



## Report of the Vermont State Auditor

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December 17, 2015

# AGENCY OF EDUCATION

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

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**Douglas R. Hoffer**  
**Vermont State Auditor**  
**Rpt. No. 15-10**

### **Mission Statement**

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**Douglas R. Hoffer**  
**STATE AUDITOR**



**STATE OF VERMONT**  
**OFFICE OF THE STATE AUDITOR**

December 17, 2015

Addressees (see page 3 of letter)

Dear Colleagues,

Open and competitive solicitation, integrity in contractor selection processes, and the proper development and review of contracts prior to their being signed are key facets of Vermont state government's procurement and contracting policies. My office received two reports of inappropriate procurement/contracting processes at the Agency of Education (AOE), one of which was specific to contracts funded by the Race to the Top – Early Learning Challenge (RTT-ELC) grant. A subsequent preliminary review conducted by my office indicated a high proportion of non-competitive services contracts. Because of these reports and the high proportion of non-competitive contracts, we determined to assess whether AOE utilized accepted practices for procuring and contracting for services associated with the state's RTT-ELC grant.

AOE had awarded 26 contracts funded by RTT-ELC by April 30, 2015. Of the eleven that were over \$15,000 (the Bulletin 3.5 threshold), ten did not result from competitive procurement but were approved by the Agency of Administration (AOA) as sole source contracts. In two of these ten cases, we concluded that the justifications cited in AOE's request to AOA for approval of sole-source procurement met the standards established in AOA's Bulletin 3.5, Contracting Procedures. In the remaining cases, all of which AOA approved, either the cited justification was not supported by evidence, or no relevant justification was cited. We attribute this to a variety of causes, including a lack of guidance and training for the AOA staff that review requests for sole source contracts and AOE no longer following an internal policy requiring pre-approval by the Chief Financial Officer prior to contacting vendors about sole source arrangements.

In addition, one of the sole source contracts was awarded to a contractor by a state employee who also worked for the contractor, with no record of how the potential conflict of interest was to be managed. This appears to be partly due to the AOE's lack of guidance on how to handle conflicts of interest related to procurement and contracting.

The other 15 contracts were issued by AOE under the auspices of its AOA approved contracting plan, which allows AOE to use a non-standard format for certain small contracts, known as expense

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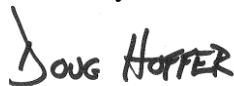
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authorizations. However, most were not consistent with the types of activities or the duration of performance that AOE allows for this type of arrangement. AOE acknowledged that the use of these expense authorizations has extended beyond their original intention. Additionally, the majority of these arrangements have characteristics that suggest an employment relationship rather than contractual relationship may exist. AOE does not have guidance in its policies and procedures for expense authorizations regarding the assessment of employment versus contractual relationships. This could partly explain why AOE did not recognize that some of the services contracted for may be considered employment. I understand that the AOA is in the process of rewriting Bulletin 3.5, and that it is the agency's intention to clarify and strengthen the general prohibition against sole-source procurement. I welcome this, and urge the agency to enforce its policies and rules rigorously.

This report includes recommendations addressed to both AOE and AOA, designed to facilitate more consistent compliance with AOA's policies. Both AOE and AOA provided comments on the draft of this report, which are included in Appendix IV and V, respectively.

I would like to thank the management and staff at the agencies of Education and Administration for their cooperation and professionalism during this audit.

Sincerely,

A handwritten signature in black ink that reads "DOUG HOFFER". The letters are in all caps and have a slightly cursive, informal style.

Doug Hoffer  
Vermont State Auditor

**ADDRESSEES**

The Honorable Shap Smith  
Speaker of the House of Representatives

The Honorable John Campbell  
President Pro Tempore of the Senate

The Honorable Peter Shumlin  
Governor

Ms. Rebecca Holcombe  
Secretary  
Agency of Education

Mr. Justin Johnson  
Secretary  
Agency of Administration

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## Introduction

In December 2013, multiple Vermont state agencies were awarded a total of \$36.9 million under the Race to the Top – Early Learning Challenge (RTT-ELC), a four-year grant administered jointly by the federal departments of Education and of Health and Human Services. According to the Vermont Agency of Education (AOE), about \$9 million of the grant has been allocated to projects it will manage, and it anticipates utilizing about half of its allocated RTT-ELC funds to hire contractors. Through April 30, 2015, AOE had issued 26 contracts in connection with the RTT-ELC grant.

Vermont law and policies emphasize a preference for competitive bidding for contracts, the importance of the integrity of the procurement processes used for contractor selection, and the proper development and review of contracts prior to their approval. However, state policies allow for non-competitive procurement in extraordinary circumstances such as emergencies or if the contractor is the only contractor able to perform the services.

The National Association of State Procurement Officers (NASPO) believes management of the procurement process that ensures equitable treatment of all vendors increases public confidence in the fairness of the procurement function. According to the Government Accountability Office (GAO), it is well documented that there are benefits—such as cost savings and improved contractor performance—in competitive acquisition of goods and services from the private sector. In addition, GAO has found that non-competitive contracts carry the risk of overspending because, among other things, they have been negotiated without the benefit of competition to help establish pricing.

The State Auditor’s Office (SAO) received two reports of inappropriate procurement/contracting processes at AOE, one specific to RTT-ELC contracts, and a preliminary review indicated a high proportion of non-competitive services contracts. Because of these reports and the high proportion of non-competitive contracts, SAO determined to assess whether the AOE utilized accepted practices for procuring and contracting for services associated with the State’s RTT-ELC grant.

Appendix I contains the scope and methodology we used to address our objectives. Appendix II contains a list of abbreviations used in this report.

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# Highlights: Report of the Vermont State Auditor

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

(December 17, 2015, Rpt. No. 15-10)

