.

- **SPEDx contract.** **The Agency's** contract with AvenirEducation, Inc., doing business as SPEDx, was for data mining of students' **mandated** individualized education plans (IEPs) with analytics to reveal trends, insights, and correlations. SPEDx was to leverage those insights using a system-level design thinking approach to identify ways to improve the IEP process and pilot solutions.

The SPEDx contract was funded with Individuals with Disabilities Education Act federal funds and began in May 2017. The total contract amount, including amendments, was \$4.4 million and the Agency paid \$2.5 million of that total before it cancelled the contract in December 2017.

Sources: The contracts audited, the Uniform Statewide Accounting System, and other information from the Agency.

This audit was conducted in accordance with Texas Government Code, Sections 321.0131, 321.0132, and 2262.052.

For more information regarding this report, please contact Audrey O'Neill, Audit Manager, or Lisa Collier, First Assistant State Auditor, at (512) 936-9500.

- Conduct and document adequate market research, advertise the procurement as required, or obtain authority to enter into a sole source contract.
- Identify and address a preexisting professional relationship between Agency management and a SPEDx subcontractor.

In addition, **weaknesses in the Agency’s contract formation resulted in the Agency paying SPEDx \$2.5 million and receiving only one deliverable valued in the contract at \$150,000. The Agency also did not review SPEDx’s data security practices prior to sharing confidential student data.**

Prior State Auditor’s Office Findings and Recommendations

Several of the findings and recommendations presented in this report are similar to findings and recommendations previously reported to the Agency from prior audits **of the Agency’s** contracts (see Appendix 4). For example, **the State Auditor’s** Office previously reported that the Agency had not verified the completion of deliverables prior to payment and that it had not completed all required contract planning steps, such as a needs assessment and cost estimate.

Table 1 presents a summary of the findings in this report and the related issue ratings. (See Appendix 2 for more information about the issue rating classifications and descriptions.)

Table 1

Summary of Subchapters and Related Issue Ratings		
Subchapter	Title	Issue Rating ^a
1-A	The Agency’s Management Override of Controls Affected the Tembo Contract Award Outcome	Priority
1-B	While the Agency Followed Its Contract Formation Processes, It Should Strengthen Those Processes to Ensure That It Complies With All Requirements	Medium
1-C	The Agency Properly Approved Payments to Tembo and Monitored Tembo’s Progress During the Initial Design Phase	Low
2	The Agency Did Not Have an Adequate Control Environment to Protect the Integrity of the SPEDx Procurement	Priority
3-A	The Agency Paid SPEDx for Deliverables It Did Not Receive Because It Did Not Properly Form the Contract	Priority
3-B	The Agency Did Not Sufficiently Monitor SPEDx Data Security Practices	High

^a A subchapter is rated Priority **if the issues identified present risks or effects that if not addressed could critically affect the audited entity’s** ability to effectively administer the program(s)/function(s) audited. Immediate action is required to address the noted concern and reduce risks to the audited entity.

A subchapter is rated High **if the issues identified present risks or effects that if not addressed could substantially affect the audited entity’s** ability to effectively administer the program(s)/function(s) audited. Prompt action is essential to address the noted concern and reduce risks to the audited entity.

A subchapter is rated Medium if the issues identified present risks or effects that if not addressed could moderately affect the audited **entity’s** ability to effectively administer program(s)/function(s) audited. Action is needed to address the noted concern and reduce risks to a more desirable level.

A subchapter is rated Low if the audit identified strengths that support the audited **entity’s ability to administer the program(s)/function(s) audited or the issues identified do not present significant risks or effects that would negatively affect the audited entity’s** ability to effectively administer the program(s)/function(s) audited.

Auditors communicated other, less significant issues separately in writing to Agency management.

Summary of Management's Response

At the end of certain chapters in this report, auditors made recommendations to address the issues identified during this audit. Agency management agreed with all recommendations in this report and stated that it began implementing an extensive and aggressive set of reforms to strengthen its control environment in the fall of 2017, and that its reform process would continue.

Key Points Related to the Tembo Contract

Agency management inappropriately requalified Tembo's proposal.

The Agency's contracting personnel correctly disqualified Tembo's proposal when it did not submit a Historically Underutilized Business Subcontracting Plan that was required by the Agency's Request for Offer. However, Agency management subsequently and incorrectly requalified that proposal.

Agency management incorrectly advanced Tembo's proposal.

The Agency's Academics Division advanced the three highest scoring proposals and Tembo's proposal, which had the fifth highest score; but it did not advance the fourth highest scoring proposal.

Agency management selected Tembo over another vendor with the same final score without an explanation for that decision.

Agency staff and management provided conflicting information on who selected Tembo for the contract award, and a memo prepared by Agency management did not include a rationale for that recommendation.

For the Tembo contract, the Agency followed most contract formation processes and properly approved payments.

The Agency ensured that its contract effective date coincided with the execution date and generally followed its formation processes for the Tembo contract. In addition, the Agency properly approved invoices prior to payment and monitored Tembo's progress during the initial design phase.

Key Points Related to the SPEDx Contract

The Agency did not follow critical planning and procurement steps, which adversely affected the integrity of the SPEDx procurement.

For the SPEDx procurement, the Agency did not follow critical planning and procurement steps designed to mitigate risks. For example, the Agency used a noncompetitive sole source procurement to award SPEDx the contract without completing sole source processes; did not perform a needs assessment prior to selecting SPEDx as its vendor; and did not ensure that its staff and SPEDx completed required conflict of interest and other disclosures. The Agency also did not identify and implement safeguards to mitigate the risk of a preexisting professional **relationship between the Agency's primary decision maker for the procurement and a SPEDx subcontractor**. In addition, **the Agency's limited contact policy** did not provide adequate guidance for communications related to sole source procurements.

The Agency paid SPEDx for deliverables it did not receive because it did not properly form the contract.

The Agency's contract did not tie payments with demonstrated progress on deliverables. Instead, the contract established a predetermined schedule of equal monthly payments. As a result, when it cancelled the contract in December 2017, the Agency had paid SPEDx \$2.5 million but it received only one deliverable valued in the contract at \$150,000.

The Agency did not sufficiently monitor SPEDx data security practices prior to sharing confidential student data.

While the Agency required SPEDx to execute a written agreement related to its access of confidential student information before it shared that information, it did not verify that SPEDx had appropriate data security controls in place.

Audit Objective and Scope

The objective of this audit was to determine whether the Agency has administered certain contract management functions for selected Agency contracts in accordance with applicable requirements.

The scope of this audit covered the Agency's planning, procurement, formation, and oversight related to:

- The contract with Tembo, Inc. for the design and creation of multiple Web pages within **the Agency's existing Web**-content structure, to include video, interactive tools, multimedia, and user-friendly information. The Agency began planning for that contract in February 2017, and the contract was effective in January 2018. Auditors reviewed **the Agency's oversight** activities through May 2018.
- The contract with AvenirEducation, Inc., doing business as SPEDx, for data **mining of students' mandated individualized education plans with analytics** to identify ways to improve the individualized education plan process and pilot solutions. That contract was effective in May 2017, and the Agency cancelled the contract effective December 2017.

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Detailed Results

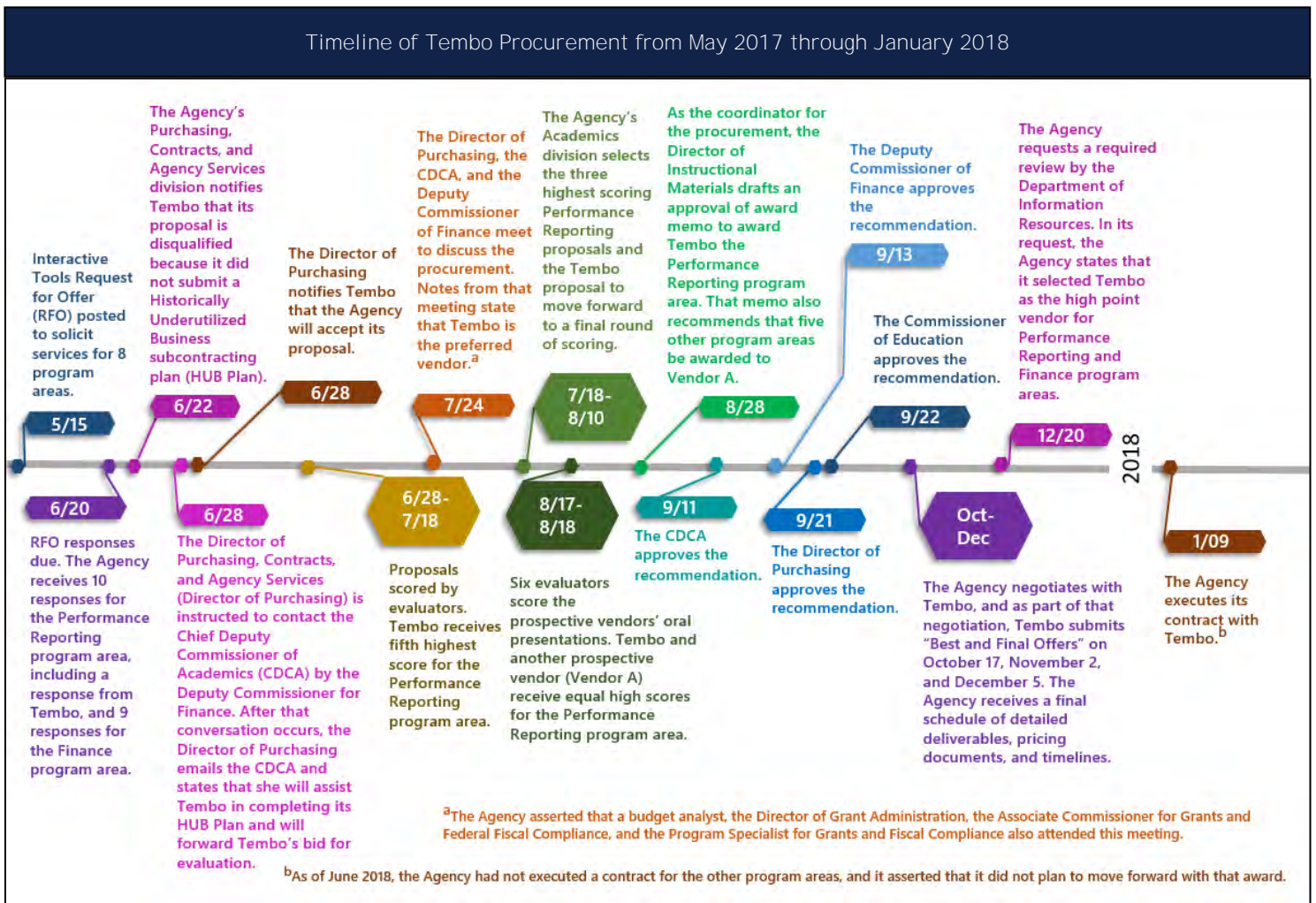
Chapter 1

The Agency's Management Overrode Controls to Award the Contract to Its Preferred Vendor, Tembo

Agency management overrode controls in its procurement of Web page design services that resulted in a contract with Tembo, Inc. The Agency also made errors in its planning and procurement of that contract. Collectively, those management actions and errors affected the award outcome.

