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DEPARTMENT OF HUMAN SERVICES

CONTRACTING FOR SERVICES – SELECTION PROCESS



AUGUST 2016

PERFORMANCE AUDIT

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August 3, 2016

DIANNE E. RAY, CPA

STATE AUDITOR

Members of the Legislative Audit Committee:

This report contains the results of the performance audit of the Department of Human Services' processes for selecting contractors for services. The audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The report presents our findings, conclusions, and recommendations, and the responses of the responsible Departments.



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REPORT HIGHLIGHTS



CONTRACTING FOR SERVICES – SELECTION PROCESS
PERFORMANCE AUDIT, AUGUST 2016

DEPARTMENT OF HUMAN SERVICES

CONCERN

The Department of Human Services (Department) has not ensured that its contractor selection process adheres to the Procurement Code and procurement rules so that its evaluation of proposals and selection of contractors fosters competition, ensures fair and equitable treatment, and promotes a system of integrity and quality.

KEY FINDINGS

- There are gaps in the Department's processes for ensuring that the most advantageous offeror is selected and that the evaluation process is transparent and equitable to all offerors. Consistently following established requirements helps ensure the solicitation process is fair and transparent. We identified problems with the Department's adherence to the Procurement Code, procurement rules, and its own established processes for 8 of the 17 Requests for Proposals (RFPs) in our sample, including:
 - The Department did not evaluate proposals for four RFPs in our sample, offering a total of about \$6 million in funds, in accordance with the scoring methodologies described in the RFPs.
 - The Department accepted two proposals on RFPs that were dated after the submission deadline. These RFPs offered \$3.2 million in funds.
- Based on our review of a sample of 17 RFP files, the Department had no documentation of the evaluation or mitigation of any of the potential conflicts of interest disclosed by evaluation members.
- State departments apply a variety of interpretations of the Procurement Code when selecting services contractors using federal grant funds. Currently there is virtually no direction in statute, rule, or guidance from the State Controller's Office on how departments should select service contractors using federal grants.

BACKGROUND

- An RFP allows the Department to solicit offeror proposals and identify the offeror that most successfully meets the program requirements listed in the RFP solicitation. RFPs are meant to increase competition and transparency in state purchasing while ensuring that the State secures the most advantageous contract.
- In Fiscal Year 2015, the Department had a total of \$1.2 billion in contracts for services related to its various functions.
- In Fiscal Year 2015, the Department issued 34 RFPs for services. Total awards ranged from approximately \$100,000 to approximately \$3.6 million.

KEY RECOMMENDATIONS

- The Department of Human Services should strengthen its processes for selecting services contractors by developing written policies and procedures that establish which documents should be generated and maintained for each RFP and provide direction on developing RFP criteria that accurately reflect how the RFPs will be evaluated.
- The Department of Human Services should improve controls over conflicts of interest when selecting personal services contractors by implementing written policies describing what constitutes a potential conflict of interest that should be disclosed, criteria for evaluating whether a disclosed situation represents a conflict, options for mitigating conflicts, and related documentation.
- The Department of Personnel & Administration should clarify its guidance and/or rules regarding selecting contractors for services using federal grant funds to promote efficient and effective use of such funds within the requirements of the Procurement Code and rules. This should include seeking statutory change, as necessary.

The Departments agreed with these audit recommendations.



CHAPTER 1

OVERVIEW OF THE SELECTION PROCESS

The Department of Human Services (Department) is solely responsible for administering and supervising the State's public assistance and human services programs, according to Section 26-1-111(1), C.R.S. These programs address a wide range of human services needs, including child welfare, aid to the needy and disabled, nutrition assistance, services for people with disabilities, mental health, nursing homes, and youth corrections.

To deliver public assistance programs in the State, the Department contracts for a variety of services including: drug and alcohol prevention and treatment; domestic violence advocacy; services for disabled Coloradans to help them live independently; early intervention services for babies and toddlers with developmental delays or disabilities; and maternal, infant, and early childhood home visiting that helps at-risk families succeed.

This audit only reviewed the Department's selection of contractors for services and did not review the Department's procurement of goods. EXHIBIT 1.1 shows the number and the dollar amounts of the Requests for Proposals (RFPs) for services that the Department issued in Fiscal Years 2014 and 2015.

EXHIBIT 1.1. REQUEST FOR PROPOSALS ISSUED AND DOLLAR AMOUNTS FISCAL YEARS 2014 AND 2015		
	2014	2015
Number of RFPs Issued for Services	42	34
Range of Award Amounts	\$57,000 to \$22M	\$100,000 to \$3.6M
Total Award Amounts	\$60.9M	\$30.4M
SOURCE: Office of the State Auditor analysis of data provided by the Department of Human Services and data from the State's Vendor Self Service System.		

The Procurement Code [Section 24-103-201, et. seq. C.R.S.] establishes requirements for the State regarding the procurement of goods and services. The Department of Personnel & Administration (DPA) is responsible for promulgating rules consistent with the Procurement Code and governing all procurement in the State [Section 24-102-301, C.R.S.], but is authorized to delegate procurement responsibilities, including contractor selection responsibilities, to state departments. Under its delegation agreement with DPA, the Department must conduct procurements according to specific standards, including complying with the Procurement Code and procurement rules, employing qualified procurement agents to conduct purchasing, and maintaining appropriate procurement records.

