

Performance
Audit

FINAL
REPORT



State Contracting for Professional Services: Procurement Process – Practices Generally Adequate to Minimize Cost-related Risks

Report No. SR-SAS-07

a report to the
Government Oversight Committee
from the
Office of Program Evaluation & Government Accountability
of the Maine State Legislature

September
2008

GOVERNMENT OVERSIGHT COMMITTEE

Sen. Elizabeth H. Mitchell, Chair
Sen. Kevin L. Raye
Sen. Philip L. Bartlett II
Sen. Jonathan T. E. Courtney
Sen. Joseph C. Perry
Sen. Dana L. Dow

Rep. Marilyn E. Canavan, Chair
Rep. Scott E. Lansley
Rep. Andrea M. Boland
Rep. Everett W. McLeod
Rep. Peggy A. Pendleton
Rep. Michael A. Vaughan

OFFICE OF PROGRAM EVALUATION & GOVERNMENT ACCOUNTABILITY

Director Beth Ashcroft, CIA

Staff

Jennifer Reichenbach, Principal Analyst
Wendy Cherubini, Senior Analyst
Scott Farwell, Analyst
Susan Reynolds, Analyst
Etta Begin, Administrative Secretary

Mailing Address:

82 State House Station
Augusta, Maine 04333-0082
Phone: (207) 287-1901
Fax: (207) 287-1906
Web: <http://www.maine.gov/legis/opega/>
Email: etta.begin@legislature.maine.gov

ABOUT OPEGA & THE GOVERNMENT OVERSIGHT COMMITTEE

The Office of Program Evaluation and Government Accountability (OPEGA) was created by statute in 2003 to assist the Legislature in its oversight role by providing independent reviews of the agencies and programs of State Government. The Office began operation in January 2005. Oversight is an essential function because legislators need to know if current laws and appropriations are achieving intended results.

OPEGA is an independent staff unit overseen by the bipartisan joint legislative Government Oversight Committee (GOC). OPEGA's reviews are performed at the direction of the GOC. Independence, sufficient resources and the authorities granted to OPEGA and the GOC by the enacting statute are critical to OPEGA'S ability to fully evaluate the efficiency and effectiveness of Maine government.

Legislators, committees, or members of the public should make their requests for reviews to members of the Committee or OPEGA directly.

Copies of OPEGA's reports are free.

Reports are available in electronic format at:

<http://www.maine.gov/legis/opega/>

Hard copies of reports may be obtained by contacting OPEGA at:

(207) 287-1901

Office of Program Evaluation & Government Accountability

82 State House Station • Augusta, ME • 04333-0082

Table of Contents

EXECUTIVE SUMMARY	1
FULL REPORT	3
Purpose	3
Methods and Scope	3
Background	5
Procurement Process Overview	5
Contractor Selection	9
Conclusion	12
Findings and Action Plans	14
Agency Response	18
Acknowledgements	18
Agency Response Letter	

This page left intentionally blank

EXECUTIVE SUMMARY

State Contracting for Professional Services: Procurement Process – Practices Generally Adequate to Minimize Cost-related Risks

The Maine Legislature’s Office of Program Evaluation and Government Accountability (OPEGA) has completed a review of State contracting for professional services. OPEGA conducted this review at the direction of the joint legislative Government Oversight Committee (GOC), in accordance with 3 MRSA §§991-997.

OPEGA chose a subset of State contracts, those identified as Professional Services Not Provided by State, to review for this project. State agencies are responsible for defining their need for a professional service, initiating and justifying the process by which they propose to find a contractor and determining whether an existing contract needs to be amended for time, cost or scope of work. The Division of Purchases (Purchases) functions as the control over the entire process.

OPEGA concluded that the State generally has appropriate practices for limiting the extent of professional services contracting and assuring the State is contracting at reasonable rates. Given our results, we do not believe there are any significant savings to be achieved through changing current practices for professional services procured through Purchases. We do, however, suggest further strengthening existing controls to enhance accountability and transparency. We also recommend a comprehensive review of Cooperative Agreements between the State and the University of Maine and Maine Community College Systems that under statute are exempt from competitive bidding.

Specific findings noted in this report are:

- documented justification for sole source decisions exists but is often minimal;
- a lack of policies limiting contract renewals and amendments;
- Cooperative Agreements may pose a financial risk; and
- apparent inconsistencies between statute, policy documents, and current procurement practice.

This page left intentionally blank

FULL REPORT

State Contracting for Professional Services: Procurement Process – Practices Generally Adequate to Minimize Cost-related Risks

Purpose

The Maine Legislature’s Office of Program Evaluation and Government Accountability (OPEGA) has completed a review of State contracting for professional services. OPEGA conducted this study at the direction of the joint legislative Government Oversight Committee (GOC), in accordance with 3 MRSA §§991-997.

OPEGA focused on whether current procurement practices minimize costs for professional services by assuring that those services are necessary and purchased at reasonable rates.