In executing and overseeing its contract with Tembo, the Agency followed its contract formation processes, properly approved payments, and monitored Tembo's progress during the initial design phase of the contract. Figure 1 presents the timeline of the Tembo procurement from May 2017 through January 2018.

Figure 1



Source: The State Auditor's Office created this timeline based on information from interviews and a review of contract documentation.

The Agency issued a request for offer to solicit proposals for web design services for eight program areas (see text box). Vendors were invited to bid on one or more program areas, and each program area was scored separately. After evaluating those proposals, the Agency awarded a contract to Tembo for work related to the Performance Reporting and Finance program areas. The Agency did not execute contracts associated with other program areas.

Tembo Contract

The Agency issued a Request for Offer to solicit proposals for the design and creation of multiple Web pages for Statewide Academic Programs and Accountability.

The Request for Offer allowed proposers to bid on one or more of the following program areas:

- College, Career, and Military Preparation.
- Early Childhood Education.
- Finance.
- Performance Reporting.
- Reading Campaign.
- Research and Analysis.
- Special Populations.
- The State Board of Education.

That solicitation resulted in a \$2.9 million contract with Tembo for the Performance Reporting and Finance program areas and was effective in January 2018.

Source: **The Agency's contract files.**

Chapter 1-A
Rating:
Priority ¹

Chapter 1-A

The Agency's Management Override of Controls Affected the Tembo Contract Award Outcome

On multiple occasions, Agency management overrode contracting controls in order to award the contract to its preferred vendor when it:

- Inappropriately requalified Tembo's proposal,
- Incorrectly advanced Tembo's proposal to the final round over a higher scoring proposal, and
- Awarded Tembo the contract over another vendor with the same final score without an explanation for that decision.

In addition, the Agency made certain errors in its planning and procurement processes.

Agency Management Override of Controls

Agency management overrode contracting controls and showed preference for Tembo by:

- Inappropriately requalifying **Tembo's proposal**. The Agency's contracting personnel correctly disqualified Tembo's proposal because it did not submit a required Historically Underutilized Business subcontracting plan (HUB plan) (see text box). However, Agency management

Historically Underutilized Business Subcontracting Plan

In Historically Underutilized Business subcontracting plans, potential vendors (1) indicate whether they intend to subcontract portions of the work and (2) specify the portion of the work the potential vendor intends to subcontract.

Source: *State of Texas Contract Management Guide*, version 1.16.

¹ The risk related to the issues discussed in Chapter 1-A is rated as Priority because the issues identified present risks or effects that if not addressed could critically affect the audited entity's ability to effectively administer the program(s)/function(s) audited. Immediate action is required to address the noted concern and reduce risks to the audited entity.

subsequently and incorrectly requalified Tembo's proposal. The Agency's Request for Offer specifically required that HUB plan and stated that proposals that failed to submit a HUB plan would be rejected. In addition, Texas Government Code, Section 2161.252, requires agencies to reject proposals that do not include the required HUB plan. Allowing Tembo's proposal to proceed through the evaluation process resulted in Tembo receiving a contract when its proposal did not meet the minimum solicitation requirements.

After the evaluation process began, the Agency required Tembo to submit a HUB plan; and in that plan, Tembo reported it would not subcontract any of its work. However, the Agency's contract with Tembo subsequently identified two subcontractors that would be performing work associated with certain deliverables, and the Agency did not require Tembo to update its HUB plan.

- **Incorrectly advancing Tembo's proposal** to the final round over a higher scoring proposal. The Agency used a two-round scoring process in which it (1) initially scored all written proposals submitted and used those initial scores to advance proposals to the second and final round, then (2) scored oral presentations for potential vendors that had been advanced to that final round. For the Performance Reporting program area of the Request for Offer, the Agency's Academics division advanced the three highest scoring proposals and Tembo's proposal, which had the fifth highest score in the initial round. The Agency did not advance the fourth highest scoring proposal.
- Awarding Tembo the contract over another vendor with the same final score without an explanation for that decision. **As a result of the final round, Tembo and another potential vendor earned equal high scores for the Performance Reporting program area.** The Agency's Academics division was responsible for deciding to award the contract to Tembo for the Performance Reporting program area. That division prepared a memo to approve the selection of Tembo. That memo was drafted by a director assigned as the coordinator for the Request for Offer process but did not include a rationale for selecting Tembo over the other vendor. Although that memo was approved by the (1) Chief Deputy Commissioner of Academics, (2) Deputy Commissioner of Finance, (3) Director of Purchasing, Contracts, and Agency Services, and (4) Commissioner of Education, multiple Agency staff and management involved in the procurement process provided conflicting information about who ultimately selected Tembo.

The Agency made errors in its planning and procurement processes.

Specifically:

- The Agency awarded Tembo work associated with an additional program area of the Request for Offer for which Tembo did not submit a bid. **The Agency awarded work outlined in the Finance program area of its original Request for Offer to Tembo, but Tembo was not one of the nine vendors that responded to that portion of the Request for Offer. That occurred because, in writing the Request for Offer, the Agency did not adequately plan to present financial information alongside accountability information on its Web site. Instead, it added the Finance program area to Tembo's award after it scored the nine proposals that it had received for that program area.**
- The Agency made certain scoring errors in its evaluation process. **The Agency did not evaluate all proposals in a consistent manner. For example, the evaluation criteria required evaluators to award points based on the experience level of subcontractors; however, not all evaluators scored that dimension in a consistent manner. In addition, the Agency made calculation errors when it totaled the scores for the Finance program area. Errors in the scoring process increase the risk that the Agency may award the contract to a vendor that does not provide the best value.**
- The Agency did not develop a cost estimate. **The Agency did not complete a cost estimate prior to initiating the Request for Offer, which is required by the *State of Texas Contract Management Guide*² and would have helped the Agency to evaluate the full cost of the procurement. As a result, after it completed the evaluation process and selected a potential vendor, the Agency identified concerns related to the availability of funding. That contributed to the Agency not executing contracts for the other six program areas of its original Request for Offer.**

Recommendations

The Agency should:

- **Consistently follow its processes for competitive solicitations, including (1) disqualifying vendors who do not meet minimum solicitation requirements and (2) selecting vendors based on its evaluation results.**
- **Adequately plan for final deliverables when developing its solicitations.**

² This guide was in effect during the planning, procurement, and formation of the two contracts audited for this report. In June 2018, this guide was updated and released as the *State of Texas Procurement and Contract Management Guide*, Version 1.0.

- Review evaluation results for inconsistencies, and when inconsistencies are identified, meet with all evaluators to ensure that they have a consistent understanding of the evaluation criteria.
- Review the calculations in its evaluation tools for accuracy.
- Prepare a cost estimate prior to posting its solicitations.

Management's Response

Management agrees with the recommendations. Below, we provide additional context, highlight cross-cutting actions that TEA has taken to address weaknesses in its control environment, and describe steps completed or in progress to specifically address these recommendations.

When agency contracting issues were first identified in the fall of 2017, TEA began a year-long effort to ensure full compliance with state contracting requirements, and to build an internal culture that is reflective of that effort. As noted by the SAO, TEA has had contracting compliance findings going back to at least 2013. Management has already begun actions to resolve every issue, but the majority of changes to date—most notably, the implementation of a five-phase compliance model—could not be considered for this report because they occurred outside the SAO's audit scope. The results of some of the agency's efforts are evident in positive findings cited in Subchapter 1-C.

Although the procurement process resulting in the Tembo contract award had several procedural weaknesses, the agency did endeavor to secure best value for Texas taxpayers. The selected vendor has produced a new tool to bring much needed clarity to performance information about public schools, providing parents, educators, and taxpayers an unprecedented ability to support students.

Within that context, management is grateful to the SAO for its in-depth and thoughtful analysis, which provides TEA with both an opportunity to highlight steps already taken, and guideposts for how to target ongoing efforts.

Cross-cutting Management Actions

Starting in November 2017, TEA leadership has fully implemented or is in the process of implementing the following changes to shift agency practices and internal contracting culture to one of efficient compliance. These actions will have a significantly positive impact on all contracting activities conducted by TEA.

- I. *On November 1, 2017, TEA created the Department of Contracts, Grants and Financial Administration under the leadership of the associate commissioner responsible for grant compliance and oversight. Leading up to the reorganization, the agency assessed staffing and resource needs, and conducted an internal review of multiple contracts to compare the contract compliance checklist against the documentation in the contract file.*
- II. *In early 2018, TEA removed the previous director of the contracts division and hired a new assistant division director to manage agency contracts, selecting an attorney with experience in state procurement. The new assistant division director immediately developed and enhanced processes to ensure the full execution of all contracts prior to starting services and the timely rebidding or renewal of all contracts expiring on August 31, 2018.*
- III. *TEA made additional staffing changes to strengthen its efficient compliance focus. In January, the agency began transitioning an employee from its grants division to the contracts division to assist with compliance reviews. In May, TEA hired an attorney in the contracts division to focus on compliance. This summer, the agency added six positions to the contracts division and increased contracts attorney positions in the Office of Legal Services from one to three. Hiring for these positions is ongoing with the intent of reaching full staffing by the end of November.*
- IV. *In March, the contracts division's service delivery approach was restructured to align to a five-phase compliance model (planning, procurement, formation, monitoring, and closeout). Subdividing the process in this manner allows staff to develop expertise within their assigned phase, establishes several natural breakpoints to verify compliance, and enhances general controls through the separation of duties.*
- V. *TEA's new five-phase compliance model prohibits a project from moving from one phase of the process to the next until the completion and receipt of the necessary documentation. The agency will adopt these procedures into policy prior to September 30, 2018, providing built-in internal compliance checks and ensuring completion of required documents—including the needs assessment, cost price analysis, and risk assessment—before a solicitation is posted.*

