
December 18, 2018

Performance Audit
Recommendations and
Corrective Actions for Audit:
15-10

AGENCY OF EDUCATION

Use of Non-Competitive and
Non-Standard Contracts Contrary
to State and Agency
Requirements

Dated: December 17, 2015

Overview

The State Auditor's Office (SAO) makes recommendations designed to improve the operations of state government. For our work to produce benefits, auditees or the General Assembly must implement these recommendations, although we cannot require them to do so. Nevertheless, a measure of the quality and persuasiveness of our performance audits is the extent to which these recommendations are accepted and acted upon. The greater the number of recommendations that are implemented, the more benefit will be derived from our audit work.

In 2010, the SAO began to follow-up on the recommendations issued in our performance audits. Experience has shown that it takes time for some recommendations to be implemented. For this reason, we perform our follow-up activities one and three years after the calendar year in which the audit report is issued. Our annual performance reports summarize whether we are meeting our recommendation implementation targets.

<http://auditor.vermont.gov/about-us/strategic-plans-and-performance-reports>

This report addresses the requirements of Act 155 (2012) to post the results of our recommendation follow-up work on our website. The report does not include follow-up on recommendations issued as part of the state's financial statement audit and the federally mandated Single Audit, which are performed by a contractor. However, our current contract for this work requires the contractor to provide the results of its recommendation follow-up.

| Audit Number & Name | Rec # | Recommendation | Follow-Up Date | Status | Review Comments | |
|--|--|---|----------------|-----------------|---|--|
| 15-10 Agency of Education: Use of Non-Competitive and Non-Standard Contracts Contrary to State Agency Requirements | 1 | Reinstitute the requirement that the Chief Financial Officer (CFO), or other Agency of Education (AOE) official, pre-approve sole source procurement prior to contacting potential vendors. | 2016 | Not Implemented | AOE reported that a new contract administrator was hired in February 2016 to manage the preparation, processing, and execution of contracts. AOE stated that the CFO or Agency Secretary approves the sole source contract. However, this approval is done prior to submitting the contract to the Attorney General's Office (AGO) and the Secretary of Administration for final approvals. AOE did not provide evidence that pre-approval of sole source procurements are required prior to contacting the potential vendors. AOE will be including this requirement in their policy and procedures manual which has not yet been completed. | |
| | | | 2018 | Implemented | The 2017 AOE Manual for Contract Administration section III.3.a. states: "When contemplating any sole source contract, approval from the [AOE] Secretary must be obtained before contacting any potential bidders or drafting the contract." | |
| | 2 | Require AOE staff to document evidence that supports extraordinary circumstances cited in sole source justification memos. | 2016 | Not Implemented | AOE reported that only one sole source contract has been executed since July 2016 for legal services. AOE provided the SAO with the sole source justification memorandum which stated the extraordinary circumstances surrounding this emergency sole source contract, including the sudden departure of the agency's general counsel and below market hourly rates offered by the legal entity. However, AOE did not provide SAO with the requested evidentiary documentation to support these justifications. | |
| | | | 2018 | Implemented | Section V.4.e. of the 2017 AOE Manual for Contract Administration requires that the memo justifying a sole-source procurement include both the reasons for the sole-source procurement and supporting evidence. | |
| | 3 | Implement policies and procedures to address 1) what circumstances constitute a conflict of interest in procurement and contracting and 2) how to assess and resolve conflicts of interest. | 2016 | Implemented | The Secretary of AOE issued an updated memo to all staff in February 2016 outlining the guidelines for managing potential conflicts or interest. The memo includes the circumstances, assessment, and resolution of potential conflicts of interest. Information has also been included in the AOE's 2016 Communications Plan. | |
| | No further follow-up is required because the recommendation was implemented. | | | | | |