This review was included in OPEGA’s biennial workplan as part of a broader effort to identify opportunities for improving the State’s financial situation. Conducted in conjunction with OPEGA’s study of State Administration Staffing, it was intended to focus on contracts for services supporting executive level functions. The category of contracts with expenditures coded as *Professional Services Not Provided by State* in the State’s accounting system encompasses the majority of the contracts of interest, and became the subject of this review.

The GOC directed OPEGA to identify whether there were opportunities to reduce costs associated with professional services contracts by examining whether the State employs appropriate procurement practices for:

- limiting the extent of professional services contracting; and
- assuring the State is contracting at reasonable rates.

Methods and Scope

The scope of OPEGA’s study included all Executive Branch agencies, the Constitutional Offices, the Judicial Branch, many boards and commissions, and a number of quasi-independent agencies. Our work included:

OPEGA reviewed procurement processes and controls; analyzed contracting activity; and examined documentation for a random sample of 295 contracts.

- understanding the State procurement process and controls in that process;
- interviewing staff from the Division of Purchases in the Bureau of General Services, and from the Department of Health and Human Services;
- querying data from the State’s MFASIS data warehouse to identify active contracts for Professional Services Not Provided by State, accounting object codes 4000 through 4099, from State fiscal year 2007;

- reviewing contract files for a random sample of 295 contracts from a total population of 3,825 professional services contracts identified through our query; and
- analyzing data obtained through that review.

Table 1 lists the agencies with contracts in our sample and the number of contracts for each. The contract files we reviewed were those held by the Division of Purchases in the Bureau of General Services.¹ We examined the documentation in each of the 295 files for:

- type of service procured;
- procurement method used;
- written sole source justification if required;
- funding source;
- life-time cost of the contract;
- existence and nature of any amendments; and
- evidence of compliance with procurement policies and procedures.

Table 1. Number of Contracts Included in Sample by Agency

AGENCY	#	AGENCY	#
Department of Health and Human Services	47	Department of Labor	6
Department of Inland Fisheries & Wildlife	42	Secretary of State	6
Department of Education	20	Judicial Department	6
Department of Conservation	18	Department of Transportation	5
Department of Administrative and Financial Services	16	Department of Agriculture	4
Public Utilities Commission	15	Atlantic Salmon Commission	4
Department of Environmental Protection	12	Workers Compensation Board	3
Department of Defense, Veterans and Emergency Management	12	Maine Arts Commission	3
Executive Department	11	Dirigo Health	3
Department of Public Safety	11	Maine State Library	2
Department of Corrections	10	Department of Economic and Community Development	1
Department of Marine Resources	9	Treasurer of the State	1
Department of Professional & Financial Regulation	8	Maine State Museum	1
Attorney General	8	Maine Historical Preservation Commission	1

¹ The Bureau of General Services and the Division of Purchases are within the Department of Administrative and Financial Services.

Background

Procurement Process Overview

Current procurement practices are governed by statute, agency rules and Executive Order No. 7, FY 94/95.

The procurement function in Maine State government is somewhat centralized with the decision to contract for a service being made in the agencies, and reviews and approvals occurring within the Division of Purchases. State agencies are responsible for defining their need for a professional service, initiating and justifying the process by which they propose to find a contractor and determining whether an existing contract needs to be amended for time, cost or scope of work.

Maine State agencies may contract for professional services if the service required meets one of a number of specified criteria detailed at 5 MRSA §1816-A.1.A-H. These criteria include:

- services not currently available within the State;
- purpose can not be accomplished by using persons within the civil service system; or
- services which are of such an urgent, temporary or occasional nature that delay would frustrate the purpose.

Agencies identify a need for services, select vendors, and develop contracts with guidance from the Division of Purchases (Purchases). Reviews and approvals of agency decisions and contracting documents occur in Purchases.

Statute² requires agencies to pursue contracts through the Division of Purchases (Purchases). The Division's primary function is to procure materials, supplies, equipment and services that represent the best value to the State of Maine. In performing this function, Purchases serves as both a support for agencies and a control to help assure contracting for services is appropriate and services are obtained at reasonable rates. Current procurement practices for professional services are also governed by agency rules, and Executive Order No. 7, FY 94/95, issued January 6, 1995.

The rules established by Purchases in accordance with the Maine Administrative Procedure Act can be found in the Code of Maine Rules Chapters 110, 120, 130, and 155. Generally they define the competitive procurement procedure, contract award appeals procedure, safe vendor working conditions, and the cost comparison procedure.

The Executive Order established the State Contract Review Committee, commonly referred to as the State Purchases Review Committee (SPRC), and set standards under which the SPRC could approve

State Purchases Review Committee Membership

- Director of the Division of Purchases (who serves as Committee Chair) or designee;
- Governor's Chief Operating Officer or designee;
- State Budget Officer or designee;
- State Controller or designee, and
- Chief Information Officer for contracts related to data processing.

