

*Final Committee Report, Vol. 10, No. 1*  
**HHSS Personal-Services Contracts**

*January 2003*

**Program  
Evaluation  
Unit**

*Legislative Research Division  
Nebraska Legislature*

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## Legislative Program Evaluation

As a result of the passage, during the 1992 regular legislative session, of the Legislative Program Evaluation Act (LB 988), the Legislative Research Division (LRD) has been assigned the responsibility of doing program evaluation. Program evaluation is defined as a systematic review of any aspect of a given state agency and any programs it administers for the purpose of assessing 1) compliance with legislative intent and 2) the overall effectiveness and/or efficiency of the program(s).

Program evaluation is carried out under the general supervision of the Legislative Program Evaluation Committee, a special committee of the Legislature. Day-to-day supervision of the program evaluation staff is provided by the Director of LRD.

Membership on the Legislative Program Evaluation Committee includes the chairpersons of the Executive Board and the Appropriations Committee and three other members of the Legislature chosen by the Executive Board. The committee's responsibilities include selecting state agency programs for evaluation, approving evaluation plans, reviewing and releasing completed evaluation reports, and monitoring agency compliance with evaluation report recommendations.

For a more detailed description of the concept of program evaluation, see LRD Report #91-10 (November 1991) entitled *Legislative Program Evaluation*. Statutes governing the program evaluation process in Nebraska are found in Chapter 50, article 12, of the Nebraska Revised Statutes.

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Senator Pat Engel, Chairperson  
Senator Chris Beutler, Vice Chairperson  
Senator George Coordsen  
Senator Marian Price  
Senator Roger Wehrbein

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# *Part I*

## *Executive Summary*

# EXECUTIVE SUMMARY

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## *Introduction*

This report is the result of a legislative program evaluation that focused on personal-services contracts entered into by the state Health and Human Services System (HHSS). In FY2000-01, HHSS spent approximately \$64.6 million on such contracts.

The evaluation examined (1) the extent to which the Health and Human Services System agencies comply with the contracting standards that govern personal-services contracts in Nebraska, (2) the adequacy of those standards, and (3) the advisability of the state's current practice of regulating personal-services contracts primarily by executive order rather than by statute.

To assess compliance with state standards, we (the Legislative Program Evaluation Unit) selected and reviewed a sample of 26 personal-services contracts, in effect in FY2000-01, entered into by the Finance and Support agency and the Services agency.<sup>1</sup> For each of these contracts, we identified the applicable personal-services contracting standards and assessed whether the agency had complied with them.

To assess the adequacy of the standards, we compared them to standards recommended by two national government-procurement organizations, a model procurement code developed by the American Bar Association, and selected processes used in other states.

To arrive at conclusions regarding the advisability of governing personal-services con-

tracts by executive order, we researched the applicability and enforceability of such orders generally and in Nebraska specifically.

We presented the evaluation results to the Legislative Program Evaluation Committee (committee), which made the following findings and recommendations.

## *Major Findings*

The committee's major findings follow. The complete findings are contained in Part III of this report.

### *Executive Order*

*FINDING: An executive order is an inadequate tool for governing personal-services contracts.*

Unlike contracts for goods and materials, which are governed by statute and administrative regulation, personal-services contracts are governed almost exclusively by an executive order issued by the governor. The committee believes that an executive order is an inadequate tool to be used in governing these contracts because it can be changed by the governor at any time without public input, and it may be difficult to enforce. In addition, the committee found no reason to regulate these contracts outside the usual legislative and administrative process, which permits public input and involves both the legislative and executive branches.

*FINDING: Executive Order 00-04 is inadequate.*

The committee identified several weaknesses in Executive Order 00-04, which governed personal-services contracts during the period under review in this evaluation. First, the order was silent when it came to several critical

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<sup>1</sup> We excluded the Regulation and Licensure agency, which is also part of the HHS system, because it had significantly fewer personal-services contract expenditures than did the other two agencies.

components of a sound contract-management system. These included requirements that an agency:

- (1) conduct a needs assessment prior to entering into a personal-services contract;
- (2) monitor contractor performance and track contract payments;
- (3) document the contract-awarding, monitoring, and tracking process and retain that documentation for a set period of time; and
- (4) include time limits and dollar amounts in all contracts.