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| 15-10 Agency of Education: Use of Non-Competitive and Non-Standard Contracts Contrary to State Agency Requirements | 4 | Develop training for program staff to address requirements for procuring and contracting for services and require attendance. | 2016 | Partially Implemented | AOE reported that all staff involved in procuring and contracting for services attended the Agency of Administration's training on the newly revised Bulletin 3.5. The Agency will conduct training on its contracting policy and procedures manual which has not yet been completed. AOE did not develop a training program for program staff but instead relied on AOA's Bulletin 3.5 training. Since AOE does not have a training program, it's not likely new employees will receive procurement training unless initiated by AOA. | |
| | | | 2018 | Implemented | The 2017 AOE Manual for Contract Administration, section I.3.b., identifies the AOE Contract Administrator as responsible for advising and training agency personnel in the State's and AOE's bidding and contracting processes. | |
| | 5 | Modify the expense authorizations (EA) policy and procedures to incorporate the Bulletin 3.5 prohibition on using successive contracts for the same service. | 2016 | Implemented | As of March 21, 2016, the Secretary of AOE ordered that the use of EAs be put on hold. A new contracting waiver plan, effective August 1, 2016, was approved by the Secretary of Administration and includes prequalifying small scale vendors, and a list of authorized small scale education contracts that previously were paid under an EA. The plan also includes a modified contract form to be used for individual short duration contracts which do not exceed a maximum of one year. | |
| | No further follow-up is required because the recommendation was implemented. | | | | | |
| | 6 | Modify EA policy and procedures to incorporate an assessment of the suitability of the use of an EA or an employment arrangement. | 2016 | No Longer Applicable | AOE has discontinued the use of EAs and has an approved contracting waiver plan as of August 1, 2016. AOE's modified small scale contract terms state that the vendor has agreed to deliver services and/or products as an independent contractor for AOE. | |
| | No further follow-up is required because the recommendation is no longer applicable. | | | | | |
| | 7 | Designate an AOE official as responsible for performing and documenting assessments of whether services requested constitute employment. | 2016 | Partially Implemented | AOE reported that assessments of whether services constitute employment are being performed by their legal division. The process for conducting and documenting these assessments will be included in the agency's contracting policy and procedures manual which has not yet been completed. | |
| | | | 2018 | Partially Implemented | The 2017 AOE Manual for Contract Administration section V.5.b. requires that the legal office verify the validity of the determination of independent contractor's status. However, there is no requirement that this verification be documented, and there is no documentation of the legal office's verification in the AOE's contract package that is received and approved by the AOE Secretary. | |

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| 15-10 Agency of Education: Use of Non-Competitive and Non-Standard Contracts Contrary to State Agency Requirements | 8 | Assess whether the TS GOLD™ trainers and the editors of Vermont Early Learning Standards (VELS) have been misclassified as independent contractors and if so, 1) determine whether the agency has a tax liability and 2) establish employment positions for the individuals that continue to provide these services to the agency. | 2016 | Partially Implemented | Going forward, AOE intends to classify TS GOLD™ Trainers as interim temporary employees once the hiring process is completed. The contract for the editors of VELS ended on September 30, 2015. According to AOE's CFO, the agency general counsel performed an assessment and concluded the trainers and editors were correctly classified as independent contractors. Although AOE reported performing a legal assessment, it was not available for SAO to review and as a result SAO categorized this recommendation as partially implemented. | |
| | | | 2018 | Partially Implemented | AOE informed us in 2016 that their agency general counsel performed an assessment and concluded the trainers and editors were correctly classified as independent contractors, but the documentary evidence of the assessment was not available. In 2018, AOE reported that the general counsel and the contract administrator that were on staff at the time of the 2015 audit and the 2016 response are no longer employed at the AOE and documentation of the assessment is not available. Because the assessment is not available, SAO considers this recommendation only partially implemented. | |
| | 9 | AOA - Expeditiously complete the revised guidance for sole source contracts. | 2016 | Implemented | AOA issued a revised Bulletin 3.5 on July 1, 2016 and strengthened the language and approvals for justification of sole source contracts. Appointing Authorities (not supervisors) are now required to forward the proposed sole source justification request, contract, and verifiable documentation to justify a sole source contract to the Secretary of AOA at least four weeks prior to the planned execution date. It is no longer acceptable to justify a sole source contract by stating "this is the only vendor/contractor/party qualified or able to do the work" unless verifiable documentation is provided. | |
| | No further follow-up is required because the recommendation was implemented. | | | | | |
| | 10 | AOA - Provide training to AOA staff responsible for reviewing sole source memos. | 2016 | Partially Implemented | All budget analysts at the Department of Finance & Management's (DFM) received training on the newly revised Bulletin 3.5. In May 2016, DFM created a contract review checklist to ensure analysts are consistent in their review of contracts and all prior approvals have been obtained. Training does not appear to focus in sole source memos, nor does the checklist they designed. Some training has been given, it's focused broadly on bulletin 3.5 overall. | |
| | | | 2018 | Partially Implemented | AOA reported that training on review of sole-source justifications was provided to budget analysts in January 2018. However, AOA did not provide an agenda or training materials to SAO as evidence of the training and as a result this recommendation is considered partially implemented. | |