- VI. *The agency redesigned its mandatory training around service delivery model changes, ethical considerations, statutory requirements, and best practices, and implemented the updated training in April. More than 225 staff had received the updated training as of mid-August.*
- VII. *The Commissioner of Education has emphasized a focus on contract process compliance with his cabinet staff, and all deputy commissioners completed the updated training by August 3, 2018. The contracts division has also implemented an online tool to verify staff has completed the required training.*
- VIII. *New contracting staff who have not already completed Certified Texas Contract Developers (CTCD), Certified Texas Procurement Managers (CTPM), or Certified Texas Contract Managers (CTCM) training are required to complete the appropriate certification before the end of their first year with TEA. Management makes it clear that becoming certified is a priority once they are hired. Furthermore, the agency will require an extensive number of program and leadership staff with responsibilities related to major contracts to undergo CTCM training before January 31, 2019.*
- IX. *The agency has implemented a pre-signature compliance review process for each contract and contract amendment and has developed risk-based monitoring and enhanced monitoring criteria. Effective September 30, 2018, the agency will ensure all high-risk contracts receive legal review prior to signature.*
- X. *In July, Management began drafting additional policies and procedures to capture updates to the State of Texas Procurement and Contract Management Guide, to clarify which contracts will require enhanced monitoring, and to address other identified issues. The agency will integrate updates into mandatory training and adopt necessary changes into the agency's operating procedures by September 30, 2018.*
- XI. *TEA is updating its internal operating procedures to implement disciplinary actions for failure to comply with its contracting rules. The agency will add this new requirement to existing contracts training and adopt it into policy before October 31, 2018.*
- XII. *Beginning with contracts executed after January 31, 2019, TEA will pursue a third-party review process to focus on targeted areas of greater compliance risk. The agency will also conduct random internal quality assurance reviews on executed contracts.*

XIII. *Before the end of fiscal year 2019, TEA will deploy an automated contract management and workflow tracking system, which will enable even greater compliance monitoring tools across the five phases of the procurement process.*

These cross-cutting changes will ensure TEA develops an internal culture focused on contract compliance, while striving to more effectively and efficiently issue procurements.

Responsible parties: Deputy Commissioner of Finance, General Counsel

Chapter 1-A Management Responses

In addition to cross-cutting actions outlined above, TEA has substantially implemented the following changes to improve its contracting processes. The agency has begun adopting operating policies and procedures to integrate these changes and will complete this effort by September 30, 2018.

a. *(1) During the updated mandatory contracts training, staff are advised of the statutory requirements that would lead to disqualification of a respondent to a solicitation. The competitive procurement procedures, forms, and templates were updated to ensure that a statement notifying respondents that proposals failing to meet minimum solicitation requirements will be disqualified from further consideration and not subject to review. To ensure Texas taxpayers receive best value for their contracts, the new process will prominently display non-negotiable minimum compliance requirements so that all vendors—especially those that are new to Texas or TEA—know about these requirements, such as HUB subcontracting forms.*

(2) The contracts division updated TEA's policy and procedures for documenting evaluation results and selecting vendors for contract award. A contract award memo is required for all competitive procurements and includes a summary of the steps of the solicitation, vendor evaluations, and the best value criteria used to select a vendor for contract award. If a variance exists between the response scores, presentation scores, and the vendor awarded, TEA staff must include a justification for that variance in the award memo supported by the best value considerations.

b. *The contracts division has reviewed, updated, and trained staff that project needs must be clearly stated on the TEA Scope of Work (SOW) Requirements Form. This form stipulates that TEA staff must design tasks, activities, deliverables, and deliverables-based budgeting in the planning phase. Under TEA's new five-phase compliance model, the*

planning team may not transfer a project to the procurement/solicitation team until the required planning documents and forms are received, reviewed, and accepted.

- c. TEA has formalized procedures for meetings between contract specialists and evaluators to review the scoring rubric and scoring guidelines to ensure consistency and accuracy.*
- d. The contracts division implemented a procedure for a required independent, second review of evaluation scores: A contract-certified staff member not assigned to the particular solicitation team will review calculated evaluation scores for accuracy and document the review. Documentation of the second review must be included in the contract master file held by the contracts division.*
- e. As noted previously, TEA's new five-phase compliance model prohibits a project from moving from one phase of the process to the next until the completion and receipt of the necessary documentation, including the cost price analysis.*

Responsible parties: Deputy Commissioner of Finance, General Counsel

Chapter 1-B
Rating:
Medium³

Chapter 1-B

While the Agency Followed Its Contract Formation Processes, It Should Strengthen Those Processes to Ensure That It Complies With All Requirements

The Agency generally followed its contract formation process for the contract that it awarded to Tembo. It also ensured that its contract effective date coincided with the execution of the contract. However, the Agency should ensure that it complies with applicable statutes and other requirements. Specifically:

- The Agency ensured that both purchasers involved in the procurement were certified as Texas Procurement Managers as required. However, neither of those purchasers completed conflict of interest disclosure statements for the procurement until two months after the contract execution. Completing disclosures prior to procuring a contract is required by Texas Government Code, Section 2262.004, and the *State of Texas Contract Management Guide*. Not ensuring that all staff make required disclosures limits the Agency's ability to identify and address potential conflicts in a timely manner.
- The Tembo contract included all required and applicable recommended clauses in the *State of Texas Contract Management Guide*. In addition, the contract included clearly defined deliverables. However, the contract did not include a requirement for Tembo to verify the employment eligibility of its employees and subcontractors as required by Executive Order RP-80.
- The Agency generally followed its process to execute the final Tembo contract; however, that process did not require a legal review. While not required, a legal review could help the Agency ensure that it complies with all contracting requirements.
- The Agency did not report the contract to the Legislative Budget Board within 30 days after contract award as required by the General Appropriations Act (85th Legislature). However, the Agency subsequently reported the contract.

³ The risk related to the issues discussed in Chapter 1-B is rated as Medium because the issues identified present risks or effects that if not addressed could moderately affect the audited entity's ability to effectively administer program(s)/function(s) audited. Action is needed to address the noted concern and reduce risks to a more desirable level.

Recommendations

The Agency should:

- Require its employees to complete the required disclosure forms in a timely manner.
- Design its contracts to include all required contract clauses.
- Strengthen its contract review process to include a legal review for major contracts.
- Report contracts and amendments to the Legislative Budget Board as required.

Management's Response

Management agrees with the recommendations. In addition to cross-cutting actions outlined previously, TEA has substantially implemented the following changes to improve its contracting processes. The agency has begun adopting operating policies and procedures to integrate these changes and will complete this effort by September 30, 2018.

- a. *The new Scope of Work (SOW) Requirements Form mandates that a project manager reasonably identify all staff (e.g., evaluators, subject matter experts, and technical advisors) that will be involved in the procurement. Non-disclosure forms must be submitted by all involved parties along with other required project planning documents. Under TEA's new five-phase compliance model, a competitive procurement cannot advance to the procurement/solicitation team until the contracts division staff have reviewed the required planning materials for accuracy and completeness and accepted the items.*
- b. *TEA's Office of Legal Services updated the agency's contract terms and conditions in response to a thorough internal review and to align with the Comptroller's June 2018 release of the new State of Texas Procurement and Contract Management Guide. Updated terms, conditions, and affirmations are used in all new contracts, and include required response preferences and an execution of offer. Similar terms and conditions are used in contract renewals as needed. The agency also requested a review of its new contract terms and conditions from its outside Intellectual Property counsel as well as the Comptroller's Contracts Advisory Team-Review and Delegation (CAT-RAD) leadership.*

Feedback received as of mid-August has been integrated and TEA will incorporate any additional input to the maximum extent possible.

- c. As previously noted, TEA added two contracts and procurement attorney positions within the Office of Legal Services. In addition to providing general legal support to the contracts division, these attorneys will conduct legal reviews of contracts deemed “high-risk” based on TEA’s new contract monitoring and enhanced monitoring criteria. Hiring for the second of these two positions is in progress.*
- d. Under the agency’s five-phase compliance model, a contract will not advance out of the formation phase unless and until all policy and reporting requirements, including Legislative Budget Board reports, are completed.*

Responsible parties: Deputy Commissioner of Finance, General Counsel

Chapter 1-C

The Agency Properly Approved Payments to Tembo and Monitored **Tembo’s Progress During the Initial Design Phase**

Chapter 1-C
Rating:
Low ⁴

The Agency properly approved invoices prior to payment and made payments to Tembo in a timely manner. As of May 2018, the Agency had paid \$298,280 for services that it received from Tembo, and it verified that it received the services outlined in Tembo’s invoices prior to making those payments.

The Agency also monitored Tembo’s initial progress on contract deliverables, met regularly with Tembo to discuss contract specifications and status, and provided feedback on Tembo’s preliminary designs. In addition, the Agency established a monitoring plan that included the testing of key deliverable elements as the contract progressed into the development stages.