According to the Procurement Code and rules, procurement of services exceeding \$150,000 in value must occur through a competitive process, namely an invitation for bid or RFP process. Procurement rules also guide the evaluation of proposals submitted in response to an RFP and require proposals be rated based solely on the evaluation factors specified in the RFP [Section R-24-103-203(9), 1 C.C.R., 101-9].

AUDIT PURPOSE, SCOPE, AND METHODOLOGY

We conducted this audit pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of the state government. The audit was conducted in response to a legislative request. The audit request expressed concerns about a specific instance of contractor selection at the Department for which statute required the use of an RFP process. The concerns associated with this specific contractor selection were resolved through legal means prior to this audit. As a result, the key objective of the audit was to broadly assess the Department's practices for selecting contractors for services and its compliance with the Procurement Code for such selections, as applicable.

Audit work was performed from July 2015 through July 2016, and reviewed the Department's contractor selection process in effect for services in Fiscal Year 2015. We appreciate the assistance provided by the management and staff of the Department of Human Services and the Department of Personnel & Administration during this audit.

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 objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

To accomplish the audit objective, we performed the following audit work:

- Reviewed applicable state and federal laws, rules, as well as state and Department written guidance on contractor selection.
- Reviewed documentation maintained by the Department related to its selection of contractors for services in effect in Fiscal Year 2015.
- Interviewed Department staff, as well as representatives of several other state departments regarding procurement and contractor selection practices.
- Reviewed data in the State's Contract Management System (CMS).

We relied on sampling techniques to support some of our audit work. Specifically, we selected a non-statistical, judgmental sample of 17 of the 34 Requests for Proposals for services that the Department awarded in Fiscal Year 2015. The results of our testing using the sample were not intended to be projected to the entire population. Rather, the sample was selected to provide sufficient coverage to test the controls related to the selection of contractors for services that were significant to the objectives of this audit.

We planned our audit work to assess the effectiveness of those internal controls that were significant to our objective. Our conclusions on the effectiveness of those controls, as well as specific details about the audit work supporting our findings, conclusions, and recommendations, are described in CHAPTER 2 of this report.

CHAPTER 2

SELECTING CONTRACTORS FOR SERVICES

When a Department of Human Services (Department) program needs to contract for services, program staff are responsible for identifying what services the program needs, determining how much money is budgeted, and developing the scope of work. A procurement agent within the Department reviews the statement of work, then prepares and posts a Request

for Proposals (RFP) on the State's Vendor Self Service (VSS) website where it is open to vendors to view and submit proposals.

Once proposals are received and the deadline to respond has passed, the Department convenes an evaluation committee composed of Department staff, and in some cases, community members with expertise. Then, the procurement agent prepares an evaluation scoresheet. After the evaluation committee members individually score each proposal, the procurement agent reviews the scores for completeness and holds a meeting with the evaluation committee to discuss the scores and give the evaluation committee members a chance to change their scores as a result of the committee discussion. The procurement agent compiles the final scores onto a master scoresheet, calculates the score totals for each proposal, and communicates to the evaluation committee and program staff which proposal received the overall highest score. In some cases, the Department awards contracts to multiple offerors through one RFP process.

Our audit reviewed the Department's contractor selection practices for services in Fiscal Year 2015 and found that the Department could strengthen its internal controls related to evaluating proposals and identifying and mitigating conflicts of interest. We also found that the lack of clear guidance in statute, rule, and policies for the State as a whole may create challenges for departments in selecting contractors for services using federal grant money. The remainder of CHAPTER 2 describes our findings and recommendations.

EVALUATION OF PROPOSALS

In Fiscal Year 2015, the Department had a total of \$1.2 billion in contracts for services related to its various functions. According to procurement rules [Section R-24-103-203(5)(a), 1 C.C.R., 101-9], state departments are generally required to use an RFP to procure services that exceed \$150,000. An RFP allows the Department to solicit offeror proposals and identify the offeror that most successfully

meets the program requirements listed in the RFP solicitation. RFPs are meant to increase competition and transparency in state purchasing while ensuring that the State secures the most advantageous contract. According to the Procurement Code [Section 24-103-203(5), C.R.S.], the RFP must outline what information offerors need to submit in their proposals to be considered for an award. All RFPs must include an overview of the scope of work that is being requested, and must specify requirements that offerors must meet such as having prior experience in the industry, having staff with certain professional licenses, and providing either a general cost estimate (such as price per participant) or a detailed budget for the services offered.

WHAT AUDIT WORK WAS PERFORMED, WHAT WAS THE PURPOSE, AND HOW WERE THE RESULTS MEASURED?

We reviewed statutes, rules, and Department policies and procedures to identify requirements related to creating RFPs and evaluating proposals. We interviewed Department staff to understand the Department's processes for creating RFPs, evaluating proposals, and making award decisions. We reviewed the Department's files for a non-statistical, judgmental sample of 17 of the 34 RFPs for services that were issued in Fiscal Year 2015. These 17 RFPs totaled about \$21.2 million out of the total \$30.4 million awarded from the 34 RFPs in Fiscal Year 2015. The purpose of the audit work was to evaluate whether the Department's process for selecting contractors for services is designed and operating to ensure that the Department selects the proposals that are most advantageous to the State. The Department's practice is to follow the Procurement Code and rules when selecting contractors for services. We evaluated the Department's selection of contractors for services against the requirements described below.