In addition, the order should have established the standard that agencies are expected to apply in assessing bids (*e.g.*, the “lowest responsible bidder” standard).

Second, the order gave the Department of Administrative Services (DAS) a number of responsibilities, but it did not give DAS the authority necessary to carry them out. Third, it is unlikely that an agency director who did not comply with the order would have been subject to any consequences unless the non-compliance was egregious. Finally, several of the order’s requirements were unclear.

Following completion of the evaluation, but prior to the release of this report, the governor issued Executive Order 02-03, which establishes new standards for personal-services contracting. While some of the foregoing concerns are addressed in the new order, many are not. We discuss the new order briefly on page four.

### ***Statutory Standards***

*FINDING: Statutory standards for personal-services contracts are inadequate*

Although personal-services contracts are governed primarily by executive order, there are some statutory standards. However, the statutes do not contain a comprehensive frame-

work governing personal-services contracts because most apply only in narrow sets of circumstances. In addition, the statutory standards are not organized in a centralized location, which makes it difficult to determine which standards apply to which contracts.

### ***HHSS Agencies’ Compliance***

*FINDING: HHSS agencies comply with most personal-services contracting standards.*

The committee found that the Finance and Support agency and the Services agency met existing standards for most of the contracts reviewed. However, in two cases, the involved agency did not comply with the executive order’s competitive-bidding requirement, nor did it obviate the need for competitive bidding by requesting a DAS exemption from the bidding requirement. In the case of two other contracts, the agency claimed it was exempt from the bidding process under federal regulation, but it did not produce documentation in a timely fashion to confirm this.

*FINDING: HHSS agencies are out of compliance with statutory standards calling for system-wide policies.*

By law, the HHSS agencies are required to develop system-wide contracting policies, but they have made little progress in this area.

### ***Other Issues***

*FINDING: The contracting process should be centralized.*

Personal-services contracts must be signed by the agency director or another administrator, but most of the responsibility for monitoring contractor performance rests with program staff members. Because of this and the absence of system-wide contracting policies, the extent of such monitoring and the related documentation varies considerably. These inconsistencies increase the risk that some con-

tracts may not be managed effectively and efficiently.

In order to ensure that sound contract-management procedures are followed, the committee believes that this responsibility should be centralized either within the HHSS or within DAS.

*FINDING: Crucial contracting data are unavailable.*

For the period under review in this evaluation, neither the HHSS agencies nor DAS had a centralized system for tracking personal-services contracts. In addition, the personal-services contract expenditure data contained in the Nebraska Accounting System administered by DAS had serious limitations. Consequently, it was virtually impossible to determine, at any given time, the number of personal-services contracts in effect, the number subject to the executive order, or the total amount paid for each contract.

DAS is developing the much-publicized Nebraska Information System (NIS), which is expected to significantly improve the availability and accessibility of information pertaining to personal-services contracts. However, while NIS is under development, the committee believes that the agencies should make reasonable efforts to compile and maintain internal lists of their personal-services contracts.

### ***Major Recommendations***

The committee believes that an executive order is an inadequate tool for governing personal-services contracts and will introduce or support legislation to place personal-services contracting standards in statute. The committee believes such legislation should, at a minimum:

- include the key components of a sound contract-management process relating to contract awarding, monitoring, and tracking;
- centralize the contracting process either at the agency or DAS level;
- require all agencies to develop written policies pertaining to the awarding, tracking, and monitoring of personal-services contracts—including how these processes will be documented—and to train their staffs on those policies;
- contain consequences for non-compliance;
- propose clarification or elimination, as appropriate, of existing personal-services contracting statutes; and
- reorganize existing personal-services contracting statutes and combine them in a single chapter with any new statutory requirements.

In addition, if the legislation:

- gives DAS the authority to grant exemptions from the competitive-bidding process, it should also give DAS the authority to deny such exemptions; and
- establishes a total dollar threshold below which the statutory personal-services contracting standards would be inapplicable, it should also require some review of contracts below that threshold to ensure that agencies do not divide larger contracts to avoid complying with the standards.