² 5 MRSA §1811 and §1812.

Contracts over \$1 million receive an additional review from the State Purchases Review Committee (SPRC). Purchases may also request that the SPRC review other specific contracts.

service contracts, including criteria for when sole source procurement would be appropriate. The Executive Order requires the SPRC to act upon all State agency contract requests for proposals, contracts and contract renewals for special services, including professional services, valued at \$100,000 or more. The SPRC’s review is to assure that:

- the service to be performed under the grant or contract cannot be economically provided by State Government;
- the award of the grant or contract is the most economical, effective and appropriate means of fulfilling a demonstrated need; and
- the award of the grant or contract will not impair the ability of the department or agency to meet its statutory duties and responsibilities under other State laws.

The SPRC has delegated its review authority for contracts between \$100,000 and \$1 million to the Director of the Division of Purchases due to the volume of contracts over \$100,000. The Director of Purchases may request SPRC review of specific contracts between \$100,000 and \$1 million. Contracts of less than \$100,000 in value may be approved solely by the Director of the Division of Purchases. The degree of Purchases’ scrutiny of contracts and amendments increases with the dollar value.

Table 2 summarizes the roles of various parties for services procured through Purchases. Figure 1, on page 8, illustrates the typical process flow.

Table 2. Roles in the Procurement Process for Services Procured Through Division of Purchases

Party	Role
Contracting Agency	Identifies need; initiates contracting process; solicits and evaluates bids; selects vendor; prepares and executes contracts
Division of Purchases	Advises and guides agencies; reviews, approves and receives responses to RFPs; reviews agency vendor selection process; and reviews contracts for final approval
State Purchases Review Committee	Reviews selected contracts for services costing over \$100,000 and all contracts over \$1,000,000
Appeals Committee	Hears appeals of contractors not selected
Contractor	Provides bids and performs the work

Division of Purchases Role

In fulfilling its control function, Purchases is responsible for reviews and approvals at various points in the procurement process. The Division of Purchases reviews each agency request to procure professional services to assure it is appropriate to contract for the services. If so, Purchases reviews the proposed means of selecting a vendor to assure it is appropriate and in compliance with established policies and rules. Any Request for Proposal (RFP) that will be issued is also reviewed by Purchases, as is the agency’s subsequent evaluation of bids received. At each review point, Purchases has the authority to deny the agency’s request.

Purchases' reviews and approvals help assure procurements of professional services are necessary and are conducted in accordance with established policies and rules.

Contracts are executed, i.e. signed by agency and contractor representatives, prior to being submitted to Purchases for final review. However, contracts are not valid, and no payments may be made, until Purchases has approved them as per Section 20 of standard contract Rider B which states: *"This Agreement must have the approval of the State Controller and the State Purchases Review Committee before it can be considered a valid, enforceable document."* If work begins prior to contract approval, Purchases requires the agency to stop work until approval is granted. In addition, agencies enter contract information in the AdvantageME accounting system, but the system does not allow payments to be made until Purchases has approved the contract in the system.

