



State Procurement: Requests For Proposals, Competitive Exemptions, And Leaseback Agreements

Research Report No. 418

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State Procurement: Requests For Proposals, Competitive Exemptions, And Leaseback Agreements

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Abstract

Requests for proposals (RFPs) are used to solicit vendors in a competitive process to provide goods or services that state employees cannot produce or provide. Based on samples of requests for professional services, nonprofessional goods and services, and architectural and engineering services, there were issues with requests not stating the need for a procurement, not indicating why in-house staff could not be used, and not providing performance requirements. Sole source contracts are the result of procurements exempt from the competitive procurement process. Based on samples of nonprofessional contracts and professional sole source requests, some contracts did not state why procurements were needed, why in-house staff could not be used, why specific vendors were chosen, and why a competitive exemption was necessary. Leaseback agreements are transactions to sell an asset to a third party and lease the asset to the original owner. Kentucky has not used leasebacks but has a similar process, built-to-suit leases, to fund facility construction. Four built-to-suit RFPs have been issued in recent years. The report has 10 recommendations related to requests for proposals and sole source contracts.

Foreword

The Legislative Research Commission was established in 1948 to provide the staffing essential to the smooth and efficient operation of the Kentucky General Assembly. Over the course of the last 70 years, this organization has evolved into today's LRC: a multifaceted organization filling the many needs of a modern state legislature. As Kentuckians, we are fortunate to have hundreds of knowledgeable and dedicated professionals who provide high levels of analysis, legislative support, and customer service.

The staff of the Program Review and Investigations Committee perform the important work of monitoring and evaluating governmental programs throughout the Commonwealth. At the direction of the committee, they undertake a number of Research Reports every year, focusing on specific, well-defined questions of public policy.

Such work is done in collaboration with the community and within LRC. Program Review staff thank the officials and staff of the Finance and Administration Cabinet for their cooperation and assistance. Staff at the Office of Procurement Services and the Division of Engineering and Contract Administration extracted data from the eMARS statewide accounting system and provided valuable support in understanding the procurement process. Don Speer, Joan Graham, and Shelby Luby at the Office of Procurement Services and Jennifer Linton and Kelly Hawkins at the Division of Engineering and Contract Administration were especially helpful.

Thank you for your interest in this publication and thank you to everyone who made this report possible.

A handwritten signature in black ink, appearing to read 'DAB', with a long, sweeping horizontal line extending to the right from the end of the signature.

David A. Byerman
Director

Legislative Research Commission
Frankfort, Kentucky
October 8, 2015

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Summary

A request for proposals (RFP) is a document used by agencies to solicit vendors for services. RFPs are used to procure services requiring professional skill or professional judgment and result in a personal service contract. The Finance and Administration Cabinet sometimes uses RFPs to procure goods or nonprofessional services under a master agreement, which is an ongoing contract that does not require renegotiation of terms.

RFPs contain standardized language and disclosures derived from Kentucky's Model Procurement Code (KRS Chapter 45A), administrative regulations, and Finance and Administration Cabinet policies. Most of the content in an RFP does not change regardless of the procurement. The parts of an RFP that agencies modify for their needs include the purpose and justification, the scope of work, scoring criteria and weights, and the evaluation process.

The EO1 document currently serves as the initial procurement request that agencies send to the Finance and Administration Cabinet. A new document, a strategic procurement request, will eventually replace the EO1. It will streamline the procurement process by limiting the types of goods and services that require a request prior to issuing an RFP.

Noncompetitive negotiation or competitive exemption is a process by which an agency procures goods or services without evaluating and negotiating with multiple prospective vendors. The Model Procurement Code defines the competitive exemptions for nonprofessional services: specified by law or regulation, standing determination of not practicable or feasible, and sole source. Competitive exemptions that are not practicable/feasible or sole source must be approved by the Finance and Administration Cabinet.

Personal service contracts solicited through noncompetitive negotiation are considered either sole source/emergency exemption or not feasible to bid, and agencies must provide written justification to the Finance and Administration Cabinet providing evidence that supports those conditions.

This study examines RFPs and associated procurement documents solicited under the purview of the Finance and Administration Cabinet's Office of Procurement Services (OPS). The study also includes a review of RFPs from the cabinet's Division of Engineering and Contract Administration. Excluded are agencies and RFPs that are not under the direct contracting oversight of the Finance and Administration Cabinet.

Over the period of fiscal year 2013 to March 2015, executive branch agencies submitted 563 RFPs to OPS. The costs of personal service contracts awarded from an RFP were mostly small; 57 percent of contracts cost less than \$20,000 each. Over the same period, the Division of Engineering and Contract Administration submitted 89 RFPs on behalf of agencies. The Finance and Administration Cabinet solicited 82 RFPs for master agreements.

There were 3,064 noncompetitive procurement requests for nonprofessional services from FY 2013 to May 2015. There were 281 noncompetitive procurement requests for professional services during the period. Agencies currently use the EO1 document to request competitive exemptions.

Program Review staff sampled RFPs and EO1s for personal service contracts, master agreements, and architectural and engineering contracts covering the past 3 fiscal years.

All RFPs contain language that details the rules of procurement per the Model Procurement Code. All RFPs contain evaluation sections for technical and cost proposals, but the relative importance of each section is not clear. The evaluation section of the RFP template should more clearly indicate that both technical and cost proposals are important to the overall evaluation.

Recommendation 1.1

The RFP template should more clearly emphasize that technical and cost components are both important and will be considered together when awarding a contract.

In a 2013 study of personal service contracts, Program Review staff were unable to determine the number of evaluators for nearly one-third of sampled contracts. Where the evaluators were not known, either there were no detailed evaluation documents or evaluation documents had no clear indication of who conducted the evaluation. The report also found that there was no standard evaluation form used by all agencies. Most agencies had in-house forms or no standard forms at all.

Recommendation 1.2

The Finance and Administration Cabinet should ensure that agencies use evaluation committees of two or more people, with possible exceptions; that each evaluator explain in writing why each proposal received its score on each of the solicitation criteria; that the scores for each proposal, evaluator, and criterion be recorded on the evaluation document in the statewide accounting system; that the detailed scoring explanation be attached to the system's evaluation document; and that a determination and findings document that summarizes and finalizes the evaluation process be attached to the system's contract document.

The number of unique procurements could not be estimated because there is no standard link between resolicited procurements and the original document. OPS staff found that some resolicitations included documentation. Other RFPs appeared to be resolicitations, but OPS staff could not confirm whether they were reissued. In addition, some RFPs awarded contracts in a separate procurement folder, disrupting the link between award and contract. The two issues could potentially affect OPS activities when contract information is required, such as when open records requests are submitted.

Recommendation 1.3

The Finance and Administration Cabinet's Office of Procurement Services should implement standards to link resolicited requests for proposals with the original requests for proposals.

Recommendation 1.4

The Finance and Administration’s Cabinet’s Office of Procurement Services should implement standards that clearly link contract awards to requests for proposals when a contract is awarded in a different procurement folder.

A significant number of RFPs did not include sufficient explanations for why a contract was needed.

Recommendation 2.1

The Finance and Administration Cabinet and other contracting agencies should ensure that the need for a contract is stated fully and clearly on request for proposals documents.

Several agencies stated that in-house staff were not qualified to perform the work, or that there were too few qualified staff to effectively carry out the demands of a project or service. This reasoning alone is insufficient and must be supported by clearly stated evidence.

Recommendation 2.2

The Finance and Administration Cabinet and other contracting agencies should ensure that the justification for why services cannot be provided in house or by another state agency is stated fully and clearly on request for proposals documents.

The terminology used to describe the competitive and noncompetitive processes in the Model Procurement Code often differed from terminology in administrative regulations and Finance and Administration Cabinet policies describing the same processes, particularly with terms describing how proposals should be evaluated.

Recommendation 2.3

The Finance and Administration Cabinet’s Manual of Policies and Procedures should conform with statutory and administrative regulation terms describing competitive and noncompetitive negotiations.

When a procuring agency selects a vendor, only the successful offeror is notified. Vendors must regularly check the procurement website to determine that a contract has been awarded. If a vendor cannot regularly check the website, the vendor may have less than the allowed 2 weeks to construct a protest.

Recommendation 2.4

The Finance and Administration Cabinet should implement a method to directly inform all applicants when a vendor has been awarded a contract.

Although competitive exemption requests for nonprofessional services or goods have specific cited authorities included on every request, those reasons alone are often insufficient to prove that competitive bidding is not feasible. Many competitive exemption requests did not explicitly state why competitive bidding was not an option. Additionally, requests must include proof that agency staff are not capable of providing the service or good.

Recommendation 3.1

The Finance and Administration Cabinet and other contracting agencies should ensure that competitive exemption requests for nonprofessional services or goods clearly and fully state why the contract is needed, why the services cannot be performed in house or by another state agency, and why competitive exemption is necessary.

Several competitive exemption requests for professional services did not explicitly prove that in-house options were not viable, that the contract was necessary, or that competitive bidding was not feasible. The reasons for need may be implied in the description of services; however, it is not always clear that the contract is necessary or that competitive exemption is the only option.