### ***The Agencies' Responses***

As required by law, the HHSS agencies were given the opportunity to provide written comments concerning the draft evaluation report and the committee's final findings and



recommendations. Following is a brief discussion of agency comments.<sup>2</sup>

### *First Response*

In the agency directors' response to the draft report, they generally agreed with the findings that they should develop better internal processes and improve documentation. However, they disagreed with the conclusion that an executive order is an inadequate tool for regulating personal-services contracts. They also disagreed with the conclusion that the responsibility for personal-services contracts should be centralized at DAS.

In addition, the directors suggested several changes in the unit's analysis and, in some cases, provided information that had been unavailable to the unit during the evaluation. The unit made a number of changes to the report based on the agencies' suggestions and the newly available information.

### *Second Response*

The agency directors' response to the committee's findings and recommendations reiterated their belief that an executive order is a proper tool for regulation of personal-services contracts. The response also emphasized that the agencies are in substantial compliance with the existing order.

The directors also included additional documentation that was unavailable during the evaluation and was not provided with their response to the draft report. The unit has never before received new information with an agency's second response. Because the committee approved the evaluation report when it made its findings and recommendations, the unit did not incorporate the additional information into the report. The agencies' inability to produce this information in a

timely fashion reinforces the need for better management of contract-related documentation.

### ***Executive Order 02-03***

On 20 December 2003, following the completion of this evaluation, Governor Mike Johanns issued Executive Order 02-03, which replaces Executive Order 00-04.<sup>3</sup> In issuing the new order, the governor recognized the need for improvement in the standards governing personal-services contracting.

The unit believes the new order contains some positive changes. For example, it requires agencies to conduct a pre-award process to determine the need for each personal-services contract. In addition, it requires agencies to enter their personal-services contract information into the new Nebraska Information System and sets a deadline for completion of that process.

However, many of the weaknesses we identified in Executive Order 00-04 remain in the new order. For example, the new order contemplates greater DAS involvement in the personal-services contracting process, but it still gives DAS no authority to compel agency compliance when it identifies problems. In addition, the order's definitions of "personal services contracts" and "services contracts" are unclear, and it includes provisions from the original order that were also unclear.

Despite the administration's recent attempt to correct some of the inadequacies of the previous executive order, we continue to believe that personal-services contracts should be regulated by statute.

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<sup>2</sup> The agencies' first response is included in Part IV of this report, and the second response is attached as Addendum A.

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<sup>3</sup> A copy of each order is included as Addendum B.

## *Part II*

### *Evaluation Report*

*Final Report*

# **HHSS Personal-Services Contracts**

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## APPENDICES

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## **SECTION I**

# **INTRODUCTION**

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Pursuant to Neb. Rev. Stat. sec. 50-1205(1), the Legislative Program Evaluation Committee directed the Legislative Program Evaluation Unit (unit) to examine personal-services contracts entered into by two agencies in the Health and Human Services System (HHSS). The evaluation focused on the agencies' compliance with existing standards for such contracts and on an assessment of those standards.

The committee approved the topic for evaluation on 9 April 2002. The scope statement and evaluation plan were adopted on 31 July 2002. The evaluation began with a 31 July 2002 letter from Senator Pat Engel, the committee chairperson, to Mr. Steve Curtiss, Director of Finance and Support, and Mr. Ron Ross, Director of Health and Human Services.

### ***Scope of the Evaluation***

The scope statement adopted by the committee instructed the unit to pursue an evaluation of personal-services contracts entered into by the following HHSS divisions: Medical Services; Child Support; and Mental Health, Substance Abuse and Addiction Services. These divisions were selected because it was determined in a preevaluation inquiry that they had significant personal-services expenditures in FY2000-01.<sup>1</sup>

### ***Contents of the Report***

Section II of this report describes the HHSS and the contracting standards contained in statutes and in an executive order that govern personal-services contracts. Section III details

how we selected contracts for evaluation and briefly describes the contracts. Section IV presents the unit's analysis of the agency's compliance with the contract standards, and section V presents our assessment of the adequacy of the contract standards.

### ***Methodology***

In approaching the evaluation, we employed a qualitative research method. We reviewed relevant statutes, executive orders, and regulations. We also examined budget and program summaries, reports and data submitted to the Department of Administrative Services (DAS) by HHSS, and numerous personal-services contracts and related documentation. We interviewed HHSS agency directors and staff members, as well as the DAS Deputy Director, Materiel Division Manager, and staff members.