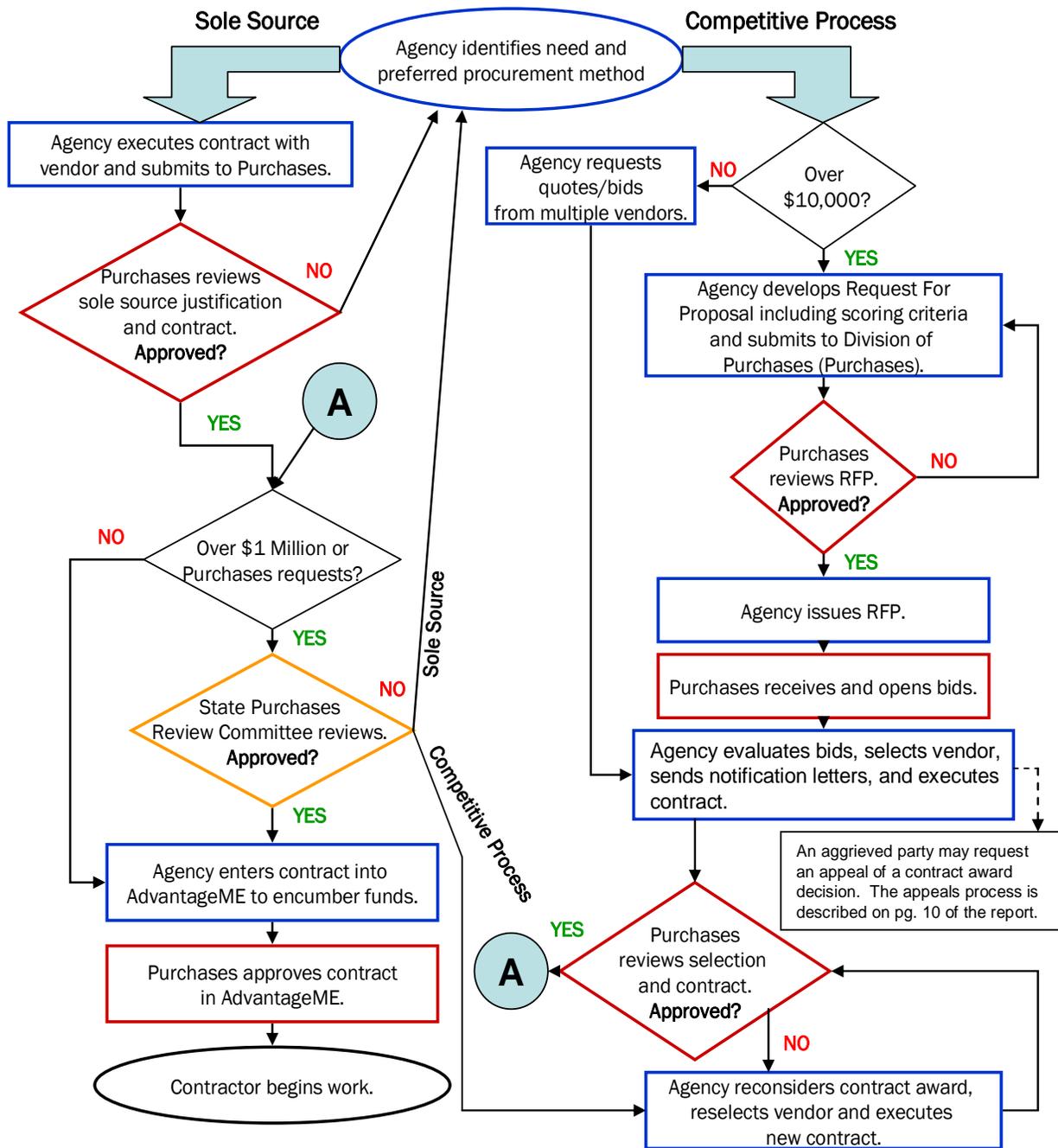
Purchases also reviews proposed amendments to existing contracts, on a case by case basis, applying the same criteria used to review the original contract. Each request for a contract amendment must be accompanied by a required form stating the nature of the amendment and reason for the proposed changes. Purchases reviews the original contract scope and RFP, if there was one, comparing both to the amendment request and looking for any changes in the amendment that go beyond the scope or time limit of the original agreement. Purchases may require the initiation of a new contract if an amendment differs significantly from the original contract.

Some agencies are allowed to procure services independently of Purchases. These contracts are not subject to review and approval by Purchases.

Some State agencies procure professional services independently of the Division of Purchases. For example, the Maine Department of Transportation has statutory authority as per 23 MRSA §4242 and §4243 to procure professional services associated with transportation infrastructure projects through its own process. Similarly, the Maine Public Utilities Commission is allowed by 35-A MRSA §3211-A to select service providers for energy conservation programs independent from the Division of Purchases. The PUC may employ either a competitive bidding process as outlined in PUC agency rules³ or procure through a sole source if the Commission makes certain findings prescribed in §3.B of the Rules. The Bureau of General Services also reviews and approves contracts for architectural and engineering services associated with construction projects. The Division of Purchases provides administrative services only for the Department of Transportation, the Bureau of General Services and the PUC in these instances.

³PUC Rules Chapter 381: Selection of Conservation Program Services Providers

Figure 1. Overview of Typical Procurement Process



Throughout the procurement process, Division of Purchases provides guidance to agencies as necessary and requests additional information as needed to make approval decisions.

Contractor Selection

Contractors generally must be selected by a competitive process if the estimated dollar amount of the contract is above the open market limit. Division of Purchases policy currently sets an open market limit lower than that set by statute.

The method by which contractors are selected depends upon the type of service and cost. 5 MRSA §1825 B.2.G establishes the State’s preference for competitive bidding and \$10,000 as the amount below which competitive selection is not required. During the time period that OPEGA’s sample was drawn from, the Division of Purchases had set an even lower threshold of \$2,500. This threshold was raised to \$5,000 on October 1, 2007 but is still below the statutory limit of \$10,000. A lower open market limit than statute allows is considered practical at this time by the Division of Purchases.

OPEN MARKET LIMIT

The amount below which competitive procurement is encouraged, but not required.

Competitive Procurement

If the estimated service cost is below the open market limit, Purchases encourages, but does not require, the agency to obtain bids. Written quotes are encouraged, but verbal quotes are sufficient. If the estimated cost exceeds the limit set by policy, a competitive process is required unless the agency can justify sole source procurement. Written quotes are required for services with expected costs between the open market limit set by Purchases policy and the statutory limit of \$10,000. A formal Request for Proposal process is required for contracts greater than \$10,000. Table 3 summarizes the competitive procurement requirements.