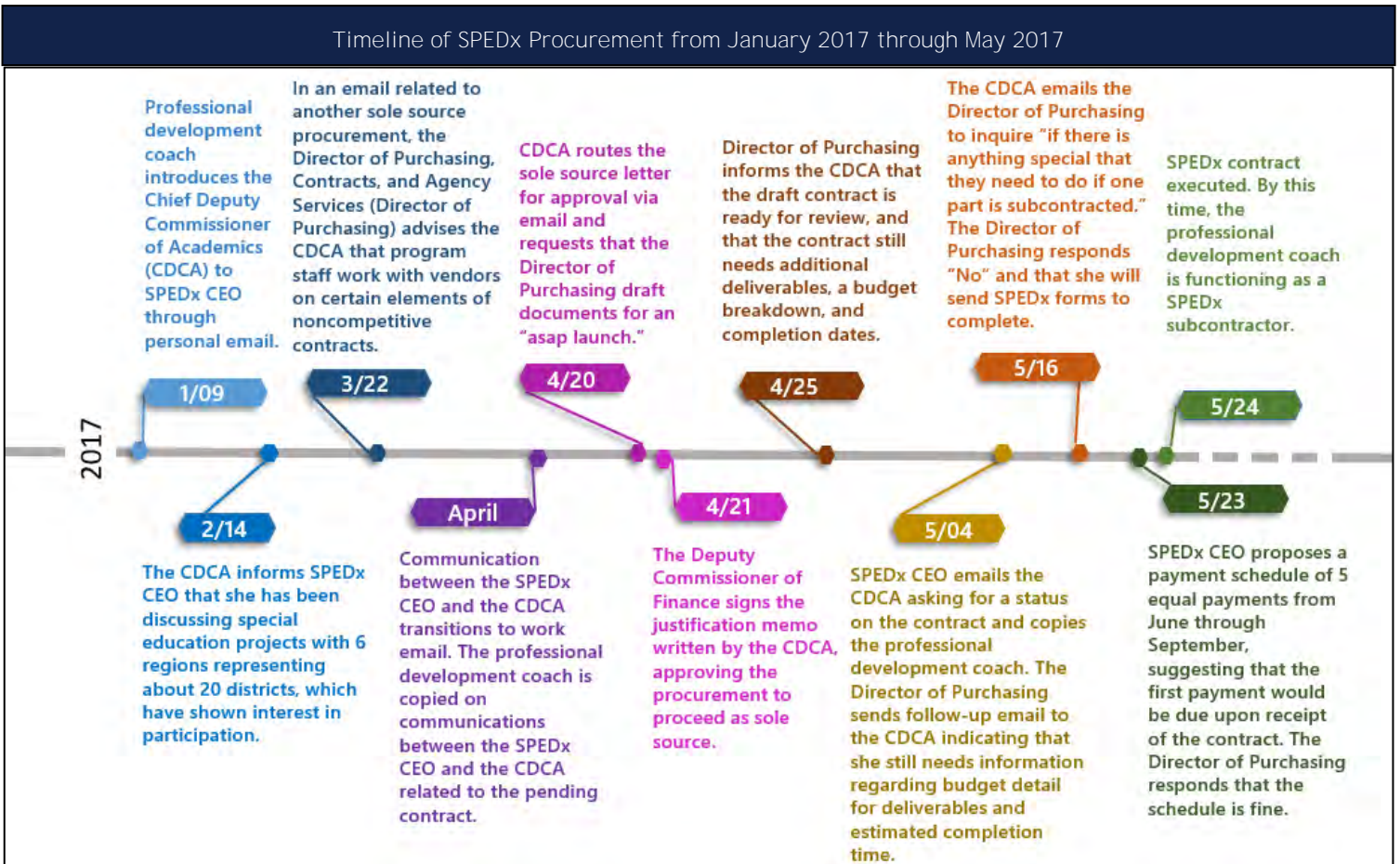
⁴ The risk related to the issues discussed in Chapter 1-C is rated as Low because the audit identified strengths that support the audited entities’ ability to administer the program(s)/function(s) audited or the issues identified do not present significant risks or effects that would negatively affect the audited entities’ ability to effectively administer the program(s)/function(s) audited.

The Agency Did Not Have an Adequate Control Environment to Protect the Integrity of the SPEDx Procurement

Chapter 2
Rating:
Priority ⁵

Significant weaknesses in the Agency’s control environment resulted in the Agency awarding the contract to SPEDx without following steps designed to safeguard the procurement process. When taken together, the following factors adversely affected the integrity of the procurement: (1) the Agency’s failure to complete critical planning and procurement steps, including the selection of SPEDx prior to fully identifying the Agency’s needs; (2) the use of a noncompetitive sole source procurement to award the contract to SPEDx without completing sole source processes; and (3) the Agency’s primary decision maker’s⁶ preexisting professional relationship with a SPEDx subcontractor. Figure 2 presents the timeline of the SPEDx procurement.

Figure 2



Source: The State Auditor’s Office created this timeline based on information from interviews and a review of contract documentation.

⁵ The risk related to the issues discussed in Chapter 2 is rated as Priority because the issues identified present risks or effects that if not addressed could critically affect the audited entity’s ability to effectively administer the program(s)/function(s) audited. Immediate action is required to address the noted concern and reduce risks to the audited entity.

⁶ The Chief Deputy Commissioner of Academics was the primary decision maker for the SPEDx procurement.

While a preexisting professional relationship would not necessarily have precluded the Agency from contracting with SPEDx, proper contracting processes and controls would have helped the Agency identify that relationship and implement safeguards necessary to protect the state's interest.

The Agency did not follow steps designed to maintain the integrity of the procurement process.

The Agency did not perform certain planning steps to mitigate risks. Specifically, the Agency did not:

- Perform a needs assessment before selecting SPEDx. The *State of Texas Contract Management Guide* requires state agencies to perform a needs assessment for individual procurements to identify the contracting objective, to clearly define key business requirements, and to help evaluate what services need to be procured. That assessment should occur prior to selecting a vendor. While the Agency had previously identified a need to collect and analyze special education data, it did not perform a needs assessment specific to the SPEDx procurement. Instead, the Agency identified SPEDx as a potential vendor, discussed potential services that SPEDx could provide, and then entered into a sole source contract with SPEDx.
- Estimate its costs. The Agency did not sufficiently determine the appropriate costs for the services it intended to procure as required by the *State of Texas Contract Management Guide*. The previous Director of Purchasing, Contracts, and Agency Services prepared the Agency's cost estimate worksheet based on information provided by the Chief Deputy Commissioner of Academics; however, the Agency could not provide documentation or explain a rationale for how it determined the estimated costs.
- Obtain authority to enter into a sole source contract. The Agency did not obtain delegated purchasing authority from the Office of the Comptroller of Public Accounts (Comptroller's Office) as required. The Agency prepared a justification memo that described its rationale for its decision to sole source the contract (see text box for information about sole source procurements). However, the Agency did not submit that memo to the Comptroller's Office for approval to proceed with sole sourcing the SPEDx procurement as required by Texas Government Code, Section 2155.067. In addition,

SPEDx Contract

The \$4.4 million contract (including an amendment) with AvenirEducation, Inc., doing business as SPEDx, was for **data mining of students' mandated** individualized education plans with analytics to identify ways to improve the individualized education plan process and pilot solutions. That contract was effective in May 2017 and cancelled effective December 2017.

Sources: The Agency's contract with SPEDx, the contract amendment, and the cancellation letter.

Sole Source Procurements

A sole source procurement is a proprietary purchase and can be used when the specified product or service is only available for purchase through a single vendor. Proprietary purchases, by definition, preclude competition. Because Texas procurement law promotes the use of competitive bidding for purchases, proprietary purchases are subject to enhanced scrutiny.

Source: *State of Texas Procurement and Contract Management Guide*, version 1.0.

while the Agency asserted that market research was performed to support its decision to sole source the procurement, the Agency could not provide adequate documentation showing that it performed that research prior to the procurement.

In addition, the Agency did not perform certain procurement steps to mitigate risks. Specifically, the Agency did not:

- Advertise the procurement specifications. The Agency did not comply with Texas Government Code, Chapter 2155, which required it to advertise the procurement on the *Electronic State Business Daily*, before it executed the contract in May 2017. Agencies are required to advertise sole source procurements so competing vendors have an opportunity to respond with how they may be able to satisfy the Agency's needs.
- Follow its processes to identify and mitigate potential conflicts. The Agency did not require Agency staff involved in the contract to disclose potential conflicts prior to the execution of the contract. The Agency also did not ensure that the Chief Deputy Commissioner of Academics and the former Deputy Commissioner of Finance⁷ completed internal contract management training required by its policies prior to overseeing the planning and procurement of the SPEDx contract. That training outlines responsibilities and duties related to all phases of contracting, including planning and ethics.

In addition, the Agency did not require SPEDx to:

- ♦ Affirm that it had not offered any gifts, economic opportunity, and future employment in connection with the contract.
- ♦ Affirm that it does not employ any former Agency executive.
- ♦ Disclose potential conflicts of interest.
- ♦ Submit a disclosure of interested parties form, in which a vendor identifies individuals who have a controlling or intermediary interest in that vendor's business.

Completing disclosures prior to procuring the contract is required by the Texas Government Code⁸ and the *State of Texas Contract Management Guide*. Not requiring staff and vendors to make required disclosures and

⁷ The former Deputy Commissioner of Finance signed the sole source justification memo that the Chief Deputy Commissioner of Academics drafted.

⁸ See Texas Government Code, Sections 669.003, 2252.908, and 2262.004.

affirmations limits the Agency's ability to identify and address potential conflicts.

The Agency did not ensure that it had adequate policies or processes to identify or implement safeguards against a preexisting professional relationship between Agency management and a SPEDx subcontractor.

Disclosure Requirements

Texas Government Code, Section 2262.001, requires certain disclosures for contracts with a value of at least \$1 million if a person:

- Directly or indirectly owns or controls more than a 10 percent interest or pecuniary interest with a value exceeding \$25,000 in a business entity that is under consideration for an award.
- Has a relationship with an employee, a partner, a major stockholder, a paid consultant with a contract of at least \$25,000 with a business entity under consideration for an award, or other owner of the business entity that is related within the third degree by consanguinity (related by blood) and second degree of affinity (a spouse and individuals related to the spouse).

Disclosures required by the Texas Government Code are designed to identify conflicts of interest related to financial and family relationships (see text box). Those required disclosures are not designed to identify other types of preexisting relationships. Because the Agency did not have additional policies or processes that required key decision makers to disclose other types of preexisting relationships that could affect a procurement, it did not identify that the primary decision maker for the SPEDx procurement had a preexisting professional relationship with a subcontractor. As a result, it did not implement safeguards to mitigate the risks associated with that relationship.

Specifically, the Agency did not identify that its primary decision maker for the SPEDx procurement had a professional development coach who was funded by a third party nonprofit academy in which the primary decision maker had participated (see 1 in Figure 4 in Appendix 3). That coach introduced the chief executive officer (CEO) of SPEDx to the primary decision maker using personal email (see 2 in Figure 4 in Appendix 3). After that introduction, the primary decision maker and the SPEDx CEO discussed potential projects related to special education in Texas (see 3 in Figure 4 in Appendix 3). The Agency ultimately entered into a sole source contract with SPEDx and paid for services that the coach provided as a subcontractor (see 4 in Figure 4 in Appendix 3).

The primary decision maker asserted that while she was aware prior to the execution of the contract that SPEDx hired her coach as a subcontractor, she was not privy to or involved in SPEDx's subcontracting decision. However, the coach was included on email communications between the primary decision maker and the SPEDx CEO discussing the pending contract, including contract language.

Limited Contact Policy

The Agency's Code of Ethics states "all [Agency] staff members are strictly prohibited from discussing, in any way, any aspect of a new or open competitive solicitation or subsequent contract with anyone outside of the agency except as part of the open public meetings that the agency conducts."

Source: Texas Education Agency's *Contract Development and Administration Manual*.