EVALUATING PROPOSALS ACCORDING TO THE CRITERIA IN THE RFP. The Procurement Code [Section 24-103-203(7), C.R.S.] requires that

contractors are selected whose proposals are deemed to be “the most advantageous to the state, taking into consideration the price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation.” Further, procurement rules [Sections R-24-103-203-09 and 11, 1 C.C.R., 101-9] require the evaluation to be, “based on the evaluation factors set forth in the RFP.” In some cases, the evaluation criteria specified in the RFP include weighting to be applied to the various factors. For example, one of the RFPs we reviewed stated that program design would be weighted at 50 percent, experience and capability of the offeror at 30 percent, and budget and financial capability at 20 percent. Based on the requirements in the Procurement Code and rules, we would expect the Department to evaluate all proposals responding to that RFP according to the criteria listed in the RFP, including any specified weighting.

EVALUATING ONLY PROPOSALS SUBMITTED BY THE DEADLINES SPECIFIED IN THE RFP. According to procurement rules [Section R-24-103-203-01(a), 1 C.C.R., 101-9], “An acceptable proposal means an offer submitted by any person in response to a Request for Proposals...that is in compliance with the solicitation terms and conditions...” The Department’s RFP solicitation terms state that “Late proposals will not be accepted.” Response deadlines are stipulated in each RFP and noted on VSS.

DOCUMENTING THE EVALUATION PROCESS. The Procurement Code requires that the determination of the most advantageous proposal be made in writing [Section 24-103-203(7), C.R.S.]. Additionally, Section 7 of the State Records Management Manual requires that state agencies maintain files that document the basis for procurement awards for 6 years after the contract term ends.

WHAT PROBLEMS DID THE AUDIT WORK IDENTIFY?

We found gaps in the Department’s processes for ensuring that the

most advantageous offeror is selected and that the evaluation process is transparent and equitable to all offerors. We identified problems with the Department's adherence to the Procurement Code, procurement rules, and its own established processes for eight of the 17 RFPs in our sample, as described below.

PROPOSALS NOT EVALUATED ACCORDING TO THE SPECIFIED EVALUATION CRITERIA IN THE RFP. We found that the Department did not evaluate proposals for four sampled RFPs in accordance with the scoring mechanisms described in the RFPs. Specifically:

- For two of the RFPs, each of which was for an award of more than \$400,000, the Department did not apply the weighting specified in the RFP. For example, for one RFP the experience and capability of the offerors was scored as a 'yes' or 'no' rather than being given points worth up to 25 percent of the overall score, which was the weighting published in the RFP.
- For two RFPs, the Department weighted some factors differently in the evaluation than was described in the published RFP. For example, one RFP, totaling about \$2.7 million in awards, stated that "coordination efforts of the vendor to work with other programs serving a similar population" would be worth up to 25 out of a total 215 points available, or 12 percent of the total score. However, the scoresheet used to evaluate the proposals only allotted this factor a maximum of 15 points, meaning that the factor actually made up only 7 percent of the total score. The other RFP, totaling about \$2.5 million in awards, stated that two particular categories would be weighted worth 25 percent each, but the scoresheets actually gave one category a weighting of 30 percent and the other a weighting of only 20 percent.

SOME PROPOSALS WERE DATED AFTER THE SUBMISSION DEADLINE. For two of the 17 RFPs that we reviewed, totaling about \$3 million and \$200,000 in awards, respectively, the dates listed on the proposal cover sheets were after the proposal submission deadlines. One of the RFPs had two proposals that were dated 1 day and 28 days after the

submission deadline, respectively. The other RFP had one proposal that was dated 30 days after the submission deadline. The Department reported that it date stamps the envelopes when proposals are received, but then throws the envelopes away once the proposals are opened for evaluation. The Department also uses an RFP summary sheet to document which proposals were received on time. According to the Department, only proposals received on time would be listed on this summary sheet. However, the RFP summary sheet does not record the date that proposals were received or opened, so we were unable to verify the receipt dates.

RFP FILES HAD MISSING OR INCOMPLETE SCORESHEETS. We found the Department did not have complete documentation of the evaluations for three sampled RFPs, as follows:

- For one RFP, totaling about \$3.6 million in awards, the scoresheet from one of the four evaluators was missing for one of the three proposals. In other words, only 11 scoresheets were present in the file although there should have been 12.
- For one RFP totaling about \$2.7 million in awards, some scoresheets were incomplete. Specifically, the evaluators did not complete the budget section of the scoresheets, and one of the two evaluators did not score a proposal on the cost per participant and number of participants served.
- For one RFP totaling about \$300,000 in awards, some scoresheets were missing and some scoresheets were incomplete. There were 11 offerors for this RFP, some of whose proposals were to provide multiple types of services, such as job readiness classes, citizenship classes, and youth services. The 11 offerors' proposals contained a total of 29 services. For this RFP, we found that some of the proposals had two evaluators while others had just one. For the sake of equity, we would expect to see at least two evaluations for each of the services being proposed or at least 58 evaluation scoresheets. However, the Department was only able to provide a total of 42 scoresheets, so at least 16 were missing. We could not

identify which 16 evaluation scoresheets were missing because only one evaluator put her name on her scoresheets, and many of the scoresheets did not list the service being proposed but instead were blank or listed a program name. Finally, four of the scoresheets were incomplete with entire pages missing.