Recommendation 3.2

The Finance and Administration Cabinet and other contracting agencies should ensure that competitive exemption requests for professional services clearly and fully state why the contract is needed, why the services cannot be performed in house or by another state agency, and why competitive exemption is required.

In leaseback agreements, assets are sold to a third party and the third party leases the asset to the original owner for continued use. Leasebacks are not used in Kentucky, but the Finance and Administration Cabinet uses a similar agreement called a built-to-suit lease. These leases may transfer ownership of state land to a third party for construction of a capital project on the land. The capital project is leased to the state until lease payments amortize the cost of the project. Ownership of the land and the capital project is then transferred to the state. Built-to-suit leases are less flexible than leaseback agreements but carry less risk. Four built-to-suit RFPs have been issued in recent years.

Chapter 1

Overview

At its December 2014 meeting, the Program Review and Investigations Committee voted to conduct a study of requests for proposals, noncompetitive negotiations, and leaseback agreements.

Major Conclusions

This report has 11 conclusions.

- Requests for proposals (RFPs) submitted to the Finance and Administration Cabinet's Office of Procurement Services generally comply with relevant statutes, regulations, and policies but sometimes lack required information.
- RFPs issued by the Finance and Administration Cabinet's Division of Engineering and Contract Administration generally comply with appropriate statutes, regulations, and policies but sometimes lack required information.
- The written justification for procurement is often inadequate or omitted on RFPs.
- RFPs often do not include an adequate description of why agency staff cannot perform services or provide goods.
- Many RFPs do not include performance requirements for vendors.
- Tracking procurements in eMARS is problematic because agencies often do not provide appropriate documentation when an RFP is canceled and resolicited under a different identification number.
- RFPs are linked to contract awards in eMARS. However, 20 RFPs over a 3-year period were awarded in a way that did not connect the RFP with the award.
- Nonprofessional sole source contracts cite the correct authorities but do not always indicate why the contract is necessary, why services cannot be performed by in-house staff, or why the competitive exemption is necessary.
- Professional sole source contracts provided descriptions of the services needed but sometimes lacked details on why a service was needed, the need for a specific vendor, and why a competitive exemption was needed.

- The terminology used to describe competitive procurement in statute differs from the terminology in the Finance and Administration Cabinet’s Manual of Policies and Procedures.
- Kentucky does not use leaseback agreements but uses a similar practice called built-to-suit. Leaseback agreements are more flexible than built-to-suit leases but introduce more risk.

The current document used to request purchases exceeding \$1,000, the EO1, is submitted prior to the request for proposal.

The need for procurement is determined by program staff at agencies, including cabinets, departments, divisions, and offices. Steps toward formulating a procurement request vary among agencies. At present, agencies communicate the need for a procurement or purchase exceeding \$1,000 via a document called an EO1.^a EO1s may also act as a request to establish a contract that does not go through the competitive process. Agencies transmit EO1s to the Finance and Administration Cabinet’s (FAC) Office of Procurement Services (OPS) for approval.

Personal service contracts require a request for proposal (RFP) and are used to solicit professional services. Master agreements are set up for multiple agencies to acquire nonprofessional services or goods.

Request for proposal documents are used to solicit vendors in a competitive process that results in an award. Generally, RFPs can be used for personal service contracts or for master agreements. Personal service contracts—contracts for one agency to procure professional services—require an RFP unless a competitive exemption such as sole source is needed. FAC is the only agency permitted to solicit master agreements—contracts for one or more agencies to acquire nonprofessional services—via an RFP.

The EO1 is being replaced by the strategic procurement request, or SPR1, which will focus on expenditures considered strategic.

Since February 2015, FAC has been overhauling the EO1 process, and it will replace that document with the SPR1, or Strategic Procurement Request. The new SPR1 document is awaiting the final upgrade to eMARS 3.10.01. eMARS is Kentucky’s statewide accounting system and handles procurements from solicitation to award. The document in eMARS is still listed as an EO1. The new SPR process itself, however, is currently in effect.

Strategic Procurement Requests

The SPR approval process differs from the EO1 in that it eliminates the need for review and approval for all expenditures. Instead it focuses on “expenditures considered strategic in nature or [that] have an enterprise impact.”¹ Table 1.1 shows the types of requests that require SPR approval and associated threshold amounts.

^a EO1 is named after Executive Order 2008-011, which established the document and the process.

Table 1.1
Requests And Thresholds That Require Strategic
Procurement Request Document And Approval

Request	Threshold	Oversight Agency
Architectural & Engineering Not Practicable to Bid	\$0	Division of Engineering and Contract Administration
Architectural & Engineering Sole Source	0	Division of Engineering and Contract Administration
IT Hardware, Maintenance, Services, Software, or Task Orders	1,000	Commonwealth Office of Technology
Postal Services & Equipment	1,000	Division of Postal Services
Printing	1,000	Transportation Cabinet – Design & Print Services
Personal Service Contracts–Start Date Request, Sole Source, or Not Practicable to Bid	0	Office of Procurement Services
Vehicle Repairs and Parts	5,000	Division of Fleet Management
Vehicles	1,000	Division of Fleet Management

Source: Finance and Administration Cabinet.

SPR1 documents are created in the statewide accounting system, eMARS, and must reference an RFP or an award document to set up the procurement.

The administrative path for an SPR1 begins with agency program staff and ends with approval by the appropriate oversight agency. In the initial stage, the RFP or award document must be created in eMARS so the SPR1 has a contract to reference.^b The SPR1 is then entered into eMARS. Following its creation, the SPR1 typically moves to the agency’s respective budget/policy office, whose personnel review the document for errors and ensure that all FAC-required elements are present.^c

SPR1s approved at the agency level are then sent to the appropriate oversight agency for final review and approval. If the document receives final approval, that action is applied in eMARS.

^b The PON2 is an award document similar to a purchase order used to procure professional services and is the contract signed by the winning vendor.

^c The SPR1, unlike the EO1, does not require a hard copy approval signature. However, it is likely that some agencies will continue the practice of having both hard copy and eMARS copies of the SPR1.

Requests For Proposals

Creation And Approval

When an RFP is being considered, agency staff must determine whether the work can be conducted in house and whether the need is justified.

RFPs are generated at the agency program level after it has been determined that contracted services are necessary and cannot be provided in house or by a university, nonprofit, or other state agency.

RFPs generally follow a life cycle similar to that of the SPR1 or EO1. They do have more components and pass through a more rigorous approval process. RFPs are required for all personal service contracts and architectural and engineering contracts with the exception of FAC-approved sole source or not practicable to bid requests.

Program staff typically identify the need for contracted services. Division directors or supervisors oversee this process to determine whether the work can be performed in house. Program staff discuss the potential procurement with the FAC Office of Procurement Services to determine whether an RFP will be needed. Once the need is determined and considered relevant, the RFP process begins in eMARS with the drafting of the document, including a comprehensive statement of work.

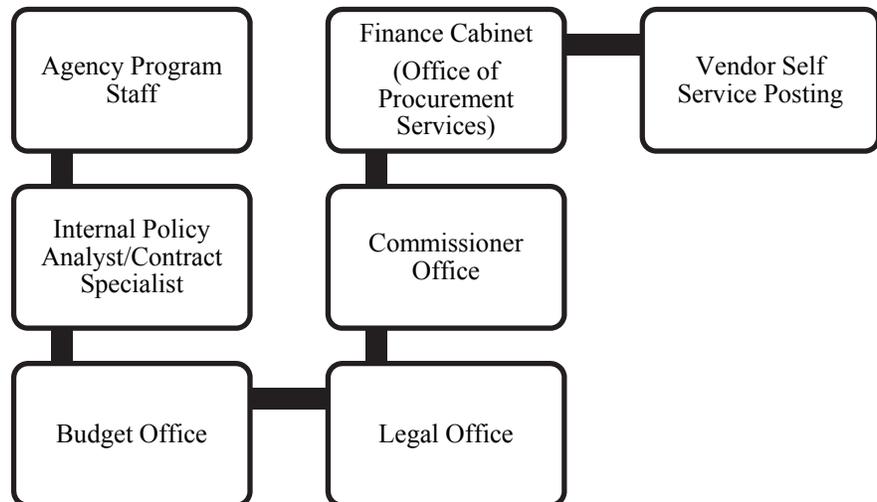
RFPs are constructed in eMARS and routed through the appropriate approval process, ending at the Finance and Administration Cabinet (FAC). RFPs contain a considerable amount of boilerplate text and disclosures.

eMARS allows standardized language for terms and conditions to be downloaded from the online eProcurement Functional Area. The Functional Area is not attached to the eMARS system but is maintained by FAC. The terms and conditions are attached to RFP documents in eMARS once they have been modified to fit the agency's need.

Depending on the size of the agency, an internal policy analyst is usually responsible for the construction of the RFP document. For security and quality control, access to eMARS is generally limited to selected, qualified staff. Legal staff may assist with the language of the actual proposal. Considering the diverse needs across agencies, this language generally must be assembled without the use of a template.