The Agency's limited contact policy was unclear because it appeared to reference only competitive solicitations. The Agency's Code of Ethics, which included a limited contact policy (see text box), should have prevented the email communication discussed above. However, the limited contact policy did not specifically prohibit individuals involved in a sole source procurement from communicating with potential sole source vendors, their subcontractors, or others outside the Agency. Instead, that policy focused on competitive procurements and did not provide

guidance on noncompetitive procurements. However, for all types of procurements, including sole source procurements, individuals who are not directly involved with a procurement should not be included in communications about the contract.

To protect the integrity of its procurements, the Agency should enhance its policies and procedures to (1) identify and evaluate preexisting relationships between key decision makers and potential vendors or subcontractors, (2) implement safeguards, such as using a competitive solicitation process, and (3) appropriately limit contact during procurements.

The **Agency's policies did not require an assessment of** the risk of fraud, abuse, or waste.

The Agency's policies and procedures did not address assessing the risk of fraud, abuse, or waste in the contractor selection process, contract provisions, and payment and reimbursement rates and methods for the different types of goods and services for which the agency contracts, as required by Texas Government Code, Section 2261.256.

The Agency updated its documentation six months after it executed its contract.

The Agency executed its SPEDx contract in May 2017. In November 2017, after concerns were raised regarding the SPEDx procurement, the Agency conducted a comprehensive review of its SPEDx contract file. As part of that review, it performed planning and procurement tasks and completed documentation it had omitted or misplaced. For example, the Agency required that (1) certain management involved in the procurement complete disclosure statements and (2) SPEDx complete the disclosure of interested parties form.

Recommendations

To help ensure the integrity of its contract functions, the Agency should:

- Perform all required planning steps, including:
 - ♦ Conducting a needs assessment.
 - ♦ Developing a cost estimate.
 - ♦ Obtaining delegated purchasing authority from the Comptroller's Office. For sole source contracts, that should include obtaining approval to proceed with the procurement as sole source.

- ♦ Completing and documenting the research it performs to support its decisions to sole source contracts.
- Advertise its procurements on the *Electronic State Business Daily* as required, including sole source procurements.
- Require its employees to disclose potential conflicts of interest and complete the required disclosure forms.
- Ensure that its employees complete required internal contract management training.
- Require its vendors make the affirmations and disclosures required by the Texas Government Code and *State of Texas Procurement and Contract Management Guide*⁹.
- Enhance its disclosure process to (1) require key decision makers to disclose and document preexisting relationships that could potentially affect a procurement and (2) implement and document safeguards to mitigate associated risks.
- Improve its limited contact policy in its Code of Ethics and consistently enforce that policy.
- Update its policies and procedures to include the required assessments of the risk of fraud, abuse, or waste.

Management's Response

Management agrees with the recommendations. Below, we provide additional context, highlight cross-cutting actions that TEA has taken to address weaknesses in its control environment (also noted in Chapter 1-A), and describe steps completed or in progress to specifically address these recommendations.

When issues with the SPEDx agreement were first identified in the fall of 2017, TEA began a year-long effort to ensure full compliance with state contracting requirements, and to build an internal culture that is reflective of that effort. As noted by the SAO, TEA has had contracting compliance findings going back to at least 2013. Management has already begun actions to resolve every issue, but the majority of changes to date—most notably, the

⁹ In June 2018, the *State of Texas Contract Management Guide*, version 1.16, was replaced with the *State of Texas Procurement and Contract Management Guide*, version 1.0.

implementation of a five-phase compliance model—could not be considered for this report because they occurred outside the SAO’s audit scope.

The agency developed the SPEDx project because, in the fall of 2016, it identified a need to help special education students in Texas. TEA continues to believe that the contract could have produced valuable information which would have noticeably improved how Texas schools support these students. However, the agency terminated the contract prior to the completion of the project, for three reasons:

- *Results of TEA’s internal review noted many of the contracting process abnormalities identified subsequently by this SAO report,*
- *Parental and educator concerns developed because of negative publicity about the project, and*
- *School districts began to withdraw from participation in the project because of the publicity.*

Within that context, management is grateful to the SAO for its in-depth and thoughtful analysis, which provides TEA with both an opportunity to highlight steps already taken, and guideposts for how to target ongoing efforts.

Cross-cutting Management Actions

Starting in November 2017, TEA leadership has fully implemented or is in the process of implementing the following changes to shift agency practices and internal contracting culture to one of efficient compliance. These actions will have a significantly positive impact on all contracting activities conducted by TEA.

- I. On November 1, 2017, TEA created the Department of Contracts, Grants and Financial Administration under the leadership of the associate commissioner responsible for grant compliance and oversight. Leading up to the reorganization, the agency assessed staffing and resource needs, and conducted an internal review of multiple contracts to compare the contract compliance checklist against the documentation in the contract file.*
- II. In early 2018, TEA removed the previous director of the contracts division and hired a new assistant division director to manage agency contracts, selecting an attorney with experience in state procurement. The new assistant division director immediately developed and enhanced processes to ensure the full execution of all contracts prior to starting services and the timely rebidding or renewal of all contracts expiring on August 31, 2018.*

- III. *TEA made additional staffing changes to strengthen its efficient compliance focus. In January, the agency began transitioning an employee from its grants division to the contracts division to assist with compliance reviews. In May, TEA hired an attorney in the contracts division to focus on compliance. This summer, the agency added six positions to the contracts division and increased contracts attorney positions in the Office of Legal Services from one to three. Hiring for these positions is ongoing with the intent of reaching full staffing by the end of November.*
- IV. *In March, the contracts division's service delivery approach was restructured to align to a five-phase compliance model (planning, procurement, formation, monitoring, and closeout). Subdividing the process in this manner allows staff to develop expertise within their assigned phase, establishes several natural breakpoints to verify compliance, and enhances general controls through the separation of duties.*
- V. *TEA's new five-phase compliance model prohibits a project from moving from one phase of the process to the next until the completion and receipt of the necessary documentation. The agency will adopt these procedures into policy prior to September 30, 2018, providing built-in internal compliance checks and ensuring completion of required documents—including the needs assessment, cost price analysis, and risk assessment—before a solicitation is posted.*
- VI. *The agency redesigned its mandatory training around service delivery model changes, ethical considerations, statutory requirements, and best practices, and implemented the updated training in April. More than 225 staff had received the updated training as of mid-August.*
- VII. *The Commissioner of Education has emphasized a focus on contract process compliance with his cabinet staff, and all deputy commissioners completed the updated training by August 3, 2018. The contracts division has also implemented an online tool to verify staff has completed the required training.*
- VIII. *New contracting staff who have not already completed Certified Texas Contract Developers (CTCD), Certified Texas Procurement Managers (CTPM), or Certified Texas Contract Managers (CTCM) training are required to complete the appropriate certification before the end of their first year with TEA. Management makes it clear that becoming certified is a priority once they are hired.*

Furthermore, the agency will require an extensive number of program and leadership staff with responsibilities related to major contracts to undergo CTCM training before January 31, 2019.

- IX. The agency has implemented a pre-signature compliance review process for each contract and contract amendment and has developed risk-based monitoring and enhanced monitoring criteria. Effective September 30, 2018, the agency will ensure all high-risk contracts receive legal review prior to signature.*
- X. In July, Management began drafting additional policies and procedures to capture updates to the State of Texas Procurement and Contract Management Guide, to clarify which contracts will require enhanced monitoring, and to address other identified issues. The agency will integrate updates into mandatory training and adopt necessary changes into the agency's operating procedures by September 30, 2018.*
- XI. TEA is updating its internal operating procedures to implement disciplinary actions for failure to comply with its contracting rules. The agency will add this new requirement to existing contracts training and adopt it into policy before October 31, 2018.*
- XII. Beginning with contracts executed after January 31, 2019, TEA will pursue a third-party review process to focus on targeted areas of greater compliance risk. The agency will also conduct random internal quality assurance reviews on executed contracts.*
- XIII. Before the end of fiscal year 2019, TEA will deploy an automated contract management and workflow tracking system, which will enable even greater compliance monitoring tools across the five phases of the procurement process.*

These cross-cutting changes will ensure TEA develops an internal culture focused on contract compliance, while striving to more effectively and efficiently issue procurements.

Responsible parties: Deputy Commissioner of Finance, General Counsel

Chapter 2 Management Responses

Management agrees with the recommendations. In addition to cross-cutting actions outlined above, TEA has substantially implemented the following changes to improve its contracting processes. The agency has begun adopting operating policies and procedures to integrate these changes and will complete this effort by September 30, 2018, except as indicated below.

- a. *A key element of TEA's realignment of staff to the five-phase compliance model is that the planning team will not transfer a project to the procurement team until all materials have been received, reviewed for accuracy and completeness, and included in the contract master file owned by the contracts division. This includes the needs assessment, cost estimate, documentation of the delegated purchasing authority, and all research or other documentation acquired to support a sole source procurement.*
- b. *The contracts division has updated the TEA Contract Management Handbook and retrained staff to ensure procurements are advertised on the Electronic State Business Daily (ESBD) as required, including sole source procurements.*
- c. *TEA has reviewed and updated its form for documenting potential conflicts of interest to enhance its disclosure processes. The updated form requires staff involved in the development, posting, evaluation, or award of a contract to actively acknowledge an actual or potential conflict of interest in any procurement or contract, by disclosing any past or current family, social, or professional relationships with identified interested parties as disclosed by vendors.*
- d. *As previously noted, TEA redesigned its mandatory training around service delivery model changes, ethical considerations, statutory requirements, and best practices, and has implemented an online tool to verify staff has completed the required training.*
- e. *TEA's Office of Legal Services updated the agency's contract terms and conditions to include required affirmations in alignment with the Texas Government Code and the State of Texas Procurement and Contract Management Guide. In addition, the contracts division and TEA's senior ethics officer revised and updated related disclosure forms.*
- f. *Under TEA's revised procedures, respondents to a solicitation must submit a Management Plan that identifies the entities interested and involved parties, including principals, owners, board members, staff with significant project responsibilities, and any known subcontractors. Respondents have an ongoing obligation to update the Management Plan as changes occur. Evaluators are provided the list of interested parties along with the conflicts of interest form for completion before distribution of vendor proposals. In the event an evaluator identifies an actual or potential conflict of interest, TEA's ethics counsel must review the disclosure and determine the appropriateness of staff's continued involvement in the procurement. The project manager may elect to*

substitute another staff without an actual or potential conflict for that evaluator.