All three of these RFPs also lacked master scoresheets. Procurement agents use the master scoresheet to compile all of the evaluation committee members' names and scores, apply any necessary weighting, total the scores, and document the committee's award recommendation(s). Without the master scoresheet, we could not determine with certainty how many evaluators participated in each evaluation, whether the weighting indicated in the RFP was applied properly or at all, what the final scores for each offeror were, or how the incomplete scoresheets that we reviewed were factored into the award decisions.

WHY DID THESE PROBLEMS OCCUR?

The delegation agreement between the Department of Personnel & Administration (DPA) and the Department requires the Department to "establish and maintain a detailed written internal operations manual that...[includes] a description...of each step in the bidding procedure or purchasing function; written procedures to ensure purchasing is in compliance with laws, regulations, and policies; and internal policies." The Department has written policies and procedures for procuring services through the RFP process, but they do not provide clear direction because they mirror the Procurement Code and rules. The Department reported that its practice is to follow the Procurement Code; however, the Procurement Code establishes only broad expectations and does not contain specific procedural guidance. The Department lacks policies and procedures addressing the factors described below that contributed to the problems we found.

ENSURING THE RFP REFLECTS THE ACTUAL SCORING METHODOLOGY. Preparing RFPs and evaluating proposals with a goal of contracting with multiple offerors may require using different criteria and different

scoring methodologies than when evaluating proposals to select a single, most advantageous, offeror. The Department has not developed written guidance that fully addresses these differences. This lack of guidance contributed to the problems we found where the Department did not evaluate proposals as described in the RFP, such as the example previously mentioned, where the Department did not award numeric scores to the requirements and instead marked each as ‘yes’ or ‘no.’ The Department reported that after receiving the proposals, it decided it could award contracts to all of the offerors that met the minimum RFP requirements, so that applying the weighted numeric scores specified in the RFP was unnecessary. In this case, rather than developing the evaluation criteria in the RFP to account for the possibility of awarding contracts to multiple vendors, the Department developed evaluation criteria as if the goal of the evaluation was to identify a single, most advantageous, offeror.

Near the end of our audit work, the Department developed some written guidance related to the scoring of RFPs. Specifically, the Department issued a memo to its procurement staff requiring a review of the scoring methodology that will be applied to proposals responding to each RFP by a procurement agent other than the one who prepared it. It is unclear that this new process will help prevent proposals from being scored in a manner different from the method described in the RFP because the procedure does not provide guidance on how the evaluation criteria in the RFPs should be written to ensure that multiple vendors can be awarded when the need arises. Additionally, communicating control procedures through a memo rather than incorporating them into a policy and procedure manual creates a risk that the control will not be communicated in a consistent manner in the future.

REQUIREMENTS FOR COMPLETE FILE DOCUMENTATION. The Department has not clearly defined or communicated to all staff what documents should be generated and maintained for each RFP process. The Department has developed a file checklist that procurement agents can use as a tool to help them include all of the documents that should be part of their files. However, the Department told us that it

did not require its procurement agents to use the file checklist prior to 2016, and that we should not expect the file checklists to be filled out. Requiring the procurement agents to use the checklist may be an effective way to ensure that all of the RFP files are complete. In addition, when we reviewed the checklist we noticed that it does not list two items that are important for having a complete RFP file: (1) the master scoresheet, which documents the final scores for each proposal and (2) documentation of the date each proposal was received.

In January 2016, the Department issued a memo to its procurement staff that requires them to use an updated file checklist on all current solicitations. The new checklist is more robust, but as of June 2016, its use had not been formally adopted, was not reflected in a written policy and procedure manual, and did not provide a means to document the date proposals are received.

WHY DO THESE PROBLEMS MATTER?

The Procurement Code requires that Department procurement practices, including the evaluation of proposals and selection of a vendor, foster competition, instill public trust, ensure fair and equitable treatment, and promote a system of integrity and quality [Section 24-101-102(b)(c)(e)(f), C.R.S.]. The gaps we found in the Department's processes limit its ability to achieve these goals and create other risks, as described below.

AWARD TO A LESS FAVORABLE OFFEROR. The purpose of using an RFP is to get the most favorable offer through a competitive evaluation process. When writing the RFP, Department program staff work to make sure that the RFP evaluation factors will help the evaluators determine which offeror is best. Since the evaluation committees often include people other than program staff, if the evaluation committees do not use the factors listed in the RFP to evaluate the offers they receive, they risk not choosing the most favorable offer according to the specifications outlined by the program staff.

LIMITED RFP RESPONSES. Including specific evaluation criteria in RFPs helps potential offerors decide whether they meet the requirements, but discrepancies between how proposals are actually evaluated and the evaluation criteria described in the RFP may result in qualified offerors not responding to the RFP. For example, if an RFP states that experience in providing the required services will be heavily weighted as an evaluation criterion, a provider that has not been in the industry long may decide not to respond. If the Department does not then use that criterion in the evaluation, the Department may have missed out on soliciting proposals that may have been successful. Further, if the Department is not consistent in evaluating proposals according to the criteria in its RFPs, over time vendors may conclude that the RFP process is not competitive or equitable and may become unwilling to work with the Department, which reduces competition.