Table 3. Competitive Procurement Requirements

Cost of Service	Procurement Requirements	Review Responsibility
\$2500 or less	Competitive bids (verbal or written quotes) encouraged but not required	Contracting Agency selection
\$2500-\$10,000	Written quotes required unless sole source criteria met	Division of Purchases approval
\$10,000-\$100,000	Request For Proposal required unless sole source criteria met	Division of Purchases approval
\$100,000-\$1,000,000	Request For Proposal required unless sole source criteria met	Division of Purchases approval or State Purchases Review Committee approval if requested by Director of Purchases
\$1,000,000 or greater	Request For Proposal required unless sole source criteria met	State Purchases Review Committee approval

Requests For Proposals (RFP) are written by the contracting agency and must be reviewed and approved by Purchases prior to issuance. Purchases staff report rare instances where a RFP was issued prior to approval and had to be withdrawn. Purchases ensures that RFPs are clearly written, include the evaluation criteria, and describe how the criteria are weighted. According to Chapter 110, Rules for the Purchase of Services and Awards, cost of the contract must be included in the evaluation criteria, and must receive a minimum of 25% of the total weight of all criteria.

Purchases monitors the competitive selection process. Bidders who respond to a formal Request For Proposal but are not selected may appeal.

Proposals from potential vendors are received by Purchases, opened on the predetermined date and time and signed over to the agency for scoring. Agencies score proposals, select vendors, and develop contracts. They submit the contracts along with justifications for the selections, including proposal scoring sheets, to Purchases for approval and verification that scoring was done correctly. If it was not, the proposals must be scored again and the award must go to the correct bidder.

An appeals process allows non-selected bidders to request a hearing on the award decision from the Director of the Bureau of General Services. Appeals of contract award decisions must be submitted within 15 days of notification of contract award, and are heard by an Appeals Committee in accordance with Chapter 120, Rules for Appeal of Contract and Grant Awards. The Appeals Committee consists of three members. Two of them are appointed by the Commissioner of the Department of Administration and Financial Services (DAFS) and must be persons who do not have a direct or indirect personal, professional or financial conflict of interest in the appeal. They also cannot be employees of the agency affected by the contract. The third member is the Director of the Bureau of General Services or his designee.

If a hearing is granted, the Committee hears and views evidence and decides if one of the three appeal standards has been met:

- a violation of law;
- an irregularity creating a fundamental unfairness; or
- an arbitrary or capricious award.

The Committee may decide to either validate or invalidate the contract award decision under appeal.

Sole Source Procurement

5 MRSA §1825-B recognizes that there are situations in which competitive bidding may not be the most appropriate means of selecting vendors. The statute provides general waivers from competitive bidding for emergencies requiring the immediate procurement of goods or services as well as goods or services that appear to be available from only one source.

Agencies seeking to use sole source procurement must provide written justification to Purchases on a prescribed form or a coversheet accompanying the contract. If the justification is satisfactory and the situation meets the sole source criteria, the contract is approved. Additional information is requested by Purchases from the agency if the justification for sole source procurement is inadequate. If Purchases finds that the situation does not meet the sole source criteria, a competitive bid process must be used.

Statute and policy provide general waivers from competitive procurement for certain situations. Agencies desiring to procure from a sole source must submit justification to Purchases.

SPRC approval of sole source procurement is also addressed by Executive Order No. 7 FY 94/95. The Executive Order states that the State Purchases Review Committee may approve sole source procurement when:

- the service is available only from a sole source;
- is of such a narrow scope or constraint that the need can be met satisfactorily only by a single source;
- is of such a compelling urgency that government operations would be seriously impaired by delay inherent in following competitive procedures;
- or otherwise is the most economical, effective and appropriate means of fulfilling a demonstrated need.

There are some professional services contracts processed through Purchases in which the vendor has been pre-selected outside of the standard approval procedure. For example, there are contracts for services in which the vendor is already specified in the federal grant funding the service, and others that are collaborations between a State agency and another entity in which the non-state agency provides funding or services in kind.

In addition, statute waives the competitive bidding requirement for services related to cooperative projects between the State and the University of Maine System or the Community College System. The contracts for these projects are known as Cooperative Agreements and must involve:

- activities that assist a State agency and also enhance the ability of the Maine University or Community College System to fulfill its traditional mission in the areas of teaching, research, and public service; and
- a sharing of the project's responsibilities, and when appropriate, costs.

Purchases reviews Cooperative Agreements to help assure that services included meet these criteria.