- g. TEA will update the policy to provide the clarity necessary to facilitate effective enforcement and to ensure alignment with applicable statutory requirements and will initiate appropriate staff training by December 31, 2018.*
- h. The contracts division is updating the TEA Contract Management Handbook and operating procedures to outline steps the Agency takes to identify, document, and mitigate the potential risk of fraud, abuse, or waste in contractor selection and payments. The contracts division also adopted additional monitoring activities to further mitigate potential risk, such as instituting random and scheduled requests for supporting documentation for expenses.*

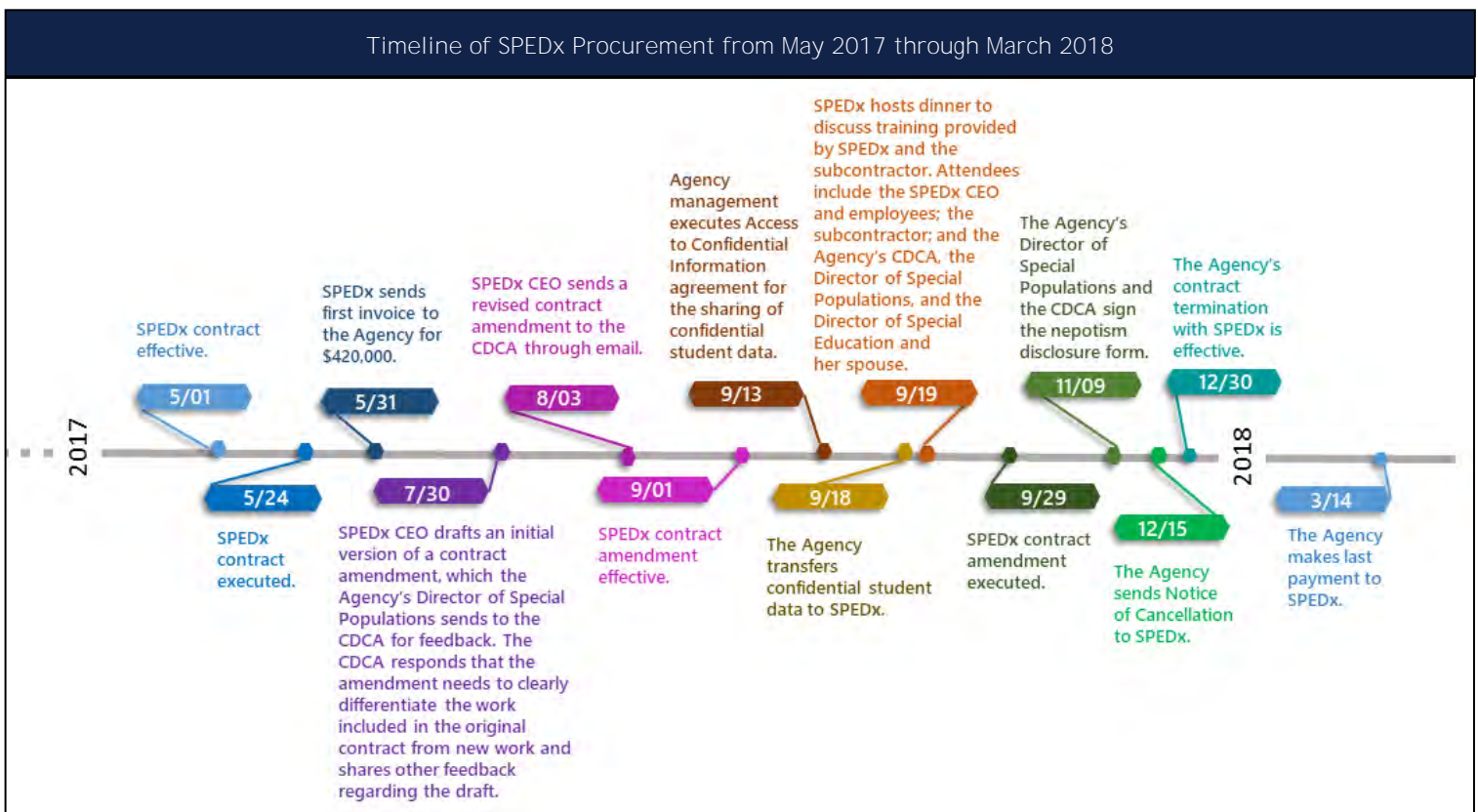
Responsible parties: Deputy Commissioner of Finance, General Counsel

The Agency Paid for Deliverables It Did Not Receive, and It Did Not Review SPEDx’s Data Security Practices Prior to Sharing Confidential Data

Weaknesses in the Agency’s contract formation resulted in the Agency paying SPEDx \$2.5 million and receiving only 1 deliverable valued in the contract at \$150,000. In addition, the Agency also did not sufficiently monitor the SPEDx contract because it did not review SPEDx’s data security practices prior to sharing confidential student data.

Figure 3 presents the timeline of the SPEDx contract from May 2017 through March 2018.

Figure 3



Source: The State Auditor’s Office created this timeline based on information from interviews and a review of contract documentation.

The Agency Paid SPEDx for Deliverables It Did Not Receive Because It Did Not Properly Form the Contract

Chapter 3-A
Rating:
Priority¹⁰

The Agency's SPEDx contract established a predetermined payment schedule under which the Agency made equal monthly payments. Although the contract contained language that would have allowed the Agency to hold back payments based on SPEDx's progress on deliverables, the Agency did not exercise that option. As a result, the Agency paid SPEDx \$2.52 million but received only 1 deliverable valued in the contract at \$150,000 (or 6 percent of the total amount paid). Specifically, the Agency paid:

- \$1.68 million of the original contract value of \$2.10 million, but only received the training specified in the contract, which was provided by the subcontractor. While SPEDx reported that it was performing work on the other contract deliverables, the Agency did not receive those other deliverables.
- \$836,562 under a contract amendment, which had a total value of \$2.32 million and included new deliverables in addition to extending the timeline for completion of the original deliverables. SPEDx invoiced the Agency for work performed on the new deliverables established in the amendment, and the Agency paid those invoices. However, the Agency did not receive any of the final deliverables specified in the amendment.

In forming the contract, the Agency agreed to the predetermined payment schedule developed by SPEDx, and that schedule did not tie payments to demonstrated progress on the deliverables. In addition, the Agency did not establish project milestones, such as requiring SPEDx to provide interim deliverables demonstrating its progress. The statement of work also did not include a detailed description of contract deliverables, which would have helped the Agency to determine whether the contract payment amounts corresponded to the work performed on each deliverable. The Agency included a more detailed description of deliverables and project milestones in the contract amendment.

Table 2 on the next page lists the contract deliverables, the costs assigned to those deliverables, and the amounts paid for the SPEDx contract.

¹⁰ The risk related to the issues discussed in Chapter 3-A is rated as Priority because the issues identified present risks or effects that if not addressed could critically affect the audited entity's ability to effectively administer the program(s)/function(s) audited. Immediate action is required to address the noted concern and reduce risks to the audited entity.

Table 2

SPEDx Payments and Deliverables				
Deliverable	Contracted Cost	Total TEA Paid to SPEDx	Percent of Contracted Cost Paid	Deliverable Received?
Original Contract Payments				
Aggregating Student Records	\$1,000,000	\$999,995	100%	No
Develop Two Pilot Programs	370,000	160,145	43%	No
Customize Analytic Report on Data	200,000	196,240	98%	No
Align Data to Draft Appropriate Targets	150,000	119,850	80%	No
Conduct Three Trainings	150,000	72,000	48%	Yes
Establish a Statewide Design Group	150,000	67,800	45%	No
Ongoing Consulting Hours	50,000	39,995	80%	No ^a
Conduct At Least 50 Interviews	30,000	24,000	80%	No
Original Contract Totals	\$2,100,000	\$1,680,025	80%	
Contract Amendment Payments				
Design Team Blueprints; Implementation Plan Development and Support	\$1,158,732	\$217,329	19%	No
18/36 Month Strategic Plan	714,963	162,492	23%	No
Incidentals	386,735	386,735	100%	Not Applicable ^b
External Fact Base	59,980	32,206	54%	No
Contract Wind Down Tasks	0 ^c	37,800	Not Applicable	Not Applicable ^c
Contract Amendment Totals	\$ 2,320,410	\$ 836,562	36%	
Grand Totals	\$4,420,410	\$2,516,587	57%	
<p>^a The contract specified “ongoing consulting hours for (multiple people at 120 hours each).” However, SPEDx did not detail a specific number of consulting hours it provided on its invoices.</p> <p>^b Incidentals were included as a cost in the contract amendment but did not represent a separate deliverable.</p> <p>^c Contract wind down tasks were not listed as a deliverable in the contract amendment. As discussed in Chapter 3-B, the Agency asserted that the contract wind down costs were for the destruction of data, which was required by the contract; however, the contract did not identify a cost for providing that service.</p>				

Sources: The Agency’s contract with SPEDx, invoices that SPEDx submitted to the Agency, other Agency contract and payment documentation, and auditor calculations and analysis.

The contract and the amendment required advance payments upon execution. The original contract required the Agency to make an initial payment of \$420,000 to SPEDx upon receipt of the executed contract, before the delivery of services. The Agency made that initial payment after approval from Agency management.

In addition, the contract amendment, which was effective September 1, 2017, required the Agency to pay \$386,735 (20 percent of the total contract amendment value for deliverables) in advance for “incidentals” but that amendment did not describe what those incidentals costs were. The Agency paid this amount in full and it subsequently cancelled the contract effective December 30, 2017.

Auditors identified other contract formation weaknesses. Those weaknesses included:

- The contract’s effective date and the contract amendment’s effective date were prior to the execution dates. Allowing the contract and amendment to be effective prior to execution limited the Agency’s ability to hold SPEDx accountable for the delivery of services.
- The contract did not require SPEDx to verify the employment eligibility of its employees and subcontractors. In addition, because the contract did not include an affirmation clause, it did not require SPEDx to make certain required affirmations, such as that it had not violated antitrust laws.
- The contract and amendment did not undergo a legal review, which should have helped the Agency to identify weaknesses in the formation of its contract.
- The Agency did not execute a written amendment to allow the subcontractor to begin providing services, which was required by the Agency’s contract with SPEDx.
- The Agency did not report the contract and amendment to the Legislative Budget Board timely as required by the General Appropriations Acts (84th and 85th Legislatures).