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<b>Why We Did this Audit</b>	Vermont law and policies emphasize a preference for competitive bidding of contracts, the importance of the integrity of the procurement processes used for contractor selection, and the proper development and review of contracts prior to their approval. SAO received two reports of inappropriate procurement/contracting processes at AOE, one specific to RTT-ELC contracts, and a preliminary review indicated a high proportion of non-competitive services contracts. Because of these factors, SAO decided to conduct an audit to assess whether the AOE utilized accepted practices for procuring and contracting for services associated with the State's RTT-ELC grant.
<b>Finding 1</b>	<p>Eleven contracts AOE awarded under RTT-ELC up to April 2015 exceeded the State's \$15,000 threshold requiring competitive bidding. Ten of these contracts, with a cumulative value of \$583,343, were approved by the Agency of Administration (AOA) as sole source arrangements, an exemption to competitive bidding established in Bulletin 3.5. However, SAO found that only two appeared to meet the "extraordinary circumstances" criteria established for the sole source exemption. Using sole source contracts when not warranted, rather than competitive bidding for needed services, is not consistent with the State's emphasis on providing all businesses equal access and opportunity to compete. Further, with limited competitive bidding, AOE may be missing opportunities for cost savings and improved contractor performance. The use of non-competitive contracts contrary to state requirements may be attributed to a variety of causes, such as limited documented guidance for the AOA staff responsible for reviewing the sole source justifications and the absence of a requirement in Bulletin 3.5 to document evidence to support assertions related to sole source.</p> <p>One contract for \$40,000, was appropriately awarded by AOE subsequent to a simplified bid process permitted by state contracting procedures established in Bulletin 3.5, "Contracting Procedures."</p> <p>In addition, one of the AOE employees responsible for these procurement decisions appeared to have a conflict of interest as she also worked for one of the vendors she helped to select to provide services as a sole source contractor. However, AOE failed to identify this as an issue during the procurement process. This may be because the AOE contract manual<sup>1</sup> does not contain guidance on what circumstances constitute a conflict of interest and how to assess and resolve conflicts.</p>

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<sup>1</sup> The contract manual was effective December 29, 2006 at a time when AOE was organized as a department. SAO concluded the manual was in use and the policies and procedures therein applied to contracts within the scope the audit. The manual was officially retired by the AOE Secretary December 3, 2015, subsequent to receiving a draft of SAO's audit report.



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## Highlights: (continued)

(December 17, 2015, Rpt. No. 15-10)

<b>Finding 2</b>	All of AOE's RTT-ELC sole source contracts addressed the State's required elements, including standard terms and conditions such as insurance requirements and payment provisions. However, in many instances, the specification of work (SOW) did not specify the details required by Bulletin 3.5 and AOE's contract manual, such as deadlines and how AOE would monitor the contractor. A clear SOW is important because parties to the contract need to have a clear understanding of the scope of work in order to know what is expected of them. According to AOE officials, the lack of specificity may be attributed to a lack of experience in contracting and also to the sudden increase in workload that resulted from the award of the RTT-ELC grant.
<b>Finding 3</b>	Fifteen other non-competitive contracts, totaling \$57,250, were structured as expense authorizations (EAs) under AOE's approved contracting plan. Most appear to be for services that are not consistent with activities AOE allows for this type of arrangement. AOE officials indicated that use of EAs has extended beyond what was originally intended and believe a review of this process is needed.  AOE employees performed the same work as ten of the individuals with EAs, and the agency may have exercised direction and control over these contracted services. These circumstances suggest the individuals might be considered employees rather than independent contractors under the ABC test <sup>2</sup> which Bulletin 3.5 describes as one test to use to determine whether services are appropriate to obtain from an independent contractor versus employee. The policy and procedures for EAs do not include a requirement to assess whether services requested constitute employment, which could explain why AOE did not recognize that some of the services contracted for via EAs might be considered employment.
<b>What We Recommend</b>	We make a variety of recommendations to the AOE and AOA, including 1) that AOE reinstate the requirement to obtain the approval of the Chief Financial Officer, or other AOE official, for sole source procurement prior to contacting potential vendors, 2) require AOE staff to provide documentary evidence of assertions related to the justifications for sole source contracting, and 3) that training be provided to AOA staff responsible for reviewing sole source memos.

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<sup>2</sup> The ABC test is established in statute, 21 V.S.A. §1301(6)(B), for the State's Unemployment Insurance Program.

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## Background

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### AOE RTT-ELC Projects

The purpose of the federal RTT-ELC grant program is to improve the quality of early learning and development and close the achievement gaps for children with high needs. The program focuses on improving early learning and development for young children by supporting states' efforts 1) to increase the number and percentage of low-income and disadvantaged children, in each age group of infants, toddlers, and preschoolers, who are enrolled in high-quality early learning and development programs; and 2) to design and implement an integrated system of high-quality early learning and development programs and services.

In December 2013, Vermont was awarded \$36.9 million in RTT-ELC funds by the U. S. Department of Education. Multiple state agencies are involved in the administration of the RTT-ELC grant. AOE is responsible for all or a portion of eight of the twenty-four projects associated with the State's RTT-ELC grant. Total RTT-ELC funds for AOE's project are \$9 million, with approximately \$5 million for contractual services. The AOE-led projects include the following:

- implementing the Early Multi-Tiered System of Supports model<sup>3</sup> (Early MTSS) in early learning and development programs throughout the state;
- increasing professional development opportunities for early childhood educators;
- revising the Vermont Early Learning Standards; and
- integrating and coordinating the early childhood system (birth to age 5) with the kindergarten to grade 3 system via a pilot project in a small number of school communities.

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<sup>3</sup> The Early MTSS model is intended to improve social, emotional, and learning outcomes for young children and address challenging behaviors for children with high needs.

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## State and Federal Requirements for Procurement

There are multiple sources of requirements governing AOE's procurement and contracting under the RTT-ELC grant. Many of these state an expectation of procurement by open competition.

### **Vermont Agency of Administration Bulletin 3.5**

Bulletin 3.5 , "Contracting Procedures", establishes the State's general policy and minimum standards for soliciting services and products from vendors outside of state government, processing the related contract(s), and overseeing established contracts to their conclusion. These policies include the use of open and competitive contract solicitation processes and proper development and review of contracts prior to being signed.

Agency secretaries and department commissioners have responsibility for management and oversight of procurement and contracting and the oversight of contracts, and they are required to do so consistently with Bulletin 3.5. That document requires approval by the Secretary of the Agency of Administration (AOA), and in some cases the Office of the Attorney General, for contracts meeting certain characteristics, including contracts greater than \$250,000. See Appendix III for a chart that shows contract approval requirements.

Bulletin 3.5 includes guidance for when exceptions to competitive bidding requirements may be approved and other provisions of the bulletin may be waived. The guidance indicates that negotiating with only one contractor (i.e., sole source contract) may be appropriate in "extraordinary circumstances." Examples cited are that time is critical for performance of the required services (such as emergency repairs) and/or when only one contractor is capable of providing the needed service or product. Information about the proposed sole source contracts over \$15,000, including the contract and justification for the sole source procurement, is required to be provided to the Secretary of AOA. For contracts ranging from \$15,000 to \$100,000, if the Secretary does not object, after 10 business days the contract may be executed. Sole source contracts with a value greater than \$100,000 must be approved by the Secretary.

In addition, for specific classes of contracts exhibiting characteristics that cannot reasonably be accommodated within the requirements of Bulletin 3.5, departments may seek approval from the Secretary of the AOA for a contracting plan that provides an acceptable alternative to any requirement of the Bulletin.