As shown in Figure 1.A, RFPs are the product of a multistep process involving program staff and budget staff. Program staff are primarily concerned with defining the type of work to be contracted. Once program staff draw up the specifics of the work being contracted, or the scope of work, that information is pasted into the boilerplate document.

Figure 1.A
RFP Work Flow And Approval



Note: Depending on agency size, the work flow and approval process may differ. Smaller agencies may not have dedicated purchasing staff or analysts.

Sometimes, the work flow and approval process of an RFP exists concurrently in eMARS and as a hard-copy document circulating through the agency.

Once the RFP is devised to fit the need of the agency, includes a complete scope of work, and receives approval from the division director, it moves to the departmental legal office. The legal office is responsible for ensuring that the language and format contain all necessary requirements for procurement as stated in KRS Chapter 45A (Model Procurement Code). The RFP process exists in eMARS but often has a counterpart in print that moves through the approval stages. The “shell” document is created in eMARS, so a PON2 or RFP number will exist; however, the actual document for approvals circulates in print.

eMARS works as a compiler and organizer for the RFP process. The scope of work and standardized terms and conditions can be joined in eMARS to form the complete RFP. For instance, program staff will identify the need to contract for a service, construct the scope of work, and send it to an internal policy analyst or budget office. The internal policy analyst will then use eMARS to attach the relevant standardized language to the scope of work, thereby creating a draft of the RFP.

RFPs For Personal Service Contracts

There were 563 RFPs submitted to FAC's Office of Procurement Services (OPS) for personal service contracts from FY 2013 to March 2015.

Program Review staff requested the total number of RFPs for personal service contracts submitted to the Finance and Administration Cabinet's Office of Procurement Services for fiscal year 2013, FY 2014, and nine months of FY 2015. In most cases, the type of contract award generated from an RFP is a PON2.

Three cabinets each submitted more than 100 RFPs for personal service contracts over the past 3 fiscal years, accounting for nearly 60 percent of total submissions.

Table 1.2 shows the number of submitted RFPs for personal service contracts per fiscal year by cabinet. Nearly 60 percent of submissions came from the Education and Workforce Development Cabinet, General Government, and the Justice and Public Safety Cabinet, with each submitting more than 100 RFPs over the past 3 fiscal years. The Labor Cabinet, Personnel Cabinet, and universities each submitted fewer than 10 RFPs over the same period.

Table 1.2
Requests For Proposals For Personal Service Contracts
Submitted To The Office Of Procurement Services
Fiscal Year 2013 To March 2015

Cabinet	FY 2013	FY 2014	FY 2015	
			To March	Total
Education and Workforce Development	55	37	18	110
Energy and Environment	11	11	4	26
Finance and Administration	4	14	6	24
General Government*	37	53	17	107
Health and Family Services	29	51	8	88
Justice and Public Safety	36	60	15	111
Labor	5	3	0	8
Personnel	1	1	0	2
Public Protection	7	4	2	13
Tourism, Arts and Heritage	11	19	1	31
Transportation	14	13	7	34
Universities	5	3	1	9
Total	215	269	79	563

*General Government consists of departments that are not assigned to a cabinet.

Source: Program Review staff analysis of data provided by the Finance and Administration Cabinet's Office of Procurement Services.

RFPs are generally issued for professional services.

The RFP process is generally associated with professional or personal services. The Model Procurement Code defines a personal service contract as

an agreement whereby an individual, firm, partnership, or corporation is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon (KRS 45A.690 (g)).

The National Institute of Governmental Purchasing defines professional services as “services rendered by members of a recognized profession or possessing a special skill. Such services are generally acquired to obtain information, advice, training, or direct assistance.”²

There is no objective definition of professional service.

Since there are no objective definitions of what constitutes a professional skill, professional judgment, or special skill, determining the type of solicitation can be problematic.

The RFP evaluation section contains technical and cost components, each scored separately and then combined for the total score. The relative importance of each component is not clear.

Although all RFPs contain a section detailing the rules of procurement that references the Model Procurement Code, the mechanics of the evaluation process are not clearly defined. The RFP evaluation section contains technical and cost components, each scored separately and then combined for the total score. The relative importance of each component is not clear. Arguably a vendor could respond to a solicitation assuming that a lower cost proposal would compensate for a technical proposal that meets only minimum requirements. The RFP template should more clearly indicate that both components are important to the overall evaluation.

Recommendation 1.1

Recommendation 1.1

The RFP template should more clearly emphasize that technical and cost components are both important and will be considered together when awarding a contract.

The evaluation follows the receipt of all responsive proposals on a solicitation. A previous Program Review and Investigations report examined this process.

Proposal Evaluation And Scoring. Evaluation is the process following the receipt of all responsive proposals on a solicitation and typically results in an award to a vendor. Program Review and Investigations staff reviewed the process in the 2013 report *Personal Service Contracting In Kentucky*. Every award should be documented by a written determination and findings (KRS 45A.025). Determination and findings is defined by FAC as a written justification of the reasons for making the award to the selected vendor.³

The report found there was no standard evaluation form used by all agencies.

The report found there was no standard evaluation form used by all agencies. Most agencies had in-house forms or no standard forms at all. In the latter case, some agencies provided a one-time use evaluation sheet; others compiled handwritten notes from each evaluator. Hard-copy evaluation files at agencies were often extensive, but the eMARS equivalent frequently contained little useful information.

Program Review staff could not find evaluator information for nearly one-third of sampled contracts in the personal service contract study.

Program Review staff were unable to determine the number of evaluators for nearly one-third of sampled contracts in the personal service contract study. When the evaluators were not known, either there were no detailed evaluation documents or evaluation documents had no clear indication of who conducted the evaluation.

For some contracts, scoring information could not be found in eMARS.

Program Review staff found that score sheets could appear in a variety of types. For some contracts, score sheets could be found only in the solicitation file, while for others the sheets might be in eMARS and the solicitation file. The determination and findings were commonly found in agency files but generally did not appear in eMARS.

Evaluation by committee reduces the risk of introducing intentional or unintentional bias. The Finance and Administration Cabinet states in FAP-111-57-00 that requesting agencies should evaluate proposals by committee.

The personal service contract report found that some evaluations were conducted by a single party and not by committee. Evaluation by committee reduces the risk of introducing intentional or unintentional bias. The Finance and Administration Cabinet states in FAP-111-57-00 that “the requesting agency shall nominate a technical evaluation committee, and if applicable, a cost evaluation committee for the project”

The 2013 personal service contract report included a recommendation that is repeated here.

Recommendation 1.2

Recommendation 1.2

The Finance and Administration Cabinet should ensure that agencies use evaluation committees of two or more people, with possible exceptions; that each evaluator explain in writing why each proposal received its score on each of the solicitation criteria; that the scores for each proposal, evaluator, and criterion be recorded on the evaluation document in the statewide accounting system; that the detailed scoring explanation be attached to the system’s evaluation document; and that a determination and findings document that summarizes and finalizes the evaluation process be attached to the system’s contract document.

From FY 2013 to May 2015, approximately 74.2 percent of RFPs issued resulted in one or more contracts.

Costs. Program Review staff analyzed the amount spent on personal service contracts awarded from RFPs. Table 1.3 indicates spending for these contracts awarded through RFPs from FY 2013 to May 2015. Approximately 74.2 percent of such RFPs issued during this period resulted in one or more contracts. On average, 1.29 contracts were issued for each RFP. The average is inflated by a Transportation RFP that resulted in 24 contracts and a Department of Alcohol Beverage Control RFP that resulted in 20 contracts. The table uses the median, the middle contract value, in place of the mean to compensate for the more expensive RFPs. Most contracts that resulted from an RFP were relatively small.

Table 1.3
Costs Of Personal Service Contracts Issued From Requests For Proposals
Fiscal Year 2013 To May 2015

Year	RFPs Awarded	Contracts Awarded	Total Expenses (Millions)	Largest Expense (Millions)	Median Expense
2013	158	171	\$40.7	\$14.8	\$22,768
2014	201	305	28.1	8.6	12,800
2015 to May	59	65	1.2	0.4	5,825
FY 2013-FY 2015	418	541	\$70.0	\$14.8	\$14,892

Source: Program Review staff analysis of data provided by the Finance and Administration Cabinet's Office of Procurement Services.

In each year analyzed, a single award from an RFP resulted in a large expenditure. Most contracts from RFPs were relatively small, with 57 percent of contracts costing less than \$20,000.

In each year analyzed, a single RFP accounted for a large portion of expenditures. In FY 2013, a contract awarded from an RFP for inmate medical services represented more than 36 percent of expenditures. In FY 2014, a contract awarded from an RFP to manage and operate an intermediate-care facility accounted for more than 30 percent of expenditures. In FY 2015, a contract awarded from an RFP for legal services for the Next Generation Kentucky Information Highway resulted in 32 percent of expenditures. Most contracts from RFPs were relatively small, with 57 percent of contracts costing less than \$20,000.

RFPs that are submitted to OPS do not always result in a successful solicitation. The number of RFPs submitted to OPS per fiscal year and the number of RFPs that were awarded differ. Some RFPs may be canceled, while others did not receive interest.

RFPs do not always result in an award. From FY 2013 to May 2015, 145 RFPs for personal service contracts did not result in awards. Some of these RFPs were resolicited.