The Agency did not follow certain aspects of its amendment process, and it allowed SPEDx to purchase meals for its staff while in the process of executing the amendment. In September 2017, the Agency approved the amendment that increased the total contract amount from \$2.1 million to \$4.4 million. However, the Agency did not complete certain required steps when it amended its contract. Those steps would have helped the Agency to fully evaluate the purpose and structure of that amendment. For example, the Agency did not:

- Evaluate the performance of its vendor.
- Complete a cost-benefit analysis.

In addition, the Agency allowed SPEDx to purchase at least one meal for employees involved in the administration of the contract. That dinner occurred in September 2017, while the Agency was in the process of executing the contract amendment. This did not comply with the Agency's Standards of Conduct policy.

Recommendations

The Agency should:

- Include in its statements of work detailed and measurable deliverables (such as interim deliverables) and project milestones.
- Design its contracts to:
 - ♦ Require that payments to its vendors align with demonstrated progress made toward completing deliverables.
 - ♦ Prevent payment for services prior to the delivery of those services, except when the Agency has documented a reason explaining the necessity and proper public purpose of an advance payment.
 - ♦ Be effective only upon or after execution.
 - ♦ Include all required contract clauses.
- Strengthen its contract review process to include a legal review for major contracts.
- Execute written amendments prior to allowing subcontractors to begin performing work.
- Report contracts and amendments to the Legislative Budget Board as required.
- Complete all required steps when amending its contracts, including (1) evaluating vendor performance and (2) completing a cost-benefit analysis.
- Follow its Standards of Conduct policy when interacting with vendors and potential vendors.

Management's Response

Management agrees with the recommendations. In addition to cross-cutting actions outlined previously, TEA has substantially implemented the following changes to improve its contracting processes. The agency has begun adopting operating policies and procedures to integrate these changes and will complete this effort by September 30, 2018.

- a. As a part of TEA's new five-phase compliance model, TEA staff must now complete the Statement of Work (SOW) Requirements Form during the planning phase to document anticipated measurable tasks, activities, milestones, and deliverables prior to advancing to the contract formation phase.*
- b. (1) TEA now requires entities responding to a competitive solicitation to specify measurable tasks, activities, milestones, and deliverables and provide a budget plan that ties payments to completion of deliverables. This information is transferred from the procurement team to the contract formation team, used in drafting the final agreement, and subsequently used to ensure payments are tied to deliverables and tasks outlined in the executed agreement.*
(2) The agency adopted a general prohibition policy on advance payment to contractors. A request for an advance payment and a justification for the payment must be vetted by the Office of Legal Services and submitted to the Senior Director for Contracts and Purchasing and the Deputy Commissioner of Finance for review and approval. No advance payments will be made unless the preauthorization documents are in the contract master file maintained by the contracts division.
(3) The contracts division updated contract and amendment templates to state clearly that a contract starts on a future specified date or the date that the agreement is fully executed by both parties, whichever is later. A contract or amendment submitted for compliance review will not be approved for internal execution if the effective date precedes the date of full execution.
(4) As previously noted, the Office of Legal Services updated TEA's contract terms and conditions, with input from external counsel and the Comptroller's Contracts Advisory Team-Review and Delegation (CAT-RAD) leadership, to ensure alignment with the Texas Government Code and the State of Texas Procurement and Contract Management Guide.

- c. *As previously noted, TEA added two contracts and procurement attorney positions within the Office of Legal Services. In addition to providing general legal support to the contracts division, these attorneys will conduct legal reviews of contracts deemed “high-risk” based on TEA’s new contract monitoring and enhanced monitoring criteria. Hiring for the second of these two positions is in progress.*
- d. *TEA’s Office of Legal Services conducted a review of the agency’s standard contract terms and conditions to ensure vendors are prohibited from allowing a subcontractor to begin work prior to the execution of a contract or contract amendment.*
- e. *Under the agency’s five-phase compliance model, a contract or contract amendment will not advance out of the formation phase unless and until all policy and reporting requirements, including Legislative Budget Board reports, are completed.*
- f. *A key element of TEA’s realignment of staff to the five-phase compliance model is that the planning team will not transfer a contract amendment to the contract formation team until all materials are received, reviewed for accuracy and completeness, and included in the contract master file owned by the contracts division. This includes the contractor performance evaluation and cost/price analysis.*
- g. *The updated TEA Contract Management Handbook, agency operating procedures, and TEA’s new required contract management training highlight the specific limitations for communicating with vendors. The Commissioner of Education has recommitted the agency to enforcing a strict Standards of Conduct policy when staff interact with vendors and potential vendors. In addition, guidance is being provided to management staff across the agency to retrain employees on appropriate behavior in a wide range of potential interactive situations.*

Responsible parties: Deputy Commissioner of Finance, General Counsel

The Agency Did Not Sufficiently Monitor SPEDx Data Security Practices

Chapter 3-B
Rating:
High ¹¹

The Agency established an agreement related to data security prior to sharing confidential student data with SPEDx, and it required SPEDx to destroy that data upon contract cancellation. However, it did not verify that SPEDx had security protocols in place. In addition, while the Agency monitored SPEDx through regular status meetings and by reviewing information provided by SPEDx, it did not initially require detailed invoices, and it paid for costs that were not outlined in the contract.

The Agency did not review SPEDx’s data security practices prior to sharing confidential student data to ensure that the data was adequately protected. While the Agency required SPEDx to execute an agreement related to its access of confidential student information before the Agency shared that information, it did not verify that SPEDx had appropriate data security controls in place. For example, the Agency’s data security processes include testing the security of vendor systems, but it did not perform that testing. The Family Educational Rights and Privacy Act (FERPA) requires state educational authorities to use reasonable methods to ensure, to the greatest extent practicable, that any entity or individual that it authorizes to access confidential student data protects personally identifiable information from further disclosure or other uses. In addition, the Agency did not verify that SPEDx employees and subcontractors completed a non-disclosure agreement related to student data, as required by its contract. Not verifying that SPEDx had necessary data security protocols in place increased the risk of unauthorized access to that confidential student data.

Agency Data Sharing

To facilitate SPEDx’s analysis, the Agency shared data related to student demographic information and statewide standardized test results.

In addition, according to the Agency, school districts that participated in the project established agreements related to sharing students’ individualized education plan information.

Source: The Agency.

When the Agency cancelled the contract in December 2017, it requested that SPEDx destroy all confidential student data that it received in accordance with the contract terms and FERPA, and the Agency later obtained an affidavit from SPEDx affirming that destruction.

The Agency monitored the SPEDx contract through regular status meetings and reviews of information provided by SPEDx. In addition to regular status meetings, SPEDx provided the Agency with written status updates, and those updates indicated that SPEDx was performing work outlined in the contract. However, the Agency did not perform a risk assessment, as required by the *State of Texas Contract Management Guide*, to determine where to focus its monitoring.

¹¹ The risk related to the issues discussed in Chapter 3-B is rated as High because the issues identified present risks or effects that if not addressed could substantially affect the audited entity’s ability to effectively administer the program(s)/function(s) audited. Prompt action is essential to address the noted concern and reduce risks to the audited entity.

The Agency did not initially require detailed invoices, and it paid for costs that were not outlined in the contract. **The Agency did not require SPEDx to include a detailed description of the services provided in the first two invoices.** It paid a total of \$840,000 for those first two invoices submitted, and a detailed description would have helped the Agency evaluate whether it received services prior to making those payments. The Agency also paid \$37,800 for “contract wind down” costs after it cancelled its contract, which it asserted were for the destruction of student data. While the contract required SPEDx to destroy student data upon contract completion or termination, the contract did not identify a cost for providing that service.

Recommendations

The Agency should:

- Verify that its vendors have adequate security protocols in place prior to sharing confidential student information.
- Verify that its vendors’ employees and subcontractors complete required non-disclosure agreements.
- Complete a risk assessment to determine where to focus its monitoring efforts, and conduct performance monitoring of key deliverables consistent with the results of the risk assessment.
- Require vendors to submit detailed invoices and, before making a payment, verify that:
 - ♦ It received the invoiced services.
 - ♦ All invoiced costs are authorized in the contract.

Management's Response

Management agrees with the recommendations. In addition to cross-cutting actions outlined previously, TEA has substantially implemented the following changes to improve its contracting processes. The agency has begun adopting operating policies and procedures to integrate these changes and will complete this effort by September 30, 2018.

- a. TEA is updating the TEA Contract Management Handbook, contract management training, and operating procedures to reflect requirements concerning confidential enterprise information in compliance with the Family Educational Rights and Privacy Act (FERPA). These updates will codify the agency's current practice of requiring a fully executed Access to Confidential Information Agent Agreement before TEA shares any confidential student data with a vendor. TEA will now also require the Information Security Officer to scan a vendor's website(s) for vulnerabilities and audit the security measures in effect on a vendor's connected systems as appropriate. Verification that the scans were completed, and scan results, will be attached to the Access to Confidential Information Agent Agreement form. These actions will be affirmed in the form and no confidential student data will be shared without an approved Agreement with attached verifications. TEA will develop a specific operating procedure detailing the policy and process for sharing data and conduct mandatory training by October 31, 2018, for affected staff.*
- b. In addition to the current requirement that vendors attest that employees will sign a non-disclosure agreement, TEA is updating its Access to Confidential Information Agent Agreement to require certification that all vendor employees and subcontractors accessing the confidential data have executed such agreements. The Confidentiality Officer will not approve the Access to Confidential Information Agent Agreement if this certification is not included with the additional supporting documentation required by agency operating procedures concerning confidential enterprise information. As noted above, no confidential student data will be shared without an approved Agreement.*
- c. Under the five-phase compliance model, the procurement risk assessment form must be completed in the planning phase before a project can be transferred to the contract formation team. In addition, the contracts division has updated TEA operating procedures and the TEA Contract Management Handbook to document how the Agency assesses risk posed to TEA by any procurement and any contract award. The contracts division has identified criteria for identifying*

contracts as low, medium, or high risk and assigning contracts to monitoring and enhanced monitoring procedures based on the level of associated risk.

- d. (1-2) The contracts division developed a contract monitoring tool and contract monitoring training for TEA project managers. Monitoring activities vary based on assessed risk, but all TEA project managers must review invoices, confirm receipt of the invoiced goods and services, and ensure invoiced charges are authorized in the contract and tied to identified deliverables. The specific monitoring activities will vary depending on the level of risk and the goods or services provided.*

Responsible parties: Deputy Commissioner of Finance, General Counsel, Deputy Commissioner of Technology

Appendices

Appendix 1

Objective, Scope, and Methodology

Objective

The objective of this audit was to determine whether the Texas Education Agency (Agency) has administered certain contract management functions for selected Agency contracts in accordance with applicable requirements.