VULNERABILITY TO AWARD PROTESTS AND LITIGATION. Inconsistently evaluating proposals according to the RFP criteria and poorly documenting the justification for award decisions may make the Department vulnerable if offerors protest awards. The Department is required by the Procurement Code [Section 24-101-401(1), C.R.S.], to provide procurement documentation to any member of the public who requests it. The Department reported that between March 2015 and May 2016 it responded to protests on 7 of the 58 RFPs that it issued. Responding to protests and legal actions requires staff time and resources, and delays the award and contracting processes. Furthermore, incomplete documentation of the evaluation and award process increases the risk that the Department will be unable to effectively defend itself in case of a protest or litigation.

RECOMMENDATION 1

The Department of Human Services should strengthen its contractor selection processes for services by developing written policies and procedures that:

- A Establish requirements for what documents should be generated and maintained for each RFP. This could include the use of a revised RFP file checklist that lists all of the required documentation, including the master scoresheet and documentation showing the date each proposal was received.
- B Provide direction on developing evaluation criteria within RFPs that accurately reflect how proposals will be evaluated, and ensure that evaluation scoresheets and weighting match the RFP.

RESPONSE

DEPARTMENT OF HUMAN SERVICES

- A AGREE. IMPLEMENTATION DATE: AUGUST 2016.

The Department agrees to establish requirements through written policies and procedures for what documents should be generated and maintained for each RFP. The Department has begun implementation of this recommendation through the use of a revised Solicitation File Checklist that lists all the required documentation, including the master score sheet, and a revised Bid Summary Sheet that documents the date each proposal was received at the time of the required bid opening. Both documents are required to be completed prior to the award of any RFP.

- B AGREE. IMPLEMENTATION DATE: OCTOBER 2016.

The Department agrees to provide direction through written policies and procedures on developing evaluation criteria within

RFPs that accurately reflects how proposals will be evaluated and ensures that evaluation score sheets and weighting match the RFP. The Department will implement this recommendation by requiring evaluation factors to be included in every RFP and instituting peer and managerial reviews of the scoring methodology utilized in evaluating the evaluation factors from the RFP. Procurement staff will be required to complete a peer level review of the scoring methodology prior to the actual evaluation. Additionally, a pre-award review will be conducted at a managerial level or higher to confirm that the evaluation and scoring was conducted according to the RFP evaluation factors and as outlined in the preliminary review. This process will be documented as part of the Solicitation File Checklist.

CONFLICTS OF INTEREST

Standards of ethical behavior for state employees exist in the Colorado Constitution, statute, rules, and guidance. Generally, these sources state that government employees should carry out their duties, including procuring goods or services on behalf of the State, for the benefit of the people and avoid conduct that violates the public trust. In order to satisfy these ethical standards and to protect the public trust, state departments must procure services in a fair and transparent manner, and avoid any appearance that conflicts of interest could influence procurement decisions. Therefore, it is incumbent upon state departments with purchasing authority to have robust processes for identifying any potential conflicts of interest that staff involved in the procurement of services may have, and for mitigating any conflicts that arise. This is important for the Department because evaluation committee members sometimes have close relationships with potential offerors including as previous employees of the offerors, thereby creating the potential for real or perceived conflicts of interest.

WHAT AUDIT WORK WAS PERFORMED, WHAT WAS THE PURPOSE, AND HOW WERE THE RESULTS MEASURED?

We reviewed Article XXIX of the Colorado Constitution, the Procurement Code [Sections 24-101-101 through 24-112-101, C.R.S.], procurement rules, and the procurement code of ethics. We also reviewed the Department's RFP file documentation for a non-statistical sample of 17 of the 34 RFPs (50 percent) that the Department issued in Fiscal Year 2015 and interviewed Department staff to understand procurement practices and how the Department handles potential conflicts of interest. The purpose of our audit work was to evaluate whether the Department's processes for evaluating bidder proposals comply with standards that are intended to ensure that bidders are treated equitably and that conflicts of interest are

avoided. Specifically, we reviewed the Department's processes against the following standards:

- The Colorado procurement code of ethics specifies that any person employed by the State of Colorado and anyone who is involved in the purchasing process for the State, shall be bound by this code and shall refrain from any private or professional activity that would create a conflict between personal interests and the interests of the State of Colorado. The procurement code of ethics further states that departments should avoid the intent and appearance of unethical or compromising practice in relationships, actions, and communications, and that departments should identify and strive to eliminate the participation of any individual in operational situations in which a conflict of interest may be involved.
- The Colorado Procurement Code states that a conflict of interest occurs when an employee has an interest in any contract made by him or her in his or her official capacity or by any agency of which he or she is an employee [Section 24-18-201(1), C.R.S.]. If a state employee acts despite a conflict of interest, it could result in a breach of fiduciary duty [Section 24-18-108(1), C.R.S.].