RFPs With No Award. Of the 145 RFPs for personal service contracts that did not result in awards from FY 2013 to May 2015, agencies resolicited 21.4 percent under a different identification number. OPS staff found evidence suggesting agencies resolicited an additional 46.2 percent, but no confirmation was found. OPS

staff could not find evidence of resolicitation for 47 RFPs without awards, or 32.4 percent.⁴

There is evidence to suggest a lack of documentation by agencies when a procurement is unsuccessful and must be resolicited.

The lack of documentation by agencies in eMARS makes the percentage of successful procurements unclear. Depending on the number of undocumented resolicitations, the percentage of successful procurements could vary from 78.6 percent to 89.9 percent. In addition, 20 RFPs were awarded in a way that did not connect the award with the RFP. If the awards had not been documented in text, those procurements would have appeared to be unsuccessful and costs could have been miscalculated.

These two issues may present challenges for OPS staff if they are required to compile a complete record of a procurement. For example, if an open-records request for a procurement was issued, OPS staff may need to review additional records to ensure that the procurement was not resolicited. If the agency did not use identical language in a resolicitation, OPS staff may not be able to determine that a contract was reissued. If a contract was awarded in a different folder, it may be difficult to determine which vendor was selected. If OPS does not want to risk providing inaccurate information, operations at OPS and the procuring agency may be interrupted when OPS staff request additional information from the agency.

Recommendation 1.3

Recommendation 1.3

The Finance and Administration Cabinet's Office of Procurement Services should implement standards to link resolicited requests for proposals with the original requests for proposals.

Recommendation 1.4

Recommendation 1.4

The Finance and Administration's Cabinet's Office of Procurement Services should implement standards that clearly link contract awards to requests for proposals when a contract is awarded in a different procurement folder.

RFPs Resulting In Master Agreements

FAC is the only agency permitted to use RFPs for master agreements.

The majority of RFPs generate awards for personal service contracts, but FAC can also establish master agreements through the RFP process. When this occurs, FAC generally acts on behalf of the agency or agencies requiring the service or goods.

The decision to use an RFP for a master agreement is ultimately at the discretion of OPS staff. Depending on the type of service and the length for which it will be needed, it may be more beneficial to award a master agreement through an RFP.

Procurement requires some flexibility in defining professional and nonprofessional services. Precedent often informs the decision for how to procure certain types of services.

OPS staff noted that creating a standardized list of what is and is not considered a professional service would be difficult and counterproductive. The diversity of services is too extensive and nuanced to be categorized. To reduce inconsistency, OPS staff regularly review past procurements to see which tasks were considered professional. Precedent often informs the decision for how to procure certain types of services. For example, IT and IT-related services are generally not considered professional by OPS.

There were a total of 82 master agreements solicited via RFPs by OPS on behalf of other agencies from FY 2013 to March 2015.

RFPs Resulting In Architectural And Engineering Contracts

FAC's Division of Engineering and Contract Administration solicits and awards contracts for capital construction and construction services on behalf of other agencies.

The Finance and Administration Cabinet's Division of Engineering and Contract Administration is responsible for soliciting and awarding contracts for capital construction and construction services for all agencies. The type of contract the division awards is generally referred to as architectural and engineering. These contracts are solicited with RFPs and result in a PON2 contract award. The division issued 29 architectural and engineering RFPs in FY 2013, 16 in FY 2014, and 44 in FY 2015.^d

Procurement That Is Exempt From Competitive Bidding, Not Practicable To Bid, Or Sole Source

In the instance of a sole source or not practicable to bid procurement, the agency in need of services requests an exemption from OPS. The laws governing noncompetitive procurements are spelled out in statute and regulation. Policies issued by FAC include, by reference, the specific statutes and regulations that govern noncompetitive procurements. Three groups of policies categorize the types of noncompetitive procurements for nonprofessional services or goods:

- FAP 111-08-00 (competitive bidding exceptions: specified by law or regulation),
- FAP 111-09-00 (competitive bidding exceptions: standing determination of not practicable or feasible), and
- FAP 111-10-00 (competitive bidding exceptions: sole source).

^d The FY 2015 figure is as of April 7.

Small purchase authorities are the monetary thresholds of agencies to procure goods and services without seeking approval from OPS. Small purchase authority amounts differ by agency and by the type of procurement.

Purchases contained under the law or regulation specification do not require prior approval from FAC. Purchases that are not practicable or feasible are those that OPS has determined are not best served through the competitive bidding process. Agencies must seek prior approval from OPS if the purchase exceeds their small purchase authority. Small purchase authorities vary among agencies and are divided between goods and services and construction. Table 1.4 shows small purchase authority amounts and the number of agencies assigned to each amount.

Table 1.4
Small Purchase Authority Amounts

Goods And Services	Agencies	Construction	Agencies
\$3,000 or less	1	\$10,000 or less	10
\$5,000 or less	29	\$20,000 or less	10
\$10,000 or less	6	\$40,000 or less	25
\$20,000 or less	10	N/A	1
Total	46	Total	46

Source: Finance and Administration Cabinet.

Sole source procurements must meet specific requirements and must provide “written justification clearly substantiating the fact that the sole source item is the only item that will meet the needs of the agency” (FAP 111-10-00). Additionally, FAC policy states that [a] procurement shall be exempt from competitive bidding if there is only one (1) known capable supplier of a commodity or service, occasioned by the unique nature of the requirement, supplier, or market condition (FAP 111-10-00).

Additional policies that can be applied to competitive exemptions for professional services are FAP 111-43-03-L for legal services and FAP 111-43-03-STD for other services.

Evaluating Noncompetitive Procurements

Competitive exemption requests are reviewed by the executive director of OPS. These requests must include additional supporting information for why the services or goods cannot be procured competitively.

The executive director of OPS is responsible for evaluating whether or not a competitive exemption is warranted. Unless otherwise stated by statute, regulation, or policy, requests for competitive exemption must provide supporting information and justification. For the purpose of record keeping, it is important that the determinations and decisions of OPS are documented. The National Association of State Procurement Officers states that [w]hether the basis of the user agency need is obvious or not, the procurement file must demonstrate that the chief

procurement officer made his or her decision to approve the purchase based on all of the information available to him or her. What is obvious to those within the executive branch of a government is not always as obvious to those outside of it, such as journalists and legislators.⁵

There were more than 3,000 noncompetitive purchase requests submitted to OPS from FY 2013 to May 2015.

Table 1.5 shows the total number of noncompetitive purchase requests for nonprofessional services or goods submitted to OPS from FY 2013 to May 2015. Of the more than 3,000 requests, more than 1,300 were by the Tourism, Arts and Heritage Cabinet. The numbers for the cabinet are inflated each year from multiple advertising requests from the Kentucky State Fair Board in promotion of the state fair and the North American International Livestock Exposition. The Kentucky Department of Fish and Wildlife generally has multiple maintenance requests each year that also contribute to the cabinet's higher numbers.

Table 1.5
Noncompetitive Requests For Purchases Submitted To The Finance
And Administration Cabinet's Office Of Procurement Services
Fiscal Year 2013 To May 2015

Cabinet	FY 2013	FY 2014	FY 2015 To May	Total
Economic Development	28	33	30	91
Education and Workforce Development	65	49	40	154
Energy and Environment	83	88	68	239
Finance and Administration	57	46	38	141
General Government*	58	60	46	164
Health and Family Services	151	115	97	363
Justice and Public Safety	101	96	115	312
Labor	46	34	21	101
Personnel	16	10	6	32
Public Protection	21	23	22	66
Tourism, Arts and Heritage	612	482	243	1,337
Transportation	1	1	0	2
Universities	23	22	17	62
Total	1,262	1,059	743	3,064

*General Government consists of departments that are not assigned to a cabinet.

Source: Program Review staff analysis of data provided by the Finance and Administration Cabinet's Office of Procurement Services.

There were 289 noncompetitive requests for personal service contracts submitted to OPS from FY 2013 to May 2015.

Table 1.6 shows the 289 competitive exemption requests for personal service contracts by cabinet from FY 2013 to May 2015. These are professional services that would normally go through the competitive bidding process and would include a request for proposals. More than 60 percent of the requests came from three cabinets: Health and Family Services (68), Justice and Public Safety (57), and General Government (57). Six cabinets each had fewer than 10 requests.

Table 1.6
Noncompetitive Requests For Personal Service Contracts Submitted To
The Finance And Administration Cabinet's Office Of Procurement Services
Fiscal Year 2013 To May 2015

Cabinet	FY 2013	FY 2014	FY 2015 To May	Total
Economic Development	2	3	0	5
Education and Workforce Development	7	13	4	24
Energy and Environment	6	2	0	8
Finance and Administration	0	2	3	5
General Government*	14	27	16	57
Health and Family Services	20	39	9	68
Justice and Public Safety	15	25	17	57
Labor	0	0	1	1
Personnel	0	1	1	2
Public Protection	5	12	1	18
Tourism, Arts and Heritage	9	5	6	20
Transportation	7	7	4	18
Universities	2	2	2	6
Total	87	138	64	289

*General Government consists of departments that are not assigned to a cabinet.