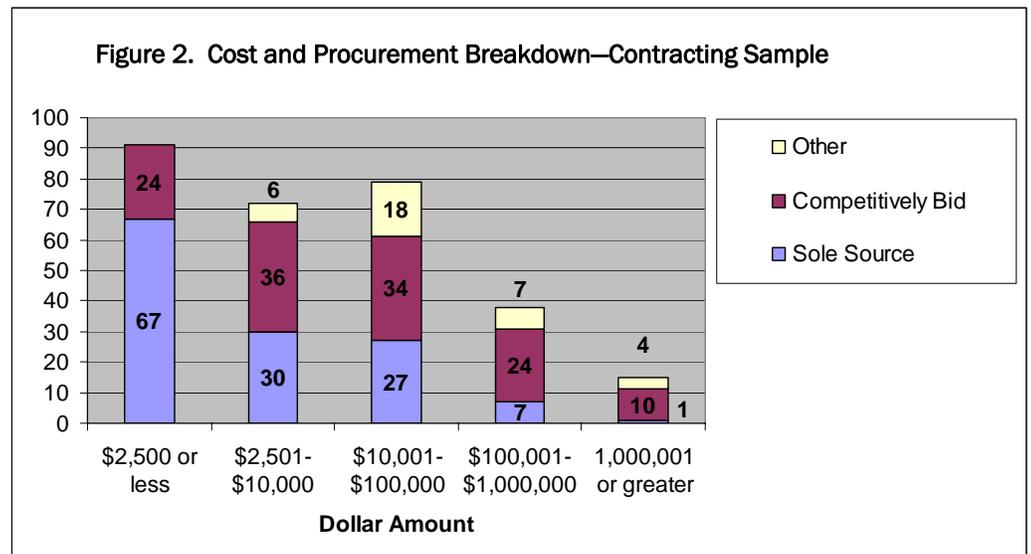
Statute also provides waivers for certain contracts such as those for services related to cooperative projects between the State and the University of Maine or Maine Community College System.

Conclusion

The State generally has appropriate practices for limiting the extent of professional services contracting and assuring contracts are at reasonable rates.

OPEGA concluded that the State generally has appropriate practices for limiting the extent of professional services contracting and assuring it is contracting at reasonable rates. These practices have their foundation in statute and, for the most part, are implemented through policies and procedures established by DAFS Division of Purchases. The Division of Purchases also fulfills a key control function in assuring adherence to policies and procedures through review and approval of agency contract requests and the awarding of contracts to specific vendors. Proposed contracts with higher dollar amounts appropriately receive more scrutiny than lower cost contracts with the most significant contracts also being reviewed and approved by the SPRC.

Fifty-one percent of the 204 professional services contracts for services costing over \$2,500 in our sample were awarded through a competitive process. In fact, 26% of the 91 contracts for \$2,500 or less had been through a competitive process even though it was not required.



Thirty-two percent of the contracts over \$2,500 had been approved by the Division of Purchases for sole source procurement and all were supported by documented justifications that met criteria established in Purchases’ policy. In addition, 17% of contracts over \$2,500 in our sample were either sole sourced under conditions that precluded Purchases’ approval or did not fall under the Division of Purchases’ jurisdiction. These are identified in Figure 2 and Table 4 as Other. Figure 2 illustrates the number of contracts in our sample by dollar range and procurement method. Table 4 shows the percentage breakdown of competitive versus sole source procurement.

Table 4. Contracts in OPEGA Sample - Number and Percent by Dollar Value and Procurement Method

Category	Number of Contracts	Percent in Category	Percent of Entire Sample
Below Open Market Limit of \$2,500	91	100%	31%
Sole Sourced	67	74%	23%
Competitively Bid	24	26%	8%
Above Open Market Limit of \$2,500	204	100%	69%
Sole Sourced	65	32%	22%
Competitively Bid	104	51%	35%
Other	35	17%	12%

Given our results, we do not believe changes to the current process for those services procured through Purchases would result in significant savings.

We do, however, suggest strengthening of existing controls to enhance accountability and transparency. We also recommend a comprehensive review of Cooperative Agreements.

Given these results, we do not believe there are any significant savings to be achieved through changing current practices for professional services procured through the Division of Purchases. We did note, however, that the effectiveness of Purchases’ review and approval is dependent upon the quality of information provided by the agencies regarding their need to contract for services and the justifications for sole sourcing or renewing and amending existing contracts. The Division of Purchases’ authority to deny a contract for service, require competitive procurement or deny a proposed amendment is also somewhat limited because it can be overridden by upper management. Consequently, we recommend some improvements that will strengthen the existing controls, bringing more accountability and transparency to the process and further reducing any risk that the State may be incurring unnecessary expense on any particular contract. We also recommend a more in-depth review of Cooperative Agreements to assure that financial risks associated with those contracts are properly mitigated.

For more detail on specific concerns, recommendations and planned actions, see the Findings and Action Plans section of this report.

We note that some agencies procure professional services through their own processes and those contracts are not subject to the Division of Purchases controls that were the focus of this review. These include:

- Bureau of General Services construction contracts;
- Department of Transportation construction contracts; and
- Public Utilities Commission Energy Conservation Program contracts.