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### **AOE Contracting Plan**

AOE has an approved contracting plan that authorizes modifications to state contracting procedures affecting agency processes for services contracting. This includes authorization for AOE to use “expense authorization documents” for single, short-duration activities. Cumulative payments to a particular contractor via this procedure are limited to \$7,500 in any fiscal year.

### **AOE Manual for Contract Administration**

The AOE Manual for Contract Administration establishes AOE’s policy and procedures for procurement and contracting. The manual incorporates the requirements of Bulletin 3.5 and prescribes how AOE will achieve compliance with the bulletin. The manual includes some additional guidance regarding factors to consider when determining if an arrangement is a grant or contract and when considering employment status versus contractor.

### **Education Department General Administrative Regulations (EDGAR)**

EDGAR is within the Code of Federal Regulations (CFR). EDGAR (34 CFR §80.36 (a)) requires state governments to use the same rules for procurement when using federal funds as they would with state funds.

### **RTT-ELC Grant Application**

The federal grant application form for RTT-ELC stated the following:

- “Generally, all procurement transactions by State or local educational agencies made with RTT-ELC grant funds must be conducted in a manner providing full and open competition.”
- “Because grantees must use appropriate procurement procedures to select contractors, applicants should not include information in their grant applications about specific contractors that may be used to provide services or goods for the proposed project.”

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## **Finding 1: Extensive Use of Sole Source Procurement Not Justified**

Eleven of the contracts AOE awarded under RTT-ELC up to April 2015 exceeded the \$15,000 threshold requiring competitive bidding. AOE sought, and received approval from AOA for, exemptions from competitive bidding in order to sole source ten of these contracts. However, SAO concluded that not all of those approved qualified for the exemptions. Further, one of the

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AOE employees responsible for these procurement decisions appeared to have a conflict of interest as she also worked for one of the vendors she helped to select and contract with via the sole source exemption. One contract for \$40,000 was appropriately awarded by AOE subsequent to a simplified bid process permitted by the State’s contracting procedures established in Bulletin 3.5.

Using sole source contracts when not warranted, rather than competitive bidding for needed services, is not consistent with the State’s emphasis on providing all businesses equal access and opportunity to compete. Further, with limited competitive bidding, AOE may be missing opportunities for cost savings and improved contractor performance. We attribute the extensive use of non-competitive contracts to a variety of causes, such as limited documented guidance for the AOA staff reviewing the sole source justifications and the absence of a requirement in Bulletin 3.5 to provide evidence to support assertions related to sole source.

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### Range of Circumstances Cited to Justify Sole Source Contracts, but Many Did Not Meet “Extraordinary” Standard or Were Not Supported by Evidence

SAO found that only two of AOE’s ten sole source contracts approved by AOA met the extraordinary circumstances criteria established for this exemption from competitive bidding and were supported by evidence. One of the memos submitted by AOE requesting the exemption from AOA covered six contracts, but did not cite criteria relevant to the standards established in Bulletin 3.5 for showing “extraordinary circumstances.” The other four cited justifications allowed by Bulletin 3.5, but not all were supported by evidence.

#### Sole Source Memo Lacking Relevant Justifications

One sole source memo addressed six contracts, five with individuals to provide Early MTSS training to schools and one with a coordinator for trainers and implementation of Early MTSS in the schools. The total value of these contracts was \$370,000.<sup>4</sup> The justification memo asserted that the pool of applicants was limited and that these were the most qualified contractors. Neither a limited applicant pool nor contractors being the most qualified constitutes justification for sole source procurement under Bulletin 3.5. Moreover, contracting with multiple vendors for the same service is not sole source procurement.

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<sup>4</sup> According to AOE, \$272,000 of these contracts will be funded with the RTT-ELC grant.

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## Four Sole Source Memos Cite Relevant Justifications, but Not All Supported by Evidence

Four sole source memos, cumulative value of \$213,343,<sup>5</sup> cited relevant justifications, but only two were supported by evidence. Two memos cited time constraints as critical in their justification for sole sourcing, one for a contract for training services starting in the fall of 2014 and one for a contract for consulting on the revision of the Vermont Early Learning Standards (VELS) needed by the end of 2014. Project status reports for RTT-ELC supported the time constraint for the training services. However, the December 31, 2014 deadline cited in the justification memo for consulting on the VELS revision was not included in the contract terms and, in fact, the contract's performance term extended nine months beyond this deadline. As a result, this evidence does not support the time constraint claimed in the memo.

Part of the urgency appeared to be due to AOE's delay in contracting. These sole source justification memos were submitted to AOA seven months and five months, respectively, after the grant was approved by the Joint Fiscal Committee in March 2014.<sup>6</sup> Bulletin 3.5 does not address situations where time constraints are due to agency delay so the cause of the time constraint does not appear relevant. These memos also included justifications that do not meet the extraordinary circumstances standard, such as the contractor's expertise and familiarity with the subject matter and the contractor's capacity and capability to perform the needed services.

The two other memos indicated that the respective contractors were the only ones capable of performing the needed service, another example of extraordinary circumstances per Bulletin 3.5. However, not all of the circumstances cited by AOE as making one of the contractors unique were supported by evidence so this justification is not valid. One memo indicated that a training program to accredit trainers to instruct early childhood professionals in the use of TS GOLD™<sup>7</sup> could only be provided by the selected vendor because the assessment tool was the vendor's proprietary tool. This memo also stated that TS GOLD™ is the required assessment tool selected by the commissioners of the Department for Children and Families (DCF) and the then Department of Education (DOE) that programs offering publically funded prekindergarten education must use to track child progress

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<sup>5</sup> According to AOE, \$175,093 of these contracts will be funded with the RTT-ELC grant.

<sup>6</sup> 32 V.S.A. 5 requires approval of the Governor and then the Joint Fiscal Committee for certain grants.

<sup>7</sup> Teaching Strategies GOLD is a tool for assessment of children from birth through kindergarten.

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annually.<sup>8</sup> While TS GOLD™ is the vendor's proprietary tool, the agency did not have a formal record of the commissioners of DCF and then DOE approving selection of the assessment tool and requiring its use. AOE provided a variety of documents related to selection of the tool such as a recommendation to the then Commissioner of DOE that this assessment tool be selected and a 2011 AOE Field Memo announcing that use of the tool was required, but neither of these demonstrate approval by the commissioners. Without evidence that TS GOLD™ is the only approved assessment tool, part of the rationale for using sole source is eroded and the justification is not valid.

In the other instance, the AOE employee responsible for the project asserted that the vendor was the only vendor capable of providing the services. However, the evidence to support this appears to be the result of AOE using information about a vendor in its grant application, despite the RTT-ELC grant application guidelines which indicate that state applicants should not include information about specific contractors. AOE acknowledged in the sole source justification memo that specification of vendors was not allowed within the RTT-ELC grant application, but that it had incorporated elements of the vendor's framework in the application and as such this vendor provides the framework and expertise for implementing a number of projects in the application. Based on AOE's disclosure that it used elements of the vendor's framework in its RTT-ELC application, it appears that this vendor is the only vendor capable of performing the service.