Our audit work also involved evaluating the Department's adherence to its own established processes related to potential conflicts of interest in the evaluation of responses to RFPs. According to the Department, its practice is to collect conflict of interest questionnaires from members of each RFP evaluation committee. The questionnaire asks about the member's relationships with, contact from, and biases related to any potential offerors. The Department also asks each evaluation committee member to attest that he or she has no conflict of interest related to the services being sought. The Department reported that if an evaluation committee member reports a potential conflict, the procurement agent, along with support from his or her manager, makes the determination of whether the committee member should be allowed to remain on the evaluation committee.

WHAT PROBLEMS DID THE AUDIT WORK IDENTIFY?

We identified areas in which the Department could improve its processes to help ensure that it consistently identifies and mitigates conflicts of interest when evaluating responses to RFPs, as follows:

- **COLLECTING AND MAINTAINING CONFLICT OF INTEREST QUESTIONNAIRES AND ATTESTATIONS FOR ALL EVALUATORS.** Four of the 17 RFP files we reviewed were missing both the conflict of interest questionnaires and attestations from at least one evaluator. Specifically, questionnaires and attestations were missing for seven evaluators, representing one-half of the 14 who reviewed offers for these four RFPs, or 8 percent of all the evaluators who reviewed offers for the 17 RFPs in our sample.
- **ENSURING REPORTED CONFLICTS OF INTEREST ARE EVALUATED AND MITIGATED CONSISTENTLY.** The Department has no documentation of the evaluation or mitigation of any potential conflicts of interest disclosed by evaluation committee members. Five of the 17 RFP files we reviewed contained questionnaires stating that at least one evaluator had a potential conflict of interest. Specifically, six evaluation committee members, representing 32 percent of those who reviewed offers for these five RFPs, or 7 percent of all the evaluators who reviewed offers for the 17 RFPs in our sample, reported some type of potential conflict of interest on their questionnaires. Three of these members reported having been previously employed by a potential offeror. The other three reported having worked with potential offerors as part of their jobs at the Department, in some cases as a contract monitor on a past or existing contract. The Department reported that the procurement agent must have decided that those committee members did not have conflicts or mitigated the conflict in some manner because the committee members were allowed to review proposals. We interviewed five of the committee members who reported conflicts; four of them told us that the procurement agent talked to them,

determined that the conflicts were not significant, and decided they were able to continue sitting on the evaluation committees. The other committee member told us that she was never contacted by the Department procurement staff, but ended up not evaluating the proposal submitted by the offeror with which she had a conflict. The information reported on the conflict of interest questionnaires is not sufficiently detailed to allow us to independently evaluate the likelihood that an evaluation committee member had an actual conflict, but some of the disclosures seemed to reflect that an actual conflict existed. For example, one evaluator in our sample reported having been employed by a potential offeror the year prior to the issuance of the RFP and having ongoing relationships with employees of the same potential offeror. Without documentation of the evaluation or mitigation process, we were unable to verify that the Department's allowance of evaluators with reported potential conflicts to participate on evaluation committees was compliant with the intent of the Procurement Code and code of ethics.

WHY DID THESE PROBLEMS OCCUR?

The Department does not have any written policies or procedures formalizing its practices, and it does not provide evaluators any written guidance related to handling conflicts of interest in procuring services. Such policies and procedures could provide evaluators and procurement agents clear direction in the following areas:

- **WHAT CONSTITUTES A CONFLICT OF INTEREST THAT SHOULD BE REPORTED AND ASSESSED.** The Department has no written instructions or guidance for evaluation committee members to reference when filling out the conflict of interest questionnaire. The questionnaires themselves do not provide clear guidance about how some of the questions should be answered. For example, the questionnaires ask about current or past relationships that the evaluators or their friends or family have with potential offerors, but does not provide any time limits for when a past relationship should be disclosed (e.g., relationships occurring months ago versus years ago). In addition, some versions of the questionnaire we

reviewed specified that both personal and professional relationships should be disclosed and some mentioned employer/employee or contractor relationships as examples of what should be disclosed. However, some of the questionnaires did not make any reference to the types of relationships that should be disclosed and there is no other written guidance that would help evaluators determine what they should report, such as whether having monitored a contract with an offeror in the past constitutes a relationship that should be disclosed.

▪ **HOW POTENTIAL CONFLICTS SHOULD BE EVALUATED OR MITIGATED.**

The Department has no written guidance on what process should be followed when a potential conflict is disclosed. Specifically, there are no written criteria for the procurement agent to use in assessing whether a disclosure constitutes a conflict and no written guidance on mitigating conflicts. Written guidance could provide examples of situations that the Department would consider a conflict and options for mitigation, such as removing a member from the committee or only allowing a member to score proposals from offerors with whom the member has no conflict.

- **WHAT DOCUMENTATION SHOULD BE MAINTAINED.** The Department has no written policy or procedure to direct staff on maintaining conflict of interest questionnaires or attestations, or on documenting and maintaining the evaluation or mitigation of disclosed conflicts to demonstrate that its practices are compliant with ethical standards in procurement.

The Department's procurement delegation agreement with DPA requires the Department to maintain a detailed written internal operations manual that includes, "written procedures to ensure purchasing is in compliance with...ethical standards including conflict of interest and record keeping requirements."

WHY DO THESE PROBLEMS MATTER?