It was outside the scope of this review to fully evaluate other controls that may exist for these contracts. However, unless these contracts are subject to other controls that effectively mitigate costs, they may represent a risk that the State is paying more than is necessary for the related services. We, therefore, encourage the Joint Standing Committees with oversight responsibility for these agencies to satisfy themselves that procurements of professional services in these agencies are also adequately controlled.

Findings and Action Plans

Finding 1 – Documented Justification for Sole Source Contracts Is Often Minimal

Agencies proposing to sole source for services that will cost more than the open market limit established by the Division of Purchases must state why a competitive process is not being used. Purchases reviews these justifications and approves or denies them. The effectiveness of Purchases' control role here is quite dependent upon the completeness and accuracy of the information provided by agencies. The Division does not have the resources necessary, nor should it be expected, to confirm the validity of these justifications for each sole source procurement request.

OPEGA reviewed 65 contracts for professional services over \$2,500 that had been procured from a sole source. All had a documented justification meeting the criteria for sole sourcing as defined in policy. However, there was often very little written explanation to support the justification. For example, the required form would indicate a contractor was the foremost expert in a particular field, but no additional information was included to indicate how the agency made this determination, or why using an outside expert was necessary. Consequently, Purchases often needed to ask for additional information from agencies before approving or denying sole source procurement. This consumes agency and Purchases resources and adds time to the contracting process. In addition, while OPEGA saw some evidence of meaningful exchanges between Purchases and the agencies, additional information gathered regarding the justification was not routinely documented. As a result, the official files did not always contain strong written sole source justifications.

The most common justifications for sole sourced contracts in OPEGA's sample were that a vendor:

- had exceptional expertise;
- was uniquely qualified; or
- was the foremost authority for the service.

To improve transparency and accountability for the sole sourcing decision, we recommend that agencies be required to submit to Purchases written justifications that more fully explain how their situations meet the criteria for sole source procurement – particularly for proposed contracts above the statutory open market limit of \$10,000. This documentation should be included in the official contract file. To improve efficiency in the procurement process, we further recommend that agencies be required to submit this enhanced written justification when the contract request is first submitted to Purchases. Purchases will then have more information available at the outset upon which to approve or deny a request for sole source procurement.

Management Action:

By June 30, 2009, the Division of Purchases will document its practices regarding the amount and type of justification required whenever an agency is requesting to award a contract pursuant to law but on a non-competitive basis. The rigor of the justification which is required for such requests will be related to contract cost and will be sufficient to allow a third party to understand what was considered by Purchases during the processing of the request. Purchases will inform agencies of the new requirements for documentation necessary for approval of sole source contract requests.

Finding 2 – Lack of Policies Limiting Contract Renewals and Amendments

The Division of Purchases reviews agency requests for renewals and amendments and either approves or denies them. Purchases' decision is currently a judgment call based on reviewing the proposed changes against the scope and time frame of the original contracts. There are no written policies regarding when contract renewals or amendments are appropriate, and no formal limit on the number of time extensions or cost increases allowed before re-bidding is required.

Sixty-six contracts (22%) in our sample had been amended, many more than once, and often for more than one reason. The average time extension was slightly over one year with the longest being 4 ½ years. Forty-eight of the contracts were amended for cost increases. Twenty-nine percent of the 48 contracts amended for cost increases doubled, or more than doubled, the original cost of the contract. We did not identify any pervasive concerns with the amendments reviewed, and we observed that Purchases does challenge agencies on the need for proposed renewals and extensions. We did however, note a couple irregularities in documentation, and instances of Purchases' determination that a contract be re-bid rather than amended being overridden.

Reasons for contract renewals and amendments in OPEGA's sample were:

- time extensions;
- funding increases;
- wording or scope changes; or
- a combination of the above.

Given the degree of activity we saw in our sample, we recommend formal policies be developed regarding contract renewals and amendments. Such policies should set standard limits on contract renewals and amendments that define when re-bidding is required, i.e. the number of amendments, length of time extension or percent of cost increases. Requests for renewals and amendments that exceed these limits should be subject to more rigorous justification and review, perhaps by the State Purchases Review Committee. We believe such policies will generally improve accountability and provide support for Purchases' decisions, thus enhancing the effectiveness of its review and approval role. Stronger policies will also help further reduce any risk of the State spending more resources than necessary on services that are extended rather than re-bid.

Management Action:

By June 30, 2009, the Division of Purchases will develop written procurement policies to establish and make clear the standard limits that apply to contract renewals and amendments, to clarify when re-bidding or additional review is required by either the Division of Purchases or the State Purchases Review Committee, and to explain how exceptions to these standards, if any, are handled.

Finding 3 – Cooperative Agreements May Pose Financial Risk

As discussed in the background section of this report, the State of Maine enters into contracts known as Cooperative Agreements with the University of Maine or Maine Community College System. These agreements are statutorily exempt from the competitive bidding.