Neither Bulletin 3.5 nor AOE's contract manual require maintenance of documentation to support sole source justifications. This may partially explain why two sole source memos were not supported by evidence. According to the former AOE contract officer, he assisted program staff with procurement on an ad hoc basis, including sole source justifications, but he was not aware of training in contractor selection practices for program staff. AOE's contract manual describes the contract officer's<sup>9</sup> role as tracking contracts through the approval process and arranging for training for AOE personnel in the preparation, approval, and management of contracts, but does not include procurement responsibilities for this role. The manual also requires that when sole source procurement is contemplated for a contract over \$5,000, the approval of the Chief Financial Officer (CFO) be obtained before contacting any potential bidders or drafting the contract. According to

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<sup>8</sup> Code of Vermont Rules 22-000-035 Section 2604(a)(5) states that qualified prekindergarten programs shall conduct child development assessments using one or more instruments approved by DOE and DCF.

<sup>9</sup> AOE's Manual for Contracting refers to the 'contract administrator'.

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the CFO, this policy is no longer followed. Skipping the pre-approval process increases the risk that program staff will negotiate contracts without following appropriate procurement practices.

The CFO explained that there has been pressure within AOE to submit sole source arrangements to AOA for approval even if there are questions about whether the criteria in Bulletin 3.5 are met, because AOA has a history of approving sole source procurement. It's difficult to discern why AOA has approved some AOE sole source contracts that do not meet the criteria established in Bulletin 3.5. According to AOA officials, there is no guidance for how to review a sole source justification memo and no formal training has been provided.

The bulletin is undergoing revision, including the section that addresses sole source procurement. The draft of this section includes more examples of when a sole source contract may be appropriate. It also states that sole source contracts will be avoided except when no available alternative exists and that failure to allow sufficient time to follow the bidding and procurement process is not considered an emergency or a justification for the use of a sole source contract. According to AOA, the revision will have a checklist of records required to be maintained in a contract file, including documentary evidence to support sole source justifications.

Additional clarification and restrictions on the use of sole source for procurement may reduce the use of this approach in the future. In conjunction with issuing revisions to the criteria for sole source procurement, AOA should consider providing training for the staff responsible for reviewing and approving sole source memos.

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## Appearance of Conflict of Interest

According to Bulletin 3.5, employees with a conflict of interest or appearance thereof are not permitted to control or influence the bidding process and/or the awarding of contracts, and every effort should be made to avoid even the appearance of a conflict of interest in the contracting process. However, AOE failed to identify an apparent conflict of interest for an employee who also worked for one of the vendors selected to provide services. According to state policy, this should have precluded the employee from participating in the procurement, or AOE should have disclosed the conflict of interest to the Secretary of AOA and the Attorney General and documented the reasons for selecting the contractor was still in the best interest of the State.

The AOE employee negotiated a \$22,000 sole source contract with an organization that she worked for as an instructor and as the coordinator of the organization's early childhood educator licensure program. The Executive



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Code of Ethics,<sup>10</sup> referenced in Bulletin 3.5, defines the appearance of a conflict of interest as the impression that a reasonable person might have, after full disclosure of the facts, that an individual's judgment might be significantly influenced by outside interests. Given the AOE employee's relationship with the contractor, it's reasonable to question her ability to be impartial because her decision to select the vendor could have been significantly influenced by her employment relationship with the vendor.

AOE's contract manual indicates that the supervisor should disclose conflicts of interest in writing to the Attorney General and Secretary of Administration, but the manual does not contain guidance on what circumstances would constitute a conflict of interest and how to assess and resolve conflicts.

In June 2015, the Secretary of AOE distributed a memo to staff describing a process for managing conflicts of interest that are highlighted in State Policy 11.5 "Income from Outside Sources (Moonlighting)" and State Policy 5.2 "Conflicts of Interest Arising from Employment." Policy 11.5 prohibits state employees from engaging in employment or other activity that is inconsistent or in conflict with their job duties, and the primary goal of Policy 5.2 is to avoid instances in which the hiring process or any term or condition of employment is inappropriately influenced by familial or other relationships. The Secretary indicated that any employee wishing to engage in or currently engaged in activities described in the two policies must seek authorization beforehand from AOE and the Department of Human Resources, providing information about the position or activity in which the employee wishes to engage, potential conflicts given the employee's present AOE duties, and the employee's proposed action to remove conflicts.

As described, this process should highlight conflicts of interest explained in the two policies. However, these policies do not address the potential for conflict of interest during procurement/contracting with vendors, and without some guidance in AOE's contract manual, written procedures or through other means, the agency lacks assurance that employees will recognize and disclose conflicts of interest in the course of procurement and contracting, and recuse themselves when appropriate.

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<sup>10</sup> Executive Code of Ethics, Executive Order #3-53

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## Finding 2: Contracts Contained Required Components, but Many Had Ambiguous SOWs

The ten sole source contracts and one contract resulting from a simplified bid incorporated the main elements required by Bulletin 3.5: the standard state contract for services, Attachment A (specification of work), Attachment B (payment provisions) and Attachment C (standard state contract provisions). However, in eight instances, the specification of work (SOW) did not contain the details required by Bulletin 3.5 and AOE's contract manual, such as deadlines and how AOE would monitor the contractor. A clear SOW is important because parties to the contract need to have a clear understanding of the scope of work in order to set expectations and monitor performance.

Bulletin 3.5 requires contracts to describe the work to be performed or products to be delivered by the contractor, including the schedule for performance and time frame for deliverables. The AOE contract manual requires the contract to specify any responsibilities of the agency. It also requires contracts to include a section that describes specifically how the agency will monitor the contract and hold the contractor accountable. The end result and specific duties of the contractor and the department must be stated in a way that all the parties to the contract know precisely what is required of them.

Two contracts included the following requirement: "The contractor shall develop a monthly on-site schedule with identified Early MTSS pilot sites for Train-Coach-Train sessions and school district visits." However, the contracts do not specify frequency of the site visits or any basis on which AOE will judge whether the schedule developed by the contractor is acceptable.

In another example, a contract for consulting in relation to drafting new Early Learning Standards specified no deadlines other than the contract's end date in September 2015, despite the fact that the RTT-ELC project plan included a target for adoption of the new standards by December 31, 2014.