Having effective controls in place to identify and address conflicts of interest is important to protect the State's interests and ensure that the State receives the maximum value in each of its contracting decisions. Without written policies and procedures for handling conflicts of interest in selecting a contractor for services, the Department may not be aware of all potential conflicts or treat all disclosed conflicts in a consistent manner to provide assurance that conflicts are avoided. This risk is heightened when the evaluation committee contains members of the community who are not bound by state employee ethics requirements and may be more likely to have relationships with potential offerors.

It is also important that the Department document its handling of potential conflicts of interest so that it can defend its award decision in cases of a vendor protest or litigation. If the RFP file does not contain documentation demonstrating that the evaluation committee members were free from conflict during the decision making process, the Department's award decision may be called into question. Ramifications of a vendor protest may include delays in the solicitation process resulting in delays to programs being able to provide services, failed solicitations or cancelation of RFPs, and litigation against the State.

RECOMMENDATION 2

The Department of Human Services should improve controls over conflicts of interest when selecting contractors for services by implementing written policies and procedures describing what constitutes a potential conflict of interest that should be disclosed and assessed, criteria for evaluating whether a disclosed situation represents a conflict, options for mitigating conflicts, and documentation related to conflicts of interest that should be maintained.

RESPONSE

DEPARTMENT OF HUMAN SERVICES

AGREE. IMPLEMENTATION DATE: OCTOBER 2016.

The Department agrees to improve controls over conflicts of interest in selecting contractors for services by implementing written policies and procedures describing what constitutes a potential conflict of interest that should be disclosed and assessed, criteria for evaluating whether a disclosed situation represents a conflict, options for mitigating conflicts, and documentation related to conflicts of interest that should be maintained.

GRANT SPECIFIED CONTRACTS

Grant specified contracts are contracts that a state department enters into with a contractor that has been identified in a grant application or award notice as being able to fulfill the requirements of a grant award from the federal government rather than one for which a state department has competitively solicited a vendor. According to the Department, competitive, discretionary federal grants often require that applicants provide very specific information in their proposals. Historically, it was not uncommon for the Department to treat contracts resulting from these types of federal grants as grant specified, awarding contracts to the providers that assisted with the application or were named on the application, rather than using a competitive process. Although the Department receives some non-competitive, non-discretionary federal grants and funding, this discussion does not pertain to those other funding mechanisms. For purposes of this discussion, we will refer to competitive, discretionary federal grants simply as “federal grants.”

We reviewed information in the state’s Contract Management System (CMS) to determine how widespread the use of grant specified contracts is throughout the State. According to CMS, 11 departments and the Governor’s Office executed more than 780 services contracts totaling about \$241 million in Fiscal Year 2015 as grant specified contracts. These contracts represent about 36 percent of the almost 2,200 services contracts recorded in CMS for the fiscal year and about 24 percent of the roughly \$1 billion in contract funds associated with the 2,200 contracts. In our review of CMS, we noted that some of the procurements labeled as grant specified were not grant specified, but mislabeled as such. While CMS might not have completely accurate information on grant specified procurements, these figures provide an indicator that they are commonly used by many state departments.

At the beginning of the audit, the Department requested that we examine grant specified contracts to determine if the Department's processes comply with the Procurement Code. According to the Department, beginning in Fiscal Year 2015, it revised its processes by directing all program staff to use a competitive process to select contractors for all services using federal grant funds when the grant award does not name a required contractor.

WHAT AUDIT WORK WAS PERFORMED, WHAT WAS THE PURPOSE, AND HOW WERE THE RESULTS MEASURED?

We looked at the Department's process for a non-statistical sample of 17 RFPs that the Department had issued in Fiscal Year 2015. In our sample, five were RFPs that the Department issued competitively for the first time in Fiscal Year 2015 because they were formerly classified as grant specified procurements. Further, 11 out of the 34 RFPs the Department issued in Fiscal Year 2015 were formerly classified as grant specified procurements. We interviewed Department program staff involved with current grant specified contracts to understand how these contracts were handled in the past and what has changed. We interviewed staff at two other state departments about how they select contractors for services using federal grant funds, and staff at DPA to gain an understanding of how it expects contractor selection for grant specified contracts to be handled.

We evaluated whether the Department is selecting contractors for services that were formerly grant specified contracts in accordance with the Procurement Code which requires that RFPs be issued for procurements of services that are estimated to exceed \$150,000 [Section 24-103-204, C.R.S.]. According to procurement rules, state departments do not have to issue an RFP, "...where the procurement of services from a specific vendor(s) is necessary to comply with the specific terms and conditions of a grant award," [Section R-24-101-105-01(h), 1 C.C.R., 101-9]. We also considered DPA's responsibilities related to purchasing. According to Section 24-102-

301, C.R.S., “...all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction...are vested in the department of personnel...” Statute [Section 24-102-204, C.R.S.] also allows DPA to delegate purchasing authority to other state departments.

WHAT PROBLEM DID THE AUDIT WORK IDENTIFY?