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<sup>1</sup> Memorandum to the Legislative Program Evaluation Committee from the Legislative Program Evaluation Unit, 19 July 2002.

## **SECTION II**

# **HHSS AND PERSONAL-SERVICES CONTRACTS**

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In this section, we describe the Health and Human Services System (HHSS), define personal-services contracts, and outline the legal framework applicable to them. We also describe the processes used by HHSS agencies when entering into and monitoring these contracts. Finally, we report the amount of recent personal-services contract expenditures made by all state agencies, including the HHSS agencies.

### ***The Health and Human Services System***

In 1996, the Legislature passed LB 1044, the Nebraska Partnership for Health and Human Services Act. This legislation merged four state health and human service agencies and one office<sup>2</sup> into three new agencies, which were brought together under the HHSS umbrella. Prior to the merger, each of the four independent health and human services agencies provided direct services to its clients and oversaw its own administrative services. Under the new “system” structure, one agency provides most of the direct services to clients, and the other two provide most of the administrative services that support those programs.<sup>3</sup>

Each agency is headed by a director appointed by the governor. The directors are part of a policy cabinet that coordinates the activities of

the three agencies, but each director remains responsible for his or her own agency.<sup>4</sup>

### ***Personal-Services Contracts Defined***

Nebraska law does not contain a generally applicable definition of “personal-services contract.” Neb. Rev. Stat. sec. 73-301 defines such a contract as “an agreement by a contractor to provide human labor,” but this definition applies only to the statutory sections relating to contracts that would replace state employees with contract employees.

Generally speaking, personal-services contracts are used to purchase “labor, time, or effort”<sup>5</sup> as opposed to commodities contracts, which are used to purchase goods or materials. The agency may use personal-services contracts to purchase services that: (1) are delivered directly to clients, such as medical care provided by professionals who work at state institutions, or (2) assist the agency in administering its programs, such as consulting services or data management. In this report we focus on contracts that assist the agency in administering its programs.

### ***Legal Framework***

Contracts for personal-services are governed primarily by an executive order. In addition, there are a number of statutory requirements that pertain to such contracts, although most are applicable only in narrow sets of circumstances. Following is a brief description of the legal framework governing personal-services contracts. Our assessment of the agencies’

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<sup>2</sup> The entities merged were the Departments of Aging, Health, Public Institutions, and Social Services, and the Office of Juvenile Services, which was part of the Department of Correctional Services.

<sup>3</sup> The Health and Human Services agency manages the programs that provide direct services to clients; the Finance and Support agency oversees the financial, human resources, and information technology systems; and the Regulation and Licensure agency manages the rules and regulations process, as well as professional and facility licensing.

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<sup>4</sup> The other members of the policy cabinet are the policy secretary and the chief medical officer.

<sup>5</sup> *State and Local Government Purchasing 5<sup>th</sup> Edition*, National Association of State Purchasing Officials, (2001), p. 73.

compliance with these standards is contained in Section IV.

The HHSS agency directors, like most state agency directors, do not have specific statutory authority to enter into contracts. Instead, this authority is derived from the state constitution, which requires the governor to administer the “affairs of the state efficiently and economically.”<sup>6</sup> As employees of the governor, agency directors are responsible for administering their agencies efficiently and effectively. Obtaining services and goods by contract is one of the tools they may use.

By law, the Department of Administrative Services (DAS), is responsible for the contracting process involving the purchase of goods and materials.<sup>7</sup> In contrast, DAS has no statutory authority over personal-services contracts. The extent of DAS’ involvement in the awarding of personal-services contracts is left almost completely to the discretion of agency directors, as discussed below.

#### **Executive Order 00-04**

The basic requirement that personal-services contracts be awarded using a competitive-bidding process is contained in an executive order, not in statute.<sup>8</sup> This order requires agency directors to ensure that most contracts valued at more than \$25,000 are let by competitive bid. An agency director may either turn the bidding process over to DAS or conduct the process internally. However, if the

process goes forward in-house, the order requires the agency director to use the contracting policies established by DAS.<sup>9</sup>

Regardless of whether DAS or the agency conducts the process, the agency director must also meet other specific requirements contained in the order. These include providing adequate public notice of the proposed contract and maintaining an accurate accounting of the process used in awarding the contract.