In a third example, a contract required the contractor to "[e]ngage in collaborative planning and problem solving with State staff and selected Vermont PreK-3 school communities." There is no indication of what is to be planned, how problems will be solved, or of how AOE will judge whether the contractor has fulfilled these requirement. Further, the contract does not describe the responsibilities or obligations of the state staff, which must be specified according to AOE's contract manual.

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In contrast, a contract for an Early Childhood Higher Education Consultant included a list of six specified deliverables and three time-specific targets, making it clear to both AOE and the contractor when the contractor's work complied with the contract.

AOE officials suggested that a lack of experience in writing contracts, coupled with the sudden increase in workload that resulted from the award of the RTT-ELC grant, contributed to these contract weaknesses.

According to an AOE manager, in some cases AOE communicates requirements and monitors contract performance informally through close involvement of the project manager and frequent communication with the individual contractor, but for some contracts vendors are required to submit logs to the project managers which show training and coaching sessions. Another AOE official acknowledged that the SOWs should contain the required detail. One of the key AOE RTT-ELC project managers left the agency in July 2015 and without documentation of the required details in the SOWs, AOE may experience challenges in ensuring that contractor performance meets AOE's expectations.

Ambiguous SOWs undermine the State's ability to hold contractors accountable for completing contractual obligations and assessing if services delivered meet quality standards. In particular, failing to set deadlines, the number of site visits required, and responsibilities of state staff increases the risk that the contractor will not know what is required of them.

Although ambiguity existed in many SOWs, all of the contracts contained payment terms indicating the timing and amounts of payments, maximum amount payable, and the basis of payment, consistent with the requirements of Bulletin 3.5.<sup>11</sup> Despite containing the requisite details, the timing of payments for two of the contracts differed from the contract terms. Both contracts contained terms that indicate payment should occur subsequent to satisfactory completion of all work. One contract stated: "The contractor may submit an invoice to the Agency upon satisfactory completion of all tasks articulated in the scope of work. The Director will inform the contractor when this status has been achieved which will in turn prompt the contractor to submit the invoice." The other stated "The contractor shall

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<sup>11</sup> Bulletin 3.5, Section VII.A.2 requires that contracts specify a maximum amount of money to be paid by the State, and describe how, when and for what the contractor will be paid.

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submit an invoice to the Agency ... within seven days of providing the series' last training.”

In both cases, the AOE division director approved interim payments and the business office, which processes payments, believed these payments were allowed during the course of the contract and were not limited to the end. According to the business office, payment terms are checked prior to the payment of invoices. It is not clear why AOE believed interim payments were appropriate, since the contract terms indicate that payment should occur subsequent to completion of all tasks required by the contract. Regardless, to the extent payments are meant to occur during the course of performance under a contract, payment terms should clearly specify the milestones or other basis that trigger payment.

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### Finding 3: Use of Expense Authorizations Not Appropriate in All Cases

Fifteen contracts, with a total value of \$57,250, were structured by AOE as expense authorizations (EAs), a non-standard contract allowed per the agency's approved contracting plan. None of these arrangements were competitively sourced; they were all below the \$15,000 threshold above which competitive procurement is required. Most of the EAs appear to be for services that are not consistent with the types of activities or the duration of performance that AOE allows for this type of arrangement, and some of them may be more suitable as employment arrangements rather than independent contractors. AOE officials indicated that use of EAs has extended beyond what was originally intended and believe a review of this process is needed.

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#### Use of EAs Not Consistent With AOE's Policies

AOE's contracting plan authorizes the use of EAs for single, short-duration activities and limits cumulative annual payments to a particular contractor to \$7,500. Further, AOE's EA policy and procedures document indicates that the activity would usually be for less than one month and limits the types of activities for which EAs may be used.

All of the fifteen EAs are for more than three months, many are for 9 months, and very few of the activities described in the EAs appear to be of the type and duration allowed by AOE's policies.

Broadly, the fifteen EAs are for three types of services: delivery of multiple training and/or coaching sessions over a period of months; drafting early learning standards; and updating some AOE informational booklets. Bulletin

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3.5 suggests that a contracting plan might cover contracts with multiple training specialists that provide a particular kind of training to a specific group and that takes place frequently on an annual basis but for which an exact time or number of trainings cannot be predicted accurately. This example seems to encompass the multiple training and/or coaching sessions. AOE's EA policy and procedures include training as an authorized activity, but not the frequency and duration described in the EAs.<sup>12</sup> Further, drafting early learning standards and updating informational booklets are not included in the authorized activities.

The dollar amount for each of the fifteen EAs is below \$15,000, the contract dollar value at which competitive bidding is required by Bulletin 3.5. However, SAO noted that six of the contractors with EAs with terms that expired June 2015 were awarded another EA for the same service - instructing and coaching in the use of TS GOLD™ or Early MTSS - with terms expiring June 2016. Bulletin 3.5 prohibits the use of multiple contracts to procure goods and/or services that can reasonably be procured through one contract in order to avoid the requirements related to competitive solicitation, but this prohibition is not included in the EA policy and procedures. Should these six EAs be continued in subsequent years, the total cumulative dollar amount for each contractor could exceed the \$15,000 threshold. These EAs relate to RTT-ELC projects that end December 2017, and the project plan includes these services through the end of the projects, so it appears likely that additional EAs will be awarded through 2017.

AOE's policies require EAs to be authorized by directors and that the business office review the scope of work to determine compliance with requirements for EAs (e.g., limitations on allowed activities). It's not clear why EAs that did not meet conditions stated in the policy were approved. According to agency officials, the use of EAs has extended beyond the realm of their intended use and they acknowledge that the agency needs to review the appropriate use of EAs.

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## EA Arrangements Have Characteristics of Employment

Ten of AOE's EAs appear to be for services that are included in the job responsibilities of some AOE employees and some of these services appear to be under AOE's supervision and control, which suggest the arrangements have employment characteristics. Bulletin 3.5 requires an assessment of the

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<sup>12</sup> Authorized activities are; 1) attending a conference or training as a participant or presenter, 2) attending a meeting in an advisory capacity to AOE, 3) participating as an "official" in a scoring or evaluation activity, and 4) developing training for a specific conference or training session.

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suitability of the use of a services contract rather than employment arrangement and references the ABC test as one test to determine whether use of a services contract or an employment arrangement is appropriate. Under this test, if services are of a type within the usual course of business for the agency, the agency exercises direction and control over the services, or the contractor is not customarily engaged in an independently established occupation, profession, or business, an employment relationship rather than contractual relationship may exist. AOE's contract manual indicates that employment (permanent, limited service, or temporary) should be used when the activity is one which the department is responsible for performing and the department will exercise supervision over the person performing the work.