Source: Program Review staff analysis of data provided by the Finance and Administration Cabinet's Office of Procurement Services.

Leasebacks

A leaseback is a transaction in which an entity receives a single infusion of funds from the sale of assets but continues control of the assets via a lease agreement with the buyer.

Leasebacks are transactions in which assets are sold or leased to a third party and immediately leased to the original owner for continued use. This process allows property owners to receive a single infusion of funds while maintaining control of assets. Leasebacks are commonly associated with buildings and facilities, though any physical asset may be suitable for a leaseback agreement. Some governments have used leaseback agreements to finance construction, close budget deficits, and provide additional funds for programs.

Kentucky does not use leaseback agreements. A similar process known as "built-to-suit" has been used occasionally.

Kentucky does not use leaseback agreements. A similar financing mechanism known as built-to-suit contracts has been used. Built-to-suit contracts are used to construct facilities without issuing debt. These contracts transfer ownership of state land to a vendor that designs, finances, and constructs a facility on the land. The state leases the facility until the lease payments account for the cost of the facility. When the lease ends, ownership of the land and the facility is transferred to the state. When "leasebacks" appear in statute, the statute describes a process identical to built-to-suit. Since 2012, four built-to-suit contracts have been issued for the Department of Military Affairs. Lease payments ranged from \$266,819 to \$1.1 million per year.

Chapter 2

Requests For Proposals

Personal Service Contracts

Agencies generally modify the RFP template for descriptions of services, expected content of proposals, and the evaluation process.

The RFP document contains a significant amount of template material that does not change regardless of the procurement. Generally, agencies modify only the sections that include the description of services, expected content of the proposals, and process by which proposals are evaluated and scored.

Program Review staff randomly sampled for review 30 RFPs for personal service contracts for FY 2013, 29 for FY 2014, and 15 for FY 2015.

Program Review staff randomly sampled for review 30 RFPs for personal service contracts for FY 2013, 29 for FY 2014, and 15 for FY 2015. The majority of RFPs contained required information detailed in statutes, regulations, and policies. Some RFPs had insufficient statements of why an agency needed to procure services or why in-house staff were unable to perform the services, or they lacked performance requirements.

In most cases, the EO1 document provided the description for why the agency required contracted services. The RFP document either duplicated what was in the EO1 or did not contain any explanation for why contracted services were required.

Determining what type of service is needed and why it is needed requires reviewing both the EO1 and RFP. In several cases, the EO1 contained a more detailed description of services and the reasons for why services were required. With elimination of the EO1 pending, care should be taken that needed information is still provided.

The full list of personal service contract RFP information reviewed by Program Review staff and the percentage of RFPs with required information is in Table 2.1. RFPs were consistent in providing addresses and posting times for proposal submissions, the procurement type, and descriptions of the service required. Evaluation criteria and weights were commonly found in RFPs. The types of criteria and weights varied depending on the service being solicited.

Table 2.1
Percentage Of 74 Sampled Personal Service
Contract RFPs Meeting Requirements
Fiscal Year 2013 To March 2015

Requirement	FY 2013	FY 2014	FY 2015 To March
States need for procurement	86.7%	96.6%	86.7%
States need for staff	56.7	65.5	66.7
Posted at least 7 days	100.0	100.0	100.0
Provides submission information	100.0	100.0	100.0
States procurement type	100.0	100.0	100.0
Provides description of service	100.0	100.0	100.0
Requests data from vendor	93.3	93.1	100.0
Provides evaluation criteria	100.0	96.6	100.0
Provides evaluation weights	100.0	100.0	100.0
Provides performance requirements	56.7	82.8	60.0

Note: Thirty RFPs were reviewed for FY 2013, 29 RFPs for FY 2014, and 15 RFPs for FY 2015.

Source: Program Review staff analysis.

Some sampled RFPs for personal service contracts did not justify a need for services. Many did not provide justification for requesting outside staff.

The sampled RFPs included contracts for rehabilitation services for the Department of Veterans Affairs, legal services for the Transportation Cabinet, and case management standards for the Education and Workforce Development Cabinet. Seven of the 74 sampled RFPs did not appropriately indicate a need for services. When RFPs did not indicate a need for services, the justification was completely absent or the EO1 stated the service was needed but with no explanation.

Recommendation 2.1

Recommendation 2.1

The Finance and Administration Cabinet and other contracting agencies should ensure that the need for a contract is stated fully and clearly on request for proposals documents.

EO1s with justifications cited statutory requirements, conflicts of interest, a lack of internal staff experience or knowledge, time constraints, and cost saving. Justifications for outside staff were insufficient in 28 of the 74 RFPs reviewed. These insufficient justifications provided no explanation, stated only that external staff were needed, or indicated only that internal staff could not provide the service.

Recommendation 2.2

Recommendation 2.2

The Finance and Administration Cabinet and other contracting agencies should ensure that the justification for why services cannot be provided in house or by another state agency is stated fully and clearly on request for proposals documents.

Performance requirements were not provided in one-third of sampled RFPs for personal service contracts.

Performance requirements were not provided in 24 of the 74 RFPs reviewed. The RFPs without performance requirements did not indicate how progress would be evaluated. Program Review staff considered performance requirements to be any required tasks or documents that may be used to evaluate progress after a vendor has been selected. For example, requiring an operations plan as part of the proposal would be an evaluation criterion, while requiring regular operation plan updates would be a performance requirement. Performance requirements in the sample included reports, audits, financial statements, written procedures, and reaching goals by a specific date.

All sampled RFPs were issued for at least 7 days, provided times and locations to submit responses, indicated the type of procurement, and described the service.

The sampled RFPs were fully compliant with five requirements. All RFPs were issued for at least 7 days, as required in statute. All RFPs provided a time, date, and location for submitting responses. RFPs must indicate the type of procurement used in the process. All the RFPs indicated within the first few pages that they were competitive negotiations for personal service contracts. A description of the requested service must appear in each RFP. All RFPs included adequate descriptions of the requested service.

Most RFPs requested some type of additional data from vendors. Almost all had clearly defined evaluation criteria and weights.

Each RFP was examined to see whether additional data were requested from vendors. Any request for additional information was considered a data request. For example, RFPs commonly asked for years of experience or a description of staff. All but four RFPs requested additional data.

Evaluation Criteria And Scoring. Program Review staff examined whether RFPs had evaluation criteria and weights. These items guide vendors in crafting responses. Criteria are a list of characteristics used to evaluate responses. Weights are points attached to each category to indicate the importance of each category. Almost every personal service contract RFP had clearly defined criteria and weights.

RFPs contain technical and cost proposal sections. The technical proposal section can vary greatly in content depending on the service being procured. It allows the agency to put in as many or as

few evaluation criteria as necessary. While this flexibility is advantageous in allowing the agency to define its own criteria, it can also result in technical evaluations that are inadequate. Sample RFPs revealed that technical proposal sections were vague in describing how proposals would be evaluated.

Scoring varied among sampled RFPs for similar services. For example, two separate RFPs for legal services contained different technical evaluation criteria and different scoring weights. Determining the evaluation criteria and associated scoring weights for similar types of services is subjective across agencies. The diversity of services procured competitively requires some flexibility in how evaluation criteria are devised and weighted. However, standardizing criteria and scoring weights to the degree possible could make procurement more efficient and make the process clearer and more consistent for vendors.

FAC policy that describes evaluation criteria uses multiple terms, which makes it problematic to analyze whether the criteria are being met.

Terms describing evaluation criteria varied among the Model Procurement Code, administrative regulations, and FAC policies. For example, the Model Procurement Code (KRS 45A.695(5)) and 200 KAR 5:307 use the term *evaluation factors* to describe the criteria by which prospective vendors will be evaluated. The Finance and Administrative Cabinet policy, FAP 111-57-00, uses multiple terms, including *technical provisions*, *evaluation criteria*, and *technical evaluation criteria*. Defining evaluation criteria was problematic for Program Review staff because of a lack of uniform terminology across the governing statutes, regulations, and policies.

Recommendation 2.3

Recommendation 2.3

The Finance and Administration Cabinet’s Manual of Policies and Procedures should conform with statutory and administrative regulation terms describing competitive and noncompetitive negotiations.

Awards. Once proposals are evaluated and the agency determines which vendor is best suited to provide services, the contract is negotiated and awarded. Table 2.2 shows the number of contract awards by number of days following the close of the solicitation for personal service contracts solicited via RFPs over 3 fiscal years.^e One-third of contracts were negotiated and awarded within 30 days; more than 75 percent were within 60 days. It took more than 60 days for one-fourth of the contracts.

^e Several RFPs resulted in multiple awards. Contracts that were renewals are excluded.

Table 2.2
Award Timeline Of Personal Service Contract RFPs
Fiscal Year 2013 To Fiscal Year 2015

	Awards From RFPs	Percent	Cumulative Percent
Within 30 days	182	33.6%	33.6%
31 to 60 days	226	41.8	75.4
61 to 90 days	85	15.7	91.1
91 to 120 days	31	5.7	96.9
More than 120 days	17	3.1	100.0
Total	541	100.0%	

Note: Contracts do not include renewals. Percentages may not add to 100.0 due to rounding.