The order also requires DAS to establish procedures for limited exemptions from the competitive-bidding process and authorizes the Director of Administrative Services to review any proposed exceptions. If an agency director wants to award a contract valued at more than \$25,000 without using a competitive-bidding process, he or she must file with DAS a form providing a justification for the exemption. DAS provides for the following exemptions: (1) in emergencies, (2) when there is only one service provider available, and (3) under other special circumstances, such as when the agency has received a federal exemption from the bidding process.<sup>10</sup>

However, the order does not directly grant the Director of Administrative Services the authority to reject an exemption request. If the Director of Administrative Services has concerns about a proposed exemption, he or she can work with the agency director to resolve them,<sup>11</sup> but the final decision rests with the agency director.<sup>12</sup>

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<sup>6</sup> Constitution of Nebraska, Article IV, section 6.

<sup>7</sup> Neb. Rev. Stat. sec. 83-153. For most commodities contracts, an agency director files a purchase requisition with the Department of Administrative Services (DAS) Materiel Division, and a buyer in that division, not the agency director, manages the rest of the process, from releasing the request for proposals to signing the final contract. However, under certain circumstances, the Materiel Division may grant an agency the authority to purchase commodities directly from the vendor. (Neb. Rev. Stat. sec. 81-161.03.)

<sup>8</sup> Executive Order 00-04, issued by Governor Johanns on 21 December 2000. This order replaced, with minor modifications, a similar order issued in 1995 by then-Governor E. Benjamin Nelson.

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<sup>9</sup> The order allows agency directors to establish their own contracting policies, which must be approved by the Director of Administrative Services, but this has never been done. (Conversation with Doni Peterson, DAS deputy director, 15 August 2002.)

<sup>10</sup> Some contracts that are partially funded by the federal government, such as some Medicaid contracts, are required by federal regulation to be let by competitive bid.

<sup>11</sup> Telephone conversation with Don Medinger, administrator, DAS Materiel Division, 9 October 2002.

<sup>12</sup> *Id.*



In addition, it is unlikely that an agency director who enters into a contract without conducting a bidding process or requesting a DAS exemption will be subject to serious consequences. The primary means of enforcing the order is through the governor's administrative powers, but such enforcement is problematic for two reasons. First, it is unclear how the governor would learn that a director was failing to comply with the order. Second, to our knowledge, disciplinary action by the governor is uncommon. Consequently, if a governor did find out about such a situation, it seems unlikely that he or she would, in fact, discipline the director unless the failure to comply was particularly egregious.

The order gives DAS several other responsibilities. These include providing a procedures manual to assist agencies in the procurement of contractual services and making itself available to assist agencies in procuring contractual services.

Finally, the order requires DAS to monitor agency compliance with its contracting procedures. DAS has not developed a formal monitoring system; instead, the director of the Materiel Division works with agencies as requested or when he or she becomes aware of a problem. Practically speaking, DAS can monitor only the contracts it is aware of because the order does not require agencies to report all contracts they enter into. If an agency conducts the contracting process in-house and does not seek a DAS exemption to the bidding process, DAS has no way of knowing about the contract.

### **Statutes Applicable to Personal-Services Contracts**

Of the assortment of statutes that apply to personal-services contracts, only two apply to all such contracts.<sup>13</sup> These statutes (1) require the contracts to include a clause prohibiting

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<sup>13</sup> These statutes also apply to contracts for goods.

the contractor from engaging in discriminatory employment practices<sup>14</sup> and (2) require agencies to pay contractors for their services within a designated time period.<sup>15</sup>

The remaining statutory requirements for personal-services contracts apply only in certain circumstances. Following is a brief description of these circumstances, and the relevant requirements.

#### *Contracts Let by Competitive Bid*

When a state agency advertises for bids, it must meet two statutory requirements. First, the agency must establish a date and time when the bids will be opened.<sup>16</sup> Second, it must provide a preference in favor of Nebraska bidders in certain circumstances.<sup>17</sup>

#### *Contracts that Would Replace State Employees with Contract Employees*

In the case of a contract that would replace state employees with contract employees, the agency must follow a detailed process for assessing the costs associated with such a change. The agency director must also obtain the approval of the Director of Administrative Services before entering into the contract.<sup>18</sup>

#### *Contingent-Fee Contracts*

If a contractor will be paid on a contingent-fee basis, and is expected to earn more than

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<sup>14</sup> Neb. Rev. Stat. sec. 48-1122.