Eight of the EAs are for trainers/coaches for the TS GOLD™ assessment tool, and this was also a job responsibility of two of AOE's Early Education Program Coordinators.<sup>13</sup> In the other instance, two individuals had EAs to draft sections of the VELs, but this same work was simultaneously being performed by an AOE Early Education Program Coordinator and other AOE employees. Because AOE had employees performing the same work, this is a strong indication that the training and VELs revision work are within the usual course of business for AOE. The terms of the EAs for the trainer/coaches show that AOE has some control over the times of work and the means and methods by which the eight trainers will provide services. In addition, AOE paid for the eight individuals to obtain training and become certified as accredited trainers for TS GOLD™. According to AOE's guidance, this is an indication of wanting the services performed in a particular manner (e.g., direction and control). The level of direction and control over the individuals hired to assist with revising the VELs is not clear from the terms of the expense authorizations. Further, limited information was available regarding whether the individuals were engaged in independently established occupations or businesses. Regardless, the use of EAs in these instances warrants further consideration by the agency.

AOE's contract manual contains an appendix with detailed guidance regarding the determination of the use of service contracts versus employment, and it also states that the AOE's human resources (HR) function is responsible for assessing whether services could be performed by an employee and if the services requested constitute employment. However, AOE does not follow its contract manual when obtaining services via EAs, and the procedures for EAs do not incorporate assessment of whether services are appropriate to obtain from an independent contractor versus

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<sup>13</sup> One of these coordinators left AOE employment in July 2015.

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employee. This could explain why AOE did not identify this as an issue when executing these EAs. Further, the process described in the contracting manual is no longer utilized, according to AOE's General Counsel, since the HR function no longer resides within the agency and the responsibility for assessing whether services constitute employment has not been assigned to another function within AOE. This could also explain why AOE did not recognize that some of the services contracted for via EAs might be considered employment.

As Bulletin 3.5 indicates, an agency that is unaware of these rules can have an unexpected tax liability after the contract is completed or may face an unexpected claim for unemployment insurance or workers' compensation.

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## Conclusions

The State of Vermont's policy is that procurement should be open and competitive. The Agency of Education engaged in procurement practices under RTT-ELC that were overwhelmingly non-competitive. By using non-competitive procurement, AOE may miss the opportunity for cost savings and denies potential bidders the opportunity of contracting with the State. A related issue is ensuring that the selection of contractors is not influenced by relationships that employees have with contractors. Avoiding conflicts of interest is critical to prevent inappropriate outside influence, or the appearance thereof, in the procurement process. It is necessary to ensure that staff are educated and structures are in place to detect and manage such conflicts.

AOE's use of expense authorizations was not consistent with its own internal policies, and for certain EAs did not follow the requirements of Bulletin 3.5 related to contracting for a single procurement through the use of one contract, rather than multiple contracts. While this may not be AOE's intent, it remains significant as it may result in breaching State policy regarding competitive procurement.

Ambiguity in AOE specifications of work expose the agency to risk of not obtaining the services it requires when it wants them. Setting out clear expectations in a contract would make it easier for both AOE and contractors to understand what exactly is expected and thereby reduce the risk of contractors underperforming or not performing within desired time frames.

According to AOE managers, these weaknesses may be partly due to AOE's lack of experience in contracting. However, the Agency of Administration

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has facilitated AOE's over-use of sole source procurement by approving sole source requests that did not meet the requirements of Bulletin 3.5.



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## Recommendations

We make the following recommendations to the Secretary of the Agency of Education:

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**Table 1: Recommendations and Related Issues**

<b>Recommendation</b>	<b>Report Page</b>	<b>Issue</b>
1. Reinstigate the requirement for Chief Financial Officer, or other AOE official, pre-approval of sole source procurement prior to contacting potential vendors.	9-10	The contract officer assisted AOE program staff with procurement on an ad hoc basis, but he was not aware of training in contractor selection practices for program staff. The current AOE contract manual requires that when sole source procurement is contemplated for a contract over \$5,000, the approval of the CFO be obtained prior to contacting potential vendors, but this policy is no longer followed. Skipping this pre-approval process increases the risk that program staff will negotiate contracts without following appropriate procurement practices.
2. Require AOE staff to document evidence that supports extraordinary circumstances cited in sole source justification memos.	8-10	Some assertions in the sole source justification memos were not supported by 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.	10-11	An AOE employee was also employed by a vendor selected to provide services to AOE. The Secretary of AOE distributed a memo to AOE staff in June 2015, describing a process for managing conflicts of interest that are highlighted in two state policies.

<b>Recommendation</b>	<b>Report Page</b>	<b>Issue</b>
		However, these policies do not address conflicts of interest related to procurement and contracts. AOE's contract manual refers to conflicts of interest, but does not include guidance on what circumstances constitute a conflict or how to assess and resolve actual or perceived conflicts that might arise during procurement and contracting.
4. Develop training for program staff to address requirements for procuring and contracting for services and require attendance.	7-10, 12-14	Many sole source memos did not meet extraordinary circumstances standard or were not supported by evidence. Many contracts contained specifications of work that lacked specificity required by Bulletin 3.5.
5. Modify EA policy and procedures to incorporate the Bulletin 3.5 prohibition on using successive contracts for the same service.	14-15	Six of the contractors with EAs with terms that expired June 2015 were awarded another EA for the same service - instructing and coaching in the use of TS GOLD™ or Early MTSS - with terms expiring June 2016. Should these six EAs be continued in subsequent years, the total cumulative dollar amount for each contractor could exceed the \$15,000 threshold for competitive bidding. The EA policy and procedures do not include the Bulletin 3.5 prohibition on using successive contracts for the same service.
6. Modify EA policy and procedures to incorporate an assessment of the	15 - 17	Ten of AOE's EAs appear to be for services that are included in the

<b>Recommendation</b>	<b>Report Page</b>	<b>Issue</b>
suitability of the use of an EA or an employment arrangement.		job responsibilities of some AOE employees and some of these services appear to be under AOE's supervision and control, which suggest the arrangements have employment characteristics. AOE's contract manual and Bulletin 3.5 includes guidance regarding this assessment, but the EA policy & procedures do not address consideration of contractor versus employee.
7. Designate an AOE official as responsible for performing and documenting assessments of whether services requested constitute employment.	16-17	According to AOE's contract manual, the agency's human resources function is responsible for assessing whether services could be performed by an employee and if the services requested constitute employment. However, this process is no longer utilized since the HR function no longer resides within the agency and the responsibility for assessing whether services constitute employment has not been assigned to another function within AOE.
8. Assess whether the TS GOLD™ trainers and the editors of VELs have been misclassified as independent contractors and if so, a) determine whether the agency has a tax liability and b) establish employment positions for the individuals that continue to provide these services to the agency.	16-17	Same as previous two recommendations.