Source: Program Review staff analysis of data provided by the Finance and Administration Cabinet’s Office of Procurement Services.

When a procuring agency selects a vendor, only the successful offeror is notified. Contract awards are posted on Kentucky’s eProcurement website. Unsuccessful vendors have 2 weeks from when they know or should have known that a contract was awarded to protest the award (KRS 45A.285(2)). In practice, the date the contract award is posted to the eProcurement website serves as the official notification of award (FAP 110-10-21).

Many contracts require several weeks to reach a conclusion, requiring vendors to devote time to regularly review the procurement website to determine when a contract has been awarded. If a vendor cannot regularly check the website, the vendor may have less than 2 weeks to construct a protest. A procedure should be established to assure that unsuccessful vendors are notified of the award so that those that protest have the full allowable time period to do so.

Recommendation 2.4

Recommendation 2.4

The Finance and Administration Cabinet should implement a method to directly inform all applicants when a vendor has been awarded a contract.

Master Agreements

Program Review staff analyzed a sample of 15 RFPs for master agreements, five each from fiscal years 2013, 2014, and 2015.

Program Review staff analyzed a sample of 15 RFPs for master agreements, five each from fiscal years 2013, 2014, and 2015. Table 2.3 presents the results of the analysis. The most significant change from the sample of personal service contracts is that no RFPs presented justification for using outside staff.

All sampled RFPs for master agreements were compliant in requesting additional information, providing evaluation criteria, indicating procurement type, and providing submission information.

The sampled RFPs for master agreements were compliant in four requirements. Each sampled master agreement RFP requested additional information from vendors, provided evaluation criteria, included the procurement type, and contained necessary submission information.

Most sampled master agreement RFPs indicated why a service was needed, but none indicated why outside staff were required.

Sampled master agreements include operating a theme park for the Kentucky State Fair Board, creating an online certification program for the Department of Alcoholic Beverage Control, and providing servers for the Office of Technology. Most agreements indicated why the service would be needed, but none indicated why outside staff would be needed to provide the service. Master agreements do not require EOIs, so agencies would need to indicate a need for services and external staff in the RFP text. There were no justifications for external staff in any of the sampled master agreement RFPs.

Table 2.3
Percentage Of 15 Sampled Master Agreement RFPs Meeting Requirements
Fiscal Year 2013 To March 2015

Requirement	2013	2014	2015
States need for procurement	80%	80%	60%
States need for staff	0	0	0
Posted at least 7 days	80	100	100
Provides submission information	100	100	100
States procurement type	100	100	100
Provides description of service	80	100	100
Requests data from vendor	100	100	100
Provides evaluation criteria	100	100	100
Provides evaluation weights	80	100	100
Provides performance requirements	80	60	60

Note: Five RFPs were reviewed from each fiscal year.

Source: Program Review staff analysis.

Some sampled master agreement RFPs did not provide performance requirements.

Five of the 15 sampled master agreement RFPs did not provide performance requirements. RFPs with the requirements commonly requested reports, records, training sessions, and standards for specific tasks. Some also required tasks to be completed by specific dates.

Division Of Engineering And Contract Administration RFPs

Program Review staff analyzed 3 years of Division of Engineering and Contract Administration (DECA) RFPs, five each from fiscal years 2013, 2014, and 2015.

Program Review staff analyzed 3 years of Division of Engineering and Contract Administration (DECA) RFPs, five each from fiscal years 2013, 2014, and 2015. Table 2.4 presents the results of the analysis. DECA RFPs were compliant with most categories but lacked explanations for needing outside staff and performance requirements.

Table 2.4
Percentage Of Division Of Engineering
And Contract Administration RFPs Meeting Requirements
Fiscal Year 2013 To Fiscal Year 2015

Requirement	2013	2014	2015
States need for procurement	80%	100%	80%
States need for staff	20	0	20
Posted at least 7 days	100	100	100
Provides submission information	100	100	100
States procurement type	100	100	100
Provides description of service	100	100	100
Requests data from vendor	100	100	100
Provides evaluation criteria	100	100	100
Provides evaluation weights	100	100	100
Provides performance requirements	0	0	0

Note: Five RFPs were reviewed from each fiscal year.
 Source: Program Review staff analysis.

Most sampled DECA RFPs provided adequate explanations of the need for a service or good. Justification for requesting external staff was rare.

Sampled DECA RFPs include surveying services for the Department of Military Affairs, renovating a building for Kentucky State University, and providing electrical services for the Department of Criminal Justice Training. All but two DECA RFPs provided adequate explanations of the need for a service or good. Justification for external staff was outlined in only 2 of the 15 sampled contracts. The justification in the FY 2015 RFP was minimal, indicating that FAC said the agency would need an external architect-engineer instead of explaining why an external employee was needed.

Performance requirements were not found in any DECA contracts.

No DECA RFPS had performance requirements. Similar concepts were used in two contracts. A FY 2013 RFP indicated that past vendor performance could be considered but the performance would only be relevant for evaluating offers. A FY 2015 RFP provided goals for the vendor, but the goals were too vague to be used as performance measurements. For example, one goal was to integrate a building automation system into a college campus system. Although this qualifies as part of the scope of work, it does not specify a time, quality, or quantity component that could be used as a measure of vendor performance.

All sampled DECA RFPs were fully compliant in most of the requirements.

Sampled DECA RFPs were fully compliant in seven requirements. All sampled RFPs were posted for at least 7 days and included information for when and where to submit proposals. The procurement type and description of work were evident on all DECA RFPs. Evaluation criteria and the associated weights, along with additional information from the vendor, were clearly stated on all DECA RFPs.

Chapter 3

Noncompetitive Negotiation

Competitive Exemption Requests For Nonprofessional Services Or Goods

Authorities Cited

Contracts are to cite a specific authority to avoid the competitive process: goods or services exempted by law or regulation, those determined to be not practicable or feasible for bidding, and those that can be provided by only a single supplier.

Contracts are required to cite at least one of three specific exemption authorities to avoid the competitive procurement process: goods or services exempted by law or regulation, those determined to be not practicable or feasible for bidding, and those that can be provided by only a single supplier.

Program Review staff reviewed 45 exempted contracts, 15 each from fiscal years 2013, 2014, and 2015. Table 3.1 shows the number of sampled contracts that cited each type of authority. In each fiscal year, contracts were least likely to request statutorily exempted goods and services. Contracts were equally likely to request either goods provided by a single vendor or goods that were not practicable to submit for bidding.

Table 3.1
Authorities Cited By Sampled Contracts
Fiscal Year 2013 To May 2015

Cited Authority	FY 2013	FY 2014	FY 2015 To May	Total
Not practicable or feasible	6	5	9	20
Sole source	7	8	4	19
Exempted goods/services	2	2	2	6
Total	15	15	15	45

Source: Program Review staff analysis.

Procurement files for 45 sampled contracts generally did not contain the additional information required by cited authorities. In addition, procurement files generally did not include adequate justification for requesting the good or service.

For some goods and services, agencies are required to provide additional information or take additional steps. Procurements generally did not provide the extra information or did not document the additional steps. In addition, agencies generally did not indicate why a good or service was needed. Of the sampled requests for competitive exemption, 60 percent did not include an adequate justification for needing the procurement. This absence may indicate agencies assume that implied reasoning, through the cited authority alone, is sufficient for OPS approval. While it is

appropriate for OPS to approve requests based on precedent, agencies should provide written justification.

Recommendation 3.1

Recommendation 3.1

The Finance and Administration Cabinet and other contracting agencies should ensure that competitive exemption requests for nonprofessional services or goods clearly and fully state why the contract is needed, why the services cannot be performed in house or by another state agency, and why competitive exemption is necessary.

Not Practicable Or Feasible Contracts. FAC's Manual of Policies and Procedures outlines the goods and services that OPS has determined are not suitable for competitive procurement in FAP 111-09-00. The sampled not practicable or feasible contracts included a commercial crime insurance policy, vehicle maintenance for the Department for Natural Resources, and advertising in *Trade and Industry Development* magazine.

The sampled not practicable or feasible contracts did not indicate whether OPS approval was received for procurements over the agencies' small purchase authority, for services not on the authorized list, or for insurance and bonds over \$1,000.

EO1s and contracts citing this authority must receive OPS approval if the procurement exceeds the agency's small purchase authority. None of these procurements clearly indicated whether the purchase falls within small purchase authority or whether OPS approval was received. In addition, seven procurements were for "Other Services." FAP 111-09-00-12 requires agencies to present electronic justification to OPS when procuring other goods and services under this authority. The EO1s did not clearly indicate that electronic justification was provided. Two sampled EO1s were for insurance and bonds, which requires prior approval by the Office of Insurance, Office of Policy and Audit, and OPS if costs exceed \$1,000. Both EO1s exceeded \$1,000, but there was no indication that additional approvals were sought.

Sole source contracts must indicate that the item is the only item that will meet the needs of the agency. None of the sampled sole source contracts provided this information.