OPEGA reviewed six Cooperative Agreements as part of our sample. Five of those contracts were between DHHS and the University of Maine System (UMS), the other was between the Atlantic Salmon Commission and UMS. The cost of these contracts at the time of our review was \$4.1 million, of which \$360,000 was funded from the General Fund. The type of activities included in these Agreements included:

- support services for MaineCare;
- continuance of the CHOICES Comprehensive Employment Opportunity program;
- coordination of projects and training in Behavioral Health areas;
- support and other information services for MaineCare policy information;
- support services for the Physical Activity and Nutrition Program; and
- water chemistry research on Maine rivers and streams.

Most of the State's Cooperative Agreements involve DHHS. In fiscal year 2007 the agency had 56 active Agreements with UMS. These Agreements had expenditures of \$22.8 million; \$4.9 million of which was from the General Fund, and \$4.2 million from Special and Other Revenue Funds.

OPEGA identified a number of areas of possible concern with Cooperative Agreements related to the ability to oversee and monitor budgets and costs related to those Agreements. DHHS has made changes recently to improve the Cooperative Agreement process, but additional improvements may be possible.

Recommendation for Legislative Action:

A comprehensive evaluation of Cooperative Agreements was beyond the scope of this review, but we do recommend such an evaluation be performed. We offer the following options for the Legislature's consideration:

- a. assign OPEGA to conduct a review;
- b. direct the State Auditor or State Controller to conduct a review; or
- c. assign responsibility for a review to a legislative policy or special study committee.

Finding 4 – Apparent Inconsistencies in Executive Order

Executive Order No. 7, FY 94/95 is the policy document on which some of the Division of Purchases' current purchasing procedures are based. OPEGA observed inconsistencies between the Executive Order, statute and current procurement practices in a couple of areas.

Statute (5 MRSA §1825-B.2.G) provides waivers from competitive bidding under certain conditions. Executive Order No. 7, FY94/95 also describes conditions under which the State Purchases Review Committee may approve a sole source procurement. Both statute and the Executive Order allow sole sourcing when procuring from a single source is the most economical, effective and appropriate means of fulfilling a demonstrated need. However, statute states that this condition is only allowable when the expected expenditures are \$10,000 or less while the Executive Order includes no dollar limit.

The Executive Order also states that the SPRC shall act upon all State agency requests for contracts costing over \$100,000. Currently, the SPRC automatically reviews contracts costing over \$1 million, and has delegated its authority for the review of contracts costing between \$100,000 and \$1 million to the Director of the Division of Purchases. The Director has the discretion to refer any contract between \$100,000 and \$1 million back to the SPRC if deemed necessary. This delegation of authority has not been formally documented.

OPEGA believes the current procurement practices provide for adequate control over contracts for professional services. However, the apparent inconsistency between what is described in the Executive Order, what exists in statute and what is actually occurring in practice, limits transparency and may be confusing to those outside the Division of Purchases seeking to understand the procurement process. We recommend that these differences be resolved. The Administration should seek Legislative agreement on the current procurement practices through the Appropriations and Financial Affairs Committee. Appropriate changes to statute and/or other policy directives should then be pursued as appropriate.

Management Action:

The Division of Purchases will pursue resolution of the apparent inconsistencies between Division polices and procedures, Executive Order No. 7, FY 94/95 and statute, and will, through the Commissioner of the Department of Administrative and Financial Services, involve the Appropriations and Financial Affairs Committee as appropriate. These inconsistencies will be resolved by June 30, 2009.

Agency Response

In accordance with 3 MRSA §996, OPEGA provided the Division of Purchases an opportunity to submit comments on the draft of this report. The response letter can be found at the end of this report.

Acknowledgements

OPEGA would like to thank the management and staff of the Department of Administrative and Financial Services and in particular the Division of Purchases in the Bureau of General Services who worked with us throughout this audit. Their cooperation and willingness to share their time and knowledge was appreciated.



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
BURTON M. CROSS BUILDING
4TH FLOOR, 77 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0077

RECEIVED SEP - 3 2008

JOHN ELIAS BALDACCI
GOVERNOR

RYAN LOW
COMMISSIONER

M.F. CHIP GAVIN
DIRECTOR

September 2, 2008

Beth Ashcroft, Director
Office of Program Evaluation and Government Accountability
Maine State Legislature
82 State House Station
Augusta, ME 04333-0082

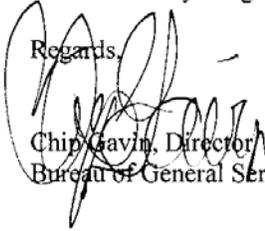
Dear Director Ashcroft,

Thank you for the copy of the final draft of OPEGA's report on State Contracting for Professional Services: Procurement Process, and for the invitation to submit these written comments.

We have reviewed the proposed management actions, and want to take this opportunity to confirm that we intend to pursue those actions as proposed.

Thank you again. We have enjoyed working with you.

Regards,


Chip Gavin, Director
Bureau of General Services

cc: Betty Lamoreau, Director, Division of Purchases