Scope

The scope of this audit covered the Agency's planning, procurement, formation, and oversight related to:

- The contract with Tembo, Inc. for the design and creation of multiple Web pages within the Agency's existing Web-content structure, to include video, interactive tools, multimedia, and user-friendly information. The Agency began planning for that contract in February 2017, and the contract was effective in January 2018. Auditors reviewed the Agency's oversight activities through May 2018.
- The contract with AvenirEducation, Inc., doing business as SPEDx, for data mining of students' mandated individualized education plans with analytics to identify ways to improve the individualized education plan process and pilot solutions. That contract was effective in May 2017, and the Agency cancelled the contract effective December 2017.

Methodology

The audit methodology consisted of collecting and reviewing contract planning, procurement, formation, and oversight documentation, including the audited contracts; conducting interviews with Agency staff; reviewing statutes and rules, Office of the Comptroller of Public Accounts requirements, and Agency policies and procedures; and performing selected tests and other procedures.

The selection methodology for the contracts audited was risk based and considered factors such as contract dollar amount and type of contract.

Data Reliability and Completeness

Auditors used expenditure information in the Uniform Statewide Accounting System (USAS) and relied on previous State Auditor's Office audit work to determine that data was sufficiently reliable for the purposes of this audit.

Information collected and reviewed included the following:

- The Agency's contracts with SPEDx and Tembo.
- Agency policies and procedures and manuals.
- Agency solicitation and bid documentation, evaluation criteria and documentation, and related supporting documentation.
- Agency contract procurement documentation, including planning documentation, approvals, memos, and other supporting documentation.
- Agency personnel training and certification records and non-disclosure and conflict of interest forms.
- Status updates and spreadsheets that the Agency used for monitoring.
- Emails and other documentation.
- Agency contract expenditures from USAS.
- Agency payment documentation, including vendor invoices, approvals, and other supporting documentation.
- Contract closeout documentation.
- Legislative Budget Board contract database.
- Agency internal audit and investigation reports.

Procedures and tests conducted included the following:

- Interviewed Agency management and staff.
- Tested selected contract planning, procurement, formation, and monitoring for compliance with the *State of Texas Contract Management Guide*, *State of Texas Procurement Manual*, Agency policies and procedures, and applicable rules and statutes.
- Reviewed applicable conflict of interest and nondisclosure forms.

- Performed a limited review of Agency emails for key staff.
- Tested payments for selected contracts to determine whether the Agency appropriately processed and approved the payments.

Criteria used included the following:

- Code of Federal Regulations, Section 200.317.
- Texas Government Code, Chapters 322, 441, 572, 656, 2155 through 2157, 2161, 2251, 2252, 2261, and 2262.
- General Appropriations Acts (84th and 85th Legislatures).
- Executive Order RP-80.
- Title 19, Texas Administrative Code, Chapter 30.
- Title 34, Texas Administrative Code, Chapter 20.
- *State of Texas Contract Management Guide*, version 1.16¹².
- *State of Texas Procurement Manual (2017)*¹².
- Contract terms for selected contracts.
- *The Agency's Contract Development and Administration Manual (2017)*.
- Agency policies and procedures, including its Code of Ethics.

¹² This guide was in effect during the planning, procurement, and formation of the two contracts audited for this report. In June 2018, this guide was updated and released as the *State of Texas Procurement and Contract Management Guide*, Version 1.0.

Project Information

Audit fieldwork was conducted from February 2018 through August 2018. We conducted this performance 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 objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The following members of the State Auditor's staff performed the audit:

- Lauren Godfrey, CIA, CGAP (Project Manager)
- Bianca Pineda, CGAP (Assistant Project Manager)
- Alexander Grunstein, CFE
- Thomas Andrew Mahoney, CGAP
- Cameron Scanlon, CFE
- Dennis Ray Bushnell, CPA (Quality Control Reviewer)
- Audrey O'Neill, CIA, CFE, CGAP (Audit Manager)

Issue Rating Classifications and Descriptions

Auditors used professional judgement and rated the audit findings identified in this report. Those issue ratings are summarized in the report chapters/sub-chapters. The issue ratings were determined based on the degree of risk or effect of the findings in relation to the audit objective(s).

In determining the ratings of audit findings, auditors considered factors such as financial impact; potential failure to meet program/function objectives; noncompliance with state statute(s), rules, regulations, and other requirements or criteria; and the inadequacy of the design and/or operating effectiveness of internal controls. In addition, evidence of potential fraud, waste, or abuse; significant control environment issues; and little to no corrective action for issues previously identified could increase the ratings for audit findings. Auditors also identified and considered other factors when appropriate.

Table 3 provides a description of the issue ratings presented in this report.

Table 3

Summary of Issue Ratings	
Issue Rating	Description of Rating
Low	The audit identified strengths that support the audited entity's ability to administer the program(s)/function(s) audited <u>or</u> the issues identified do not present significant risks or effects that would negatively affect the audited entity's ability to effectively administer the program(s)/function(s) audited.
Medium	Issues identified present risks or effects that if not addressed could <u>moderately affect</u> the audited entity's ability to effectively administer program(s)/function(s) audited. Action is needed to address the noted concern(s) and reduce risks to a more desirable level.
High	Issues identified present risks or effects that if not addressed could <u>substantially affect</u> the audited entity's ability to effectively administer the program(s)/function(s) audited. Prompt action is essential to address the noted concern(s) and reduce risks to the audited entity.
Priority	Issues identified present risks or effects that if not addressed could <u>critically affect</u> the audited entity's ability to effectively administer the program(s)/function(s) audited. Immediate action is required to address the noted concern(s) and reduce risks to the audited entity.

SPEDx Contract Relationships

As discussed in Chapter 2, the Texas Education Agency’s (Agency) primary decision maker for the SPEDx procurement had a preexisting professional relationship with a professional development coach, who later was a SPEDx subcontractor. Figure 4 shows the relationships between Agency management, SPEDx, and the coach/subcontractor.

Figure 4



Source: The State Auditor’s Office created this figure based on information from interviews and a review of contract documentation.

Related State Auditor's Office Work

Related State Auditor's Office Work		
Number	Product Name	Release Date
13-042	An Audit Report on Selected State Contracts at the Texas Education Agency	July 2013
<p>Contract Audited Student Assessment Contract with NCS Pearson, Inc.</p> <p>Summary of Related Findings</p> <p>The Agency's contract included a schedule of tasks to be completed that listed the payment amounts due to the vendor on a monthly basis; however, the contract did not itemize the price per testing subject, grade level, or interim deliverable. As a result, the Agency could not verify whether tasks and deliverables were completed prior to payment. The Agency also did not execute contract amendments in a timely manner.</p> <p>In addition, key personnel in the Agency's Student Assessment Division did not complete required contract management training, and it did not complete a cost estimate or needs assessment.</p> <p>Recommendations</p> <p>The Agency should:</p> <ul style="list-style-type: none"> ▪ Restructure the contract's schedule of tasks completed so that it itemizes costs by testing subject, grade level, and interim deliverable. ▪ Develop a method to verify whether tasks and deliverables are complete prior to paying the vendor by amending the schedule of task and deliverables in the contract to itemize the price to prepare interim deliverables related to the development of final tests. ▪ Develop and implement comprehensive written policies and procedures within the Student Assessment Division to monitor the contract, including procedures to execute contract amendments prior to the amendments' effective date. ▪ Ensure that Student Assessment Division employees with contract management responsibilities for the contract complete required Comptroller and Agency contract management training. ▪ Complete necessary planning documents and retain those documents for future contracts. 		
17-002	An Audit Report on the Texas Education Agency's Procurement and Oversight of Texas Virtual School Network Contracts	September 2016
<p>Contracts Audited Texas Virtual School Network Contracts with the Region 10 Education Service Center</p> <p>Summary of Related Findings</p> <p>The Agency did not have executed contracts before it allowed the Region 10 Education Service Center to perform work. The Agency also did not require the Region 10 Education Service Center to submit sufficient supporting documentation to allow the Agency to verify that services were received prior to payment and that expenditures were allowable. In addition, the Agency did not ensure that all purchasing personnel signed disclosure statements.</p> <p>Recommendations</p> <p>The Agency should:</p> <ul style="list-style-type: none"> ▪ Ensure that contracts are executed prior to allowing its contractors to begin work. ▪ Require the contractor to provide sufficient supporting documentation, including tasks and activities performed, with the submission of an invoice to allow the Agency to determine whether services had been received and whether the expenditures were allowable. ▪ When applicable, ensure that all employees involved in the contracting process have completed a disclosure statement for purchasing personnel prior to their involvement with the contract, as required by the <i>State of Texas Contract Management Guide</i> and Agency contracting policy. 		

Related State Auditor's Office Work		
Number	Product Name	Release Date
17-013	An Audit Report on Selected Texas Education Agency Contracts and Grant with Education Service Centers	November 2016
<p>Contracts Audited</p> <p>Early College High School Contract with the Region 13 Education Service Center</p> <p>Texas District and School Improvement Support Center Contract with the Region 13 Education Service Center</p> <p>Summary of Related Findings</p> <p>The Agency allowed the Region 13 Education Service Center to begin work without executed contracts. The Agency also did not require the Region 13 Education Service Center to submit sufficient documentation with invoices to verify that (1) the Agency had received the invoiced services and (2) the expenditures were allowable and associated with specific deliverables under the contracts. In addition, the Agency did not ensure that purchasing personnel signed disclosure statements.</p> <p>Recommendations</p> <p>The Agency should:</p> <ul style="list-style-type: none"> ▪ Develop and implement a process to ensure that it appropriately reviews and executes contracts and grant agreements, amendments, and renewals (1) prior to their effective dates, (2) prior to allowing work to be performed, and (3) with sufficient lead times for required reviews and approvals. ▪ Require contractors to submit sufficient documentation with each invoice to allow the Agency to determine whether it received the invoiced services and whether the expenditures were for allowable costs. ▪ Require contractors to document the work they performed related to contract deliverables and submit that documentation with invoices for payment. ▪ Require all appropriate purchasing personnel to complete the disclosure statements required by statute, the <i>State of Texas Contract Management Guide</i>, and the Agency's Contract Development and Administration Manual. 		

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The Honorable Joe Straus III, Speaker of the House, Joint Chair

The Honorable Jane Nelson, Senate Finance Committee

The Honorable Robert Nichols, Member, Texas Senate

The Honorable John Zerwas, House Appropriations Committee

The Honorable Dennis Bonnen, House Ways and Means Committee

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