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We make the following recommendations to the Secretary of the Agency of Administration:

**Table 2: Recommendations and Related Issues**

<b>Recommendation</b>	<b>Report Page</b>	<b>Issue</b>
9. Expediently complete the revised guidance for sole source contracts.	10	A revision of Bulletin 3.5 is in process.
10. Provide training to AOA staff responsible for reviewing sole source memos.	10	According to AOA officials, there is no guidance for how to review a sole source justification memo and no formal training has been provided.

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## Management's Comments

The Deputy Secretary of the Agency of Education provided written comments on a draft of this report on December 9, 2015. The comments are reprinted in Appendix IV of this report along with our evaluation. The Secretary of the Agency of Administration provided written comments on a draft of this report on December 14, 2015, which is reprinted in Appendix V of this report.

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In accordance with 32 V.S.A. §163, we are also providing copies of this report to the commissioner of the Department of Finance and Management and the Department of Libraries. In addition, the report will be made available at no charge on the state auditor's website, <http://auditor.vermont.gov/>.

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## Appendix I

### Scope and Methodology

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The scope of this audit was AOE contracts funded by the RTT-ELC grant that had been issued as of April 30, 2015. The RTT-ELC grant was awarded on December 26, 2013.

To gain an understanding of requirements for procurement and contracting applicable to AOE contracting under the RTT-ELC grant, we reviewed the RTT-ELC grant documentation including the federal application guidance, the award notification, and EDGAR (34 CFR §80.36 (a)). We also reviewed Bulletin 3.5, and AOE's policy and procedure documentation relating to procurement and contracting. We reviewed HR policies and Vermont statutes relating to contractors and employment. We reviewed GAO and other reports to gain an understanding of recognized procurement and contracting issues and best practices.

We interviewed AOE program staff responsible for managing AOE's projects under the RTT-ELC grant in order to gain an overview of those projects and an understanding of the processes the program staff use in relation to procurement, contracting, contract performance monitoring, invoices and payments. We also reviewed reports from the RTT-ELC grant management system and other RTT-ELC grant reports.

We also interviewed AOE's Contracts and Information Management Officer to gain an understanding of his role in AOE's procurement and contracting processes and to discuss AOE's procedures for procurement and contracts. To gain an understanding of the business office's role in processing of invoices and contracts, we interviewed the AOE Financial Director and the Financial Administrator.

We compared AOE's contract manual and other procedural documentation with state and federal requirements to assess whether AOE's procurement and contracting guidance is consistent with state and federal requirements and to determine whether AOE's guidance contained additional requirements or restrictions.

We compared AOE contracts, contract approval, contract execution and procurement documentation to agency, state and federal requirements in order to assess compliance. In particular, we reviewed sole source justification memos and evidence supporting sole source rationale, to assess compliance with Bulletin 3.5 and AOE's procedures. We reviewed invoices to assess compliance with requirements for contract payment terms. We also reviewed expense authorizations and compared these to AOE's approved contracting plan and policy and procedures for EAs and to requirements in state Bulletin 3.5.

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## Appendix I

### Scope and Methodology

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We assessed whether risk existed that some individuals providing services to AOE under expense authorizations had been erroneously classified as independent contractors rather than as employees. For this analysis, we compared the circumstances for these arrangements to the ABC test established in 21 V.S.A. §1301(6)(B). We also sought advice of the Attorney General's Office regarding our analysis.

We reviewed the email correspondence of the two staff at AOE responsible for the RTT-ELC projects relating to selected vendors. We reviewed this correspondence for evidence of 1) communications regarding competitive procurement, 2) information relating to justifications for and approval of sole source procurement, and 3) conflicts of interest.

We reviewed the relevant approval for dual employment status for an individual who was simultaneously an employee and a contractor of AOE.

Our audit field work was performed between May and November 2015, and included visits to AOE and to AOA in Barre, Vermont and Montpelier, Vermont, respectively.

We conducted this performance audit in accordance with generally accepted government auditing standards, which 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 the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Appendix II

### Abbreviations

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ABC	A test for employee/contractor status
AOA	Agency of Administration
AOE	Agency of Education
CFO	Chief Financial Officer
CFR	Code of Federal Regulations
DCF	Vermont Department for Children and Families
DOE	Vermont Department of Education – now known as AOE
EA	Expense Authorization
EDGAR	Education Department General Administrative Regulations
GAO	United States Government Accountability Office
HR	Human Resources
MTSS	Multi-Tiered System of Support
NASPO	National Association of State Procurement Officers
RTT-ELC	Race to the Top – Early Learning Challenge
SAO	State Auditor’s Office
SOW	Specification of Work
VELS	Vermont Early Learning Standards



# Appendix III

## Bulletin 3.5 Contract Approval Requirements

BULLETIN 3.5 QUICK REFERENCE GUIDE												
	Citation	Competitive Requirements			Prior Approvals Required							
		Standard Bid	Simplified Bid	Qualification Based Selection	Supervisor <sup>1</sup>	Attorney General	Finance & Management	Secretary of Admin.	CIO	CMO	Comm DHR	Auditor of Accounts
Monetary Thresholds <sup>2</sup>	\$15,000 or less				✓							
	Greater than \$15,000 but less than \$100,000	✓	✓		✓	✓						
	Greater than \$100,000 but less than \$250,000	✓		✓	✓	✓						
	Greater than \$250,000	✓		✓	✓	✓	✓	✓				
	No-Cost Contract – all	✓			✓	✓	✓	✓				
Exceptions and Waivers	Sole Source Greater than \$15,000 but not more than \$100,000				✓		✓	✓				
	Sole Source Greater than \$100,000 (waiver letter plus contract)				✓	✓	✓	✓				
	Duration - Greater than 2 Years or 4 years if renewal option is included in original contract (waiver letter plus contract)				✓		✓	✓				
Type of RFP or Contract	Information Technology & Telecommunications Contract over \$150,000	22 V.S.A. § 901			✓	✓	✓	✓	✓			
	Information Technology & Telecommunications RFP over \$10,000	22 V.S.A. § 901			✓				✓			
	Marketing RFP	Act 71 § 205a			✓					✓		
	Privatization Contract	3 V.S.A. § 343			✓	✓	✓	✓			✓	
	State of VT Retiree				✓						✓	

**NOTES:**

- This guide is intended as a quick reference guide to monetary thresholds, primary waiver conditions, basic contract types and prior approval requirements. It is not all inclusive and is not a substitute for reading, understanding and complying with this Bulletin;
- Deviations from the requirements expressly listed in this guide and Bulletin require a written waiver request to the Secretary of Administration, approved “Blanket Delegation of Authority” or an approved Contracting Plan;
- Additional Agency or Departmental conditions, not included in this Bulletin, may apply.