Sole Source Contracts. Goods and services suitable for sole source procurement are listed in FAP 111-10-00. The sampled sole source contracts include software for electronic signing of official correspondence, leases of K-12 instructional television programs, and maintenance of the eMARS procurement system. Procurements citing a sole source authority must clearly substantiate that the item is the only item that will meet the needs of the agency. However, no EO1s or contracts indicated why the good or service was the only usable item.

The need for a service in relation to a particular program was not provided in one of the two instructional service procurements.

Instructional services were cited in two EO1s, which require an additional electronic statement describing the need in relation to a particular program. One of the two provided no statement; the second indicated that instructional television programs were tied to Common Core State Standards, Academic Expectations, and Program of Studies.

The 11 service and maintenance agreements did not appropriately identify the provider as required by FAC policy.

Proprietary service and maintenance agreements were cited in 11 EO1s. This justification requires the authority to identify the provider as either a manufacturer or authorized service agent. None of these EO1s identified the provider as either a manufacturer or a service agent.

Procurements for dues and organization fees must be for societies or organizations related to the agency's function. One of the four fee procurements indicated how the organization was related to the agency.

Dues and organizational fees were cited in four EO1s and contracts. This justification requires the fees be paid to a society or organization related to the agency's authorized function in state government. Individual employee dues to local organizations are not allowed. Only one EO1 indicated the organization was related to the agency's authorized function, with the Department of Fish and Wildlife Resources identifying the Association of Fish and Wildlife Agencies as the organization that represents North American fish and wildlife agencies. Other procurements did not clearly indicate an agency in an EO1 or contract, or indicated an agency but did not provide a connection to the agency's actions.

The procurement for copyrighted computer software did not indicate it was the only software to meet the agency's need.

A single contract was for copyrighted computer software available from a single source. This authority requires the product to be the only software that will meet the need of the application, but the EO1 and contract did not describe the need for the software.

A procurement for services not preapproved did not indicate whether it exceeded small purchase authority or whether OPS approval was received.

Another contract was for other commodities, equipment, or services available from only one source. All purchases citing this authority that exceed the small purchase authority of the agency must receive prior approval from OPS. The EO1 and contract did not indicate whether it exceeded small purchase authority or whether OPS approval was received.

Items on the exempted goods and services list may be purchased without prior approval from OPS. Descriptions and justifications were present for five of the six exempted goods or services contracts.

Exempted Goods Or Services Contracts. The list of exempt goods and services is detailed in FAP 111-08-00. Agencies may purchase any good or service on the list without prior approval from OPS. The sampled exempted contracts included a speaker for a workshop on best practices in student success and 2 years of charges to use a depository of Occupational Safety and Health Administration inspection data.

All but one procurement provided descriptions and justifications for their services. A 2015 contract did not provide an EO1, and the contract text consisted of the speaker “presenting to Region 10 FRYSC Coordinators” on a specific date.^f The other exempted EO1s indicated that use of a database was federally mandated, that having a public speaker would allow sharing of evidence-based education practices to promote student learning, and that a blanket waiver was needed for the Transportation Cabinet to provide ongoing services.

Expenditures For Sampled Sole Source And Competitive Exemption Contracts

Most sampled noncompetitive nonprofessional contracts were relatively small, with 62 percent costing \$10,000 or less.

Table 3.2 summarizes the expenditures associated with all 45 randomly selected not practical or feasible, sole source, and competitive exemption contracts over 3 fiscal years. The median was used as an estimate of average expense because of the relatively high cost of a few contracts. Most contracts were relatively small, with 62 percent costing \$10,000 or less.

Table 3.2
Expenditures For Sampled Sole Source And
Competitive Exemption Contracts
Fiscal Year 2013 To May 2015

Fiscal Year	Total Expenditures	Highest Expenditure	Median Expenditure
2013	\$343,960	\$131,000	\$6,600
2014	574,315	331,489	8,190
2015 (To May)	376,928	300,000	4,000
FY 2013-FY 2015	\$1,295,204	\$331,489	\$5,914

Note: Fifteen contracts were analyzed from each fiscal year. Total expenditures do not sum to the number shown due to rounding.

Source: Program Review staff analysis.

In each year, one or two contracts accounted for the majority of expenses.

In each fiscal year, one or two contracts accounted for the majority of expenses. For FY 2013, 58.8 percent of costs were tied to contracts for a transportation agreement blanket waiver and for maintenance of state police software used to draw scenes and diagrams. For FY 2014, 79.4 percent of costs were associated with contracts for maintenance service on enterprise software and for a transportation agreement blanket waiver. For FY 2015, a blanket waiver for a college degree attainment program accounted for 79.6 percent of costs.

^f FRYSC is Family Resource and Youth Services Center.

Competitive Exemption EO1s Resulting In Personal Service Contracts

Program Review staff reviewed a separate sample of EO1s for professional services, which included contracts for a health network for inmate medical care, equine drug research for the Horse Racing Commission, and administration of the Workers' Compensation program. While the EO1s provided sufficient descriptions of the services provided, there were issues with the justification for the service or for a noncompetitive process.

Sixteen of the 45 sampled contracts had deficiencies. These contracts did not justify use of a specific vendor, did not indicate why a noncompetitive process was needed, or did not provide a need for the service.

Sixteen of the 45 sampled contracts had deficiencies. Justifications for noncompetitive procurements were not apparent in six FY 2013 EO1s, with the EO1s indicating why external staff were needed but not explaining why a specific vendor was required. These EO1s indicated agencies had an insufficient number of qualified personnel or other state agencies could not provide the service. Reasons for using a noncompetitive process were absent in three FY 2014 EO1s. The reasons for services were not documented in three FY 2015 EO1s, and five EO1s did not explain why specific vendors were needed. For example, two EO1s to rehire retired officers explained why specific officers were chosen but not why the officers were needed. A Department of Fish and Wildlife Resources EO1 for a survey requested a specific vendor because the vendor's software met the needs of the agency, but the EO1 did not indicate which needs were met.

The contracts with sufficient documentation provided a variety of justifications. In four EO1s, the agency planned to issue competitive awards in the future but needed to temporarily assign the work to a vendor to ensure that medical or administrative services could be provided while a new vendor was chosen. An EO1 awarded a contract to the second most responsive bidder from a competitive Department of Corrections procurement. The original winner raised service prices beyond the rates quoted in the bid. An EO1 requested an extension for a Big Brothers Big Sisters contract because the contract was funded by a grant and funds remained in the grant at the end of the contract term.

Recommendation 3.2

Recommendation 3.2

The Finance and Administration Cabinet and other contracting agencies should ensure that competitive exemption requests for professional services clearly and fully state why the contract is needed, why the services cannot be performed in house or by another state agency, and why competitive exemption is required.

Expenditures For Sampled Noncompetitive Personal Service Contracts

Some of the 45 sampled EO1s resulted in multiple PSCs. For example, a FY 2014 EO1 to hire retired state troopers resulted in 10 contracts. Table 3.3 summarizes the analysis results by fiscal year. Median estimates were used in place of means due to large expenditures dominating total expenditures.

Table 3.3
Expenditures For Sampled Noncompetitive Personal Service Contracts
Fiscal Year 2013 To May 2015

Fiscal Year	EO1s Awarded	Contracts Awarded	Total Expenses (Millions)	Largest Expense (Millions)	Median Expense
2013	12	12	\$80.9	\$61.8	\$55,369
2014	13	22	0.9	0.3	39,968
2015 (To May)	13	14	2.8	2.5	14,931
FY 2013-FY 2015	38	48	\$84.6	\$61.8	\$39,968

Note: Fifteen EO1s were analyzed from each fiscal year.
Source: Program Review staff analysis.

Single personal service contracts accounted for the majority of expenses in FY 2013 and FY 2015.

Individual contracts accounted for the majority of expenses in FY 2013 and FY 2015. A 6-month extension for a contract to provide a corrections health network for inmate medical care represented 76.4 percent of expenses in FY 2013. A 6-month extension for a third-party administrator of the Workers' Compensation program accounted for 88.9 percent of costs in FY 2015.^g

Contract expenditures were concentrated in two lower ranges but varied significantly outside of those ranges. Contracts costing less than \$10,000 comprised 25 percent of the sample; 23 percent of contracts cost \$30,000 to \$40,000. The largest 25 percent of contracts ranged from \$50,000 to \$61.8 million.

^g Expenditures are for the fiscal year to May 2015.

Chapter 4

Leasebacks And Built-To-Suit Leases

Leasebacks

Leasebacks are transactions in which assets are sold to a third party and leased immediately to the original party for continued use.

Leasebacks are transactions in which assets are sold to a third party and leased immediately to the original party for continued use.⁶ For example, an agency may sell an office building to a real estate agency, arrange a long-term lease to continue using the building, and vacate the building once it is no longer needed or reacquire the building in the future. Typical terms for leasebacks are 15 to 20 years.⁷ In the private sector, the most common reasons for leasebacks have been debt reduction, expansion, financial distress, and restructuring.⁸

Benefits And Risks

The primary benefit of a leaseback is an infusion of funds that may be used for any need.