We found that the Department complied with its interpretation of the Procurement Code by using an RFP process to establish contracts for all five of the formerly grant specified contracts in the sample of 17 RFPs we reviewed. However, we found that different departments interpret the Procurement Code in different ways when selecting contractors for services funded with federal grant money. As discussed, the Department interprets the provisions in the Procurement Code and rules to require the use of a competitive process to select contractors for services using federal grant funds in virtually all circumstances, with the only exception being when the grantor explicitly names the vendor in the grant award notice. We spoke to two other state departments with grant specified contracts in CMS and both had slightly different interpretations of the Procurement Code and rules. One department reported that it does not use a competitive contractor selection process for any contracts that are paid for with funds from a federal grant, but simply designates those contracts as grant specified and identifies contractors in a non-competitive way. The other department reported that it puts out a Request for Applications (RFA) when selecting contractors for services with federal grant funds. The use of RFAs is essentially the same as using a competitive grant process; offerors submit applications for the opportunity to contract with the department to provide specified services. RFAs are not considered a procurement mechanism in the Procurement Code.

WHY DID THIS PROBLEM OCCUR?

Currently, there is no guidance from the Office of the State Controller, within DPA, outlining how departments should select contractors for services using federal grants. Specifically, there is no guidance to help departments determine whether they are procuring services or passing through grant funds when using federal grants to contract for services. Additionally, although procurement rules exempt grants from the Procurement Code, they do not provide a definition of a grant. The Procurement Code defines a grant as “the furnishing of assistance, including financial or other means of assistance by the purchasing agency to any person to support a program authorized by law” [Section 24-101-301(10.5)(a), C.R.S.], but this definition does not help departments clearly distinguish between procuring services and granting funds to provide services. DPA believes that statute contains conflicting guidance on contracting using federal grant funds and reported that it has been advised by the Office of the Attorney General that statutory change may be needed for it to issue guidance in these areas.

WHY DOES THIS PROBLEM MATTER?

Some Department program staff expressed concerns with the application of the Procurement Code when obtaining services using federal grants and indicated a need for more flexibility. Examples of the concerns that were raised are described below.

COMPETITIVENESS. According to Department program staff that we interviewed, the Department may be less competitive on some grant applications because of the use of a competitive solicitation for services paid for with all federal grants. For example, in Fiscal Year 2015, the Department applied for, but did not receive, a capacity expansion grant. The program staff involved with the application reported that it scored poorly in the section of the grant application that asked about the ability and experience of grant partners. The staff believe that the application did not score well because it was not able to identify specific grant partners and instead noted in the application

that the Department would identify partners using a competitive solicitation process, after winning the grant. The grant funds totaled about \$1.5 million per year for 3 years.

For another federal grant offering about \$574,200 in funds annually for early childhood services, the grant application requires applicants to use vendors with specific certifications that take months to obtain and to give specific budget information and planned number of clients to be served. Some program staff believe that the Department may not be able to reliably estimate budget or client numbers when it applies for this grant again in the future without the help of providers who are qualified to offer the services, and that not obtaining the detailed information asked for in the grant application from potential vendors may reduce the Department's ability to compete for the grant funds. In addition, Department procurement staff told us that any provider that supplied the detailed data needed for the grant application may be ineligible to submit a proposal to provide services in response to an RFP if the Department won the grant because that provider may have a competitive advantage. Therefore, asking a provider to supply information to increase the Department's chances at winning a grant may create an unfair situation for some providers.

EFFICIENCY. Department program staff also reported that after the switch to the competitive process for services paid for with federal grants, the contractor selection and contracting processes were delayed for one of its federal grants. The Department issued four RFPs to implement one grant in April 2015 and was not able to sign contracts and begin spending the grant money until between September 2015 and November 2015—6 to 8 months later—because the Procurement Code specifies how long RFPs must be posted, how much time potential offerors have to respond to RFPs, and how long bidders have to protest an award decision after the decision has been made. The delay in contracting affected roughly 40 contractors who often rely on the grant funds to continue providing services. The program received some complaints from the vendors who had to use lines of credit to maintain services. While the program has not lost grant funding as a result of the delays, Department staff have spent time negotiating with

the federal government to extend the timeline to spend the grant funds and to provide the intended services. This grant totaled about \$4.3 million in federal funds.

The concerns we heard from Department program staff were echoed by the two other departments we spoke to about grant specified contracts. Specifically, these departments reported that competitively bidding for all services to be obtained using grant funds hinders the efficient and timely execution of the grants, which is particularly problematic with shorter-term (e.g., 1-year) grants. Additionally, one of the other departments reported that it is less likely to receive a competitive grant award if it does not specify a particular vendor in the grant application.

RECOMMENDATION 3

The Department of Personnel & Administration should clarify its guidance and/or rules regarding selecting contractors for services using federal grant funds to promote efficient and effective use of such funds within the requirements of the Procurement Code and rules. This should include seeking statutory change, as necessary.

RESPONSE

DEPARTMENT OF PERSONNEL & ADMINISTRATION

AGREE. IMPLEMENTATION DATE: SEPTEMBER 2017.

The Department of Personnel & Administration (DPA) agrees with this recommendation and will issue guidance regarding the selection of contractors for services using federal grant funds, including situations with grant specified contracts. DPA will work with stakeholders including procurement directors and other groups involved in the procurement process to update the procurement code. DPA plans to introduce legislation on procurement modernization that will address the issue of selecting contractors for services using federal grant funds. After the General Assembly passes the procurement modernization bill and the bill becomes law, DPA plans to issue guidance on grants, including situations with grant specified contracts.