<sup>1</sup> Supervisor - any secretary, commissioner, executive director, elected officer, or other head of an agency.

<sup>2</sup> Monetary Thresholds are Cumulative, if the original contract amount plus all amendments reaches a new threshold; the requirements for the higher threshold apply.

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## Appendix IV

# Comments from the Deputy Secretary of the Agency of Education and SAO's Evaluation

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219 North Main Street, Suite 402  
Barre, VT 05641 (p) 802-479-1030 | (f) 802-479-1835

## MEMORANDUM

TO: Doug Hoffer, State Auditor  
FROM: Bill Talbott, Deputy Secretary  
SUBJECT: Comments on Draft Agency Contracting Audit  
DATE: December 9, 2015

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We appreciate the careful attention to detail the Auditor has given to this audit. AOE will carefully reflect upon the Auditor's report and findings as we consider how AOE can continuously improve procurement practices. The one and only comment AOE wishes to offer in response to the draft report received by AOE on November 20, 2015 is that the multiple references to the "AOE Contracting Manual" should all be qualified (if not removed).

The qualification that should be noted is the fact that this manual has been functionally out of use since 2011, when a former (DOE) contracts manager retired. The audit report fails to note the correct title of this manual, and its last revision date. It is titled "DOE" contracting manual (formerly, AOE was a state department), and it was last revised in 2006. When the contracts manager retired in 2011, the DOE ceased using this manual as an internal guide/supplement to Bulletin 3.5. When the AOE contracts manager from 2014-2015 discovered (in early 2014) that this dated document was still available for staff viewing on the AOE's internal website, he promptly removed this document from the internal website.

One example that stands out is the fact that AOE has not had an internal "HR Division" for many years. Reference is made to this non-existent HR division (of DOE/AOE) in this outdated manual, as part of an internal contract review process AOE should be following. This DOE contracting manual has not been used or followed by AOE since 2011, as noted above. Due to SAO's surprising reliance on this "out of use" manual in its audit findings, the Agency Secretary has formally directed all AOE staff, effective immediately, that this 2006 document is officially retired and out of use.

cc: Rebecca Holcombe, Secretary  
Greg Glennon, General Counsel

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## Appendix IV

### Comments from the Deputy Secretary of the Agency of Education and SAO's Evaluation

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The following presents our evaluation of comments made by the Agency of Education:

The AOE states in its letter that it will reflect on SAO's findings as the agency considers how it can improve procurement practices, but the Deputy Secretary did not address whether the agency would implement our recommendations.

Regarding the Deputy Secretary's assertion about the applicability of the contracting manual, while this manual may have been outdated, we disagree that it was not in use. During the course of our audit, various AOE staff represented that the Manual for Contract Administration was the agency's manual for procurement and contracting policies and procedures. In particular, in May 2015, the then contract officer, provided a copy of the manual to SAO in response to our request for AOE's procurement and contracting policies and procedures and highlighted a particular section of this manual to demonstrate how AOE had implemented a requirement of Bulletin 3.5. In October 2015, an AOE director indicated that the manual was part of the agency's orientation/training for new staff. SAO held meetings with various AOE staff that included discussion regarding procurement and contracting procedures and policies and the contract manual. The contract officer, director, and other AOE staff acknowledged that some provisions were no longer followed or were out of date and that the manual required updating. Based on AOE staff representations pertaining to their use of the manual, SAO concluded that AOE's Manual for Contract Administration applied to contracts within the scope of the audit, although some provisions were not being followed and AOE believed some provisions needed updating.

Given that the Secretary officially retracted the manual on December 3, 2015, we updated certain recommendations to reflect that the agency no longer has internal guidance for procurement and contracting. We also added a footnote to the highlights section of the report to clarify that the contract manual was dated as of 2006 at a time when the agency was a department, and that the Secretary officially retired its use on December 3, 2015.

# Appendix V

## Comments from the Secretary of the Agency of Administration and SAO's Evaluation



State of Vermont  
Agency of Administration  
Office of the Secretary  
Pavilion Office Building  
109 State Street  
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[fax] 802-828-3320

Justin Johnson, Secretary

### MEMORANDUM

TO: Doug Hoffer, Auditor of Accounts  
CC: Sue Zeller, Brad Ferland  
FROM: Justin Johnson  
RE: Response to AOE Contract Audit  
DATE: December 9, 2015

Thank you for the opportunity to respond on two of the recommendations contained in your office's recently drafted report on the *Agency of Education: Use of Non-Competitive and Non-Standard Contracts Contrary to State and Agency Requirements*.

While we agree generally with the recommendations contained in Table 2, we would like to make the following comments:

Recommendation	Report Page	Issue	Administration Comment
9. Expediently complete the revised guidance for sole source contracts.	9-10	A revision of Bulletin 3.5 is in process.	The review and reissue process of Bulletin 3.5 is in its finalization. The next step is a review by the Secretary of Administration, a 30-day review and comment period for agencies and departments and the final issuance by the Secretary. Our goals in this review and reissue were: 1) improve flow, completeness and understandability of this complex document; and 2) provide stronger language concerning the use and justification of sole source contracts; 3) address legislative language in 2015 Act 58 to "streamline the process of approval and evaluation while preserving and strengthen the pay for performance"; and 4) provide additional tools, templates and additional guidance to users. In addition, we will be developing a multi-tiered training program directed at users, as well as agency and department signing authorities.



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## Appendix V

### Comments from the Secretary of the Agency of Administration and SAO's Evaluation

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10. Provide training to AOA staff responsible for reviewing sole source memos.	9.-10	According to AOA officials, there is no guidance for how to review a sole source justification memo and no formal training has been provided.	While it is true that a formal sole source review memo does not exist, the new hire program for the Finance & Management Budget Analysts includes a face-to-face session with the Deputy Secretary of Administration about contract review, including sole source requests. Another session is spent with the Chief Performance Officer on the structure and purpose of Bulletin 3.5 and the evaluation of performance outcomes and measures in contracting.
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Please note that under the current version of Bulletin 3.5, each sole source contract is reviewed on its own merits and not in relationship to an agency or department total of similar or like requests.

Again, thank you for the opportunity to provide comments prior to the release of this report.

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## **Appendix V**

### **Comments from the Secretary of the Agency of Administration and SAO's Evaluation**

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The following presents our evaluation of comments made by the Agency of Administration:

AOA generally agreed with the recommendations. In its response to one recommendation, the agency indicated that newly hired budget analysts have a session with the Deputy Secretary about contract review, including sole source requests. We concluded that only two of AOE's ten sole source contracts approved by AOA met the extraordinary circumstances criteria established for this exemption from competitive bidding and were supported by evidence. Based on these results, we believe that the AOA staff responsible for reviewing sole source exemptions should be provided additional training.