The primary benefit of a leaseback is a single infusion of funds that may be used for any need. The lease payments may not be considered debt, but the payments will have a similar economic effect as debt until the agency no longer needs the facility. Leasebacks can be compared to a loan, with lease payments representing interest payments and the repurchase of the asset representing the principal. However, leaseback repurchases must be paid in a lump sum, while loans allow users to gradually decrease the principal.

Assets sold through leaseback arrangements may sell for a higher price than if a lease was not part of the agreement, though the lease payments may eventually counter the gains in the initial sale.⁹ If the funds can be used to initiate savings or increase income, the process may result in net gains. Leasebacks also transfer maintenance requirements to a third party, which may be more efficient than management by the original owner.

If the seller requires future use of the facilities, increases in leasing costs or property values may result in costs greater than the original income.

The primary risk of leasebacks is the seller may need to own the facility in the future. If the property has increased in value since the original sale, the cost to repurchase the property may be greater than the original income from the sale. The new lessee may also find that the leasing costs are greater than the former cost of operating the facilities. If the proceeds from the original sale do not result in savings greater than the cost of leasing or repurchasing the facility, the leaseback will result in greater costs.

Examples

Federal. The federally owned Tennessee Valley Authority (TVA) sold a combined cycle gas plant to a private investment firm for \$1 billion and then leased the plant for 30 years in 2012. The TVA chief financial officer stated the leaseback provided greater financial flexibility and maintained lower power rates for customers.¹⁰ TVA had used leasebacks since 2000, when TVA leased power generators to private investors for 50 years in exchange for cash from the private investors. TVA immediately entered into an agreement to lease the generators back from the investors for 20 years, with an option to purchase the generator lease from the investors at the end of the lease term. A 2003 Government Accountability Office report found the net economic benefits of the leaseback depended on the future value of TVA assets and could result in higher costs than traditional financing if the purchase price was greater than expected savings. The report also stated the leasebacks had the same impact “on TVA’s financial condition and future competitiveness as traditional debt financing.”¹¹

Other States. In 2010, the California Legislative Analyst’s Office examined the effects of issuing leaseback agreements on 11 state-owned office properties. The report found that sale proceeds would cover the original bonds for the properties and provide up to \$1.4 billion in contributions to California’s general fund. However, leasing would eventually cost \$200 million more than maintaining ownership, and the authors estimated that the leaseback would cost the state between \$600 million and \$1.5 billion. The report concluded that other alternatives should be considered and that authorizing a leaseback for the lower range of sale offers would be equivalent to long-term borrowing at double-digit interest rates.¹² California chose not to pursue a leaseback agreement.¹³

The state of Arizona sold and leased back buildings twice in 2010. The first sale resulted in the sale of 14 buildings, including six prison buildings and the governor’s office. The state sold certificates of participation in the public bond market for each building and generated \$735 million of income. The total payback on the certificates was expected to be \$1.1 billion.¹⁴ A spokesperson for the Department of Administration stated the proceeds would go towards Arizona’s budget crisis.¹⁵ The second sale of buildings, including Arizona’s Supreme Court building, generated \$300 million. Payback costs were unavailable, but the

previous month's sale of \$450 million in bonds at a similar interest rate was estimated to cost \$680 million to repay.¹⁶

In July 2015, the state of North Carolina sold the Dorothea Dix Campus to the city of Raleigh and leased back portions of the campus for the administrative operations of the Department of Health and Human Services. The lease will last 10 to 25 years.¹⁷ The city paid North Carolina \$52 million for the 308-acre property and leased 109 acres back to the state.¹⁸ The governor's office planned to use the funds to support the state's mental health services programs.¹⁹

Built-To-Suit Leases

Traditional leasebacks are not used in Kentucky. DECA uses a similar practice known as "built-to-suit" leases. These leases may transfer land to an entity that builds a capital project, rents the facility to the state, and eventually transfers ownership of the land and facility to the state.

Traditional leasebacks are not used in Kentucky. However, DECA uses a similar practice known as "built-to-suit" leases.²⁰ In some built-to-suit leases, the state transfers ownership of land to another entity that builds a capital project on the land, rents the constructed facility to the state, and eventually turns the land and the facility over to the state. Built-to-suit leases require the contracted entity to design, finance, and build the project and may require the entity to manage the maintenance of the facility once it is leased to the state (KRS 56.8161). When leasebacks are mentioned in statutes, the statutes authorize local governments and FAC to use a process identical to built-to-suit leases (KRS 56.515; KRS 56.590; KRS 91A.180).

Built-to-suit leases must include an option to extend leases for 2-year terms until the total sum of lease payments would amortize the total cost of the project. The state must be allowed to purchase the project at the end of any lease term for a price equal to the total cost of the project minus the current sum of lease payments.

If built-to-suit facilities are to be constructed on state-owned land, ownership of the land must be transferred to the contracted entity once it has been selected for the agreement. The initial lease must begin on the day the state accepts the project for occupancy, which must be no later than 30 days after an architect has certified that the facility has been completed. The initial lease must end June 30 of the second year of the fiscal biennium. The contract must include an option to extend the lease for 2-year terms until the total sum of the lease payments would amortize the total cost of the project. The state must be allowed to purchase the project at the end of any 2-year lease term for a price equal to the total cost of the project minus the current sum of lease payments paid to the contracted entity. The contracted entity is required to transfer ownership of the land to the state when the state gains ownership of the construction project (KRS 56.820).

If the capital project is constructed on land owned by the entity, the state must be granted an option to purchase the buildings, lands,

and any pertinent facilities. The price cannot exceed the fair market value at the time of the purchase, as determined by a real estate appraiser selected by the state and the contracted entity (KRS 56.8175).

Examples

Built-to-suit leases were issued for four projects from 2012 to 2014. In these projects, lease rates were set in the contract and vendors competed based on the number of months before ownership transferred to the state.

From 2012 to 2014, the Department of Facilities and Support Services issued four built-to-suit RFPs on behalf of the Department of Military Affairs. Buyers were required to finance, design, and construct the facilities so the department could retain and attract new missions and positively impact Kentucky's socioeconomic growth. Each RFP established an annual lease rate, paid monthly, by multiplying a rate by the square footage of the new facility. Vendors submitted the number of monthly payments needed before facility ownership would transfer to the state.

In July 2012, FAC issued a RFP to construct a warehouse and reserved the option to construct an addition increasing the size of the warehouse by 50 percent. If the addition was needed, the planning and procurement would occur at a later date, but the facility had to be constructed so that expansion would be easily accomplished. Rent was set at \$710,000 annually.

In March 2013, FAC issued a RFP to construct two buildings, two outdoor storage lots, and related infrastructure. The structures were intended to be loading/unloading docks, vehicle storage, equipment storage, and equipment maintenance areas. Lease payments were set to \$1.1 million per year. In August 2013, a second RFP was issued for a combined warehouse and administration/operations facility. The facility would serve as an aviation warehouse that allowed the loading and unloading of rotary-wing aircraft blades. Rent was set at \$266,819.

In November 2014, an RFP was issued for an "administration/operations/warehouse/shipping-receiving/transportation" building. The building was intended to serve as a receiving, storage, and shipping facility with capabilities for administration, operations, and transportation. The RFP required the administration/operations area to be designed to accommodate a future mezzanine/office area. Lease payments were set at \$754,000 per year.

Comparison To Leasebacks

Leasebacks and built-to-suit leases do not increase total state debt but do result in long-term costs.

Leasebacks introduce more risk than built-to-suit contracts. The initial procurement of built-to-suit contracts establishes future costs; the future costs of leasebacks may be unknown.

Leasebacks are more flexible than built-to-suit leases. The initial income from leasebacks may be used for any issue. Built-to-suit leases can be used only for new capital projects.

Like leasebacks, built-to-suit leases allow the state to avoid increases in total state debt. Both mechanisms result in long-term costs, though built-to-suit contracts result in consistent costs, while costs from a leaseback may be difficult to estimate if the state wishes to repurchase the original property.

A primary difference between the two mechanisms is that leasebacks introduce more risk than built-to-suit contracts. Built-to-suit contracts establish payment rates and ownership transfer procedures at the start of the project. Future costs are known, and the vendor cannot prevent the state from regaining ownership of the property. Leaseback arrangements can introduce unknown costs into planning. If the asset is not bought at the end of the initial lease, the original owner may find that leasing costs have increased. If the contract did not establish a fixed buying price for the asset, reacquiring the asset may cost more than expected. In the worst scenario, a contract that does not provide exclusive leasing or purchasing rights to the original owner may result in the new owner leasing or selling the asset to a new party.

Built-to-suit leases lack the flexibility of leasebacks. Built-to-suit leases can be used only for new capital projects (KRS 56.8161). The initial funds from leasebacks can be used for any type of spending, such as eliminating high-interest debt. Leasebacks may also be used to dispose of facilities that will not be needed after a specific date. Leasebacks also provide more flexibility in the length of the arrangement. If a state no longer wishes to use an asset, it can decide not to renew the lease. In built-to-suit contracts constructed on state property, the state receives custody of the land it provided to the vendor only if it buys the new facility or provides lease payments necessary to cover the project cost (KRS 56.820(2)). Leaving the lease means the state loses the land donated for the project.

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