<sup>15</sup> Neb. Rev. Stat. secs. 81-2401 to 81-2408 constitute the Prompt Payment Act. In most cases, this statute requires an agency to pay a creditor within 45 days of the receipt of goods or services or receipt of the bill, whichever occurs later.

<sup>16</sup> We note that it is not perfectly clear that this section applies to all instances in which competitive bidding occurs. We discuss this issue in more detail in Section V.

<sup>17</sup> Neb. Rev. Stat. sec. 73-101.01. In essence, a Nebraska bidder must receive a preference if there is also a bidder from a state that provides a preference to its own bidders. In such a case, the Nebraska bidder must receive a preference equal to the preference that the other bidder would receive in his or her resident state.

<sup>18</sup> Neb. Rev. Stat. secs. 73-301 to 73-307.

\$25,000, the agency must provide public notice.<sup>19</sup> In the absence of such notice, the contract is void.

### *Contracts for Certain Services*

Four statutory provisions apply only to personal-services contracts that provide specific types of services. These provisions require that: (1) all contracts that provide health and human services directly to clients contain a clause subjecting the contractor to the authority of the Office of the Public Counsel,<sup>20</sup> and (2) all contracts for architecture, engineering, landscape architecture, and land surveying services must be awarded using the process set forth in The Nebraska Consultants' Competitive Negotiation Act.<sup>21</sup> In addition, agencies may only enter into contracts with outside legal counsel or with collection agencies in specifically defined circumstances.<sup>22</sup>

### **HHSS Agencies' Policies on Contract Tracking, Awarding, and Monitoring**

The statutes that created HHSS include three requirements related to contract management and contract compliance monitoring. Under these statutes, the Finance and Support agency is required to: (1) develop and manage a system for tracking contract expenditures<sup>23</sup> and (2) consolidate contract management.<sup>24</sup> In addition, the Regulation and Licensure agency is required to "evaluate services or programs to determine compliance with state, federal or other contractual requirements."<sup>25</sup>

Although some efforts have been made to develop these systems, the functions of track-

ing contract expenditures, managing contracts, and monitoring contract compliance remain almost exclusively the responsibility of the individual program staff members who are responsible for the contracts.

### *Tracking Contract Expenditures*

The Finance and Support agency's accounting division makes some effort to track contracts but does not have a comprehensive tracking system. Because program staff members are not required to file their contracts with the division,<sup>26</sup> the reach of the division's tracking system does not extend to all contracts.

At the same time, while payments made to contractors are recorded in the Nebraska Accounting System (NAS), this system does not include contract-specific information. For example, it is impossible to extract from NAS the amount paid to a contractor for a specific contract. The Department of Administrative Services is currently developing a new accounting system, which is expected to provide contract-specific information.

### *Awarding Contracts*

None of the three HHSS agencies has a written policy governing the contract-award process, although the legal division prepares model contracts that are available to all staff.<sup>27</sup> The legal division is also available, but not required, to provide input during the contract-award process.

Personal-services contracts can be initiated at any level in the agency, from the program level on up to the director.<sup>28</sup> When a contract

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<sup>19</sup> Neb. Rev. Stat. secs. 73-201 to 73-204. A contingent-fee contract is one in which the contractor is paid a portion of any revenue he raises.

<sup>20</sup> Neb. Rev. Stat. sec. 73-401. The Office of the Public Counsel receives and works to resolve complaints by citizens made against state agencies.

<sup>21</sup> Neb. Rev. Stat. secs. 81-1701 to 81-1721.

<sup>22</sup> Neb. Rev. Stat. secs. 84-205(5) and 45-623, respectively.

<sup>23</sup> Neb. Rev. Stat. sec. 81-3007(3)(d).

<sup>24</sup> Neb. Rev. Stat. sec. 81-3007(3)(e).

<sup>25</sup> Neb. Rev. Stat. sec. 81-3007(2)(c).

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<sup>26</sup> Conversation with Willard Bouwens, administrator, Financial Services Division, Finance and Support agency, 9 May 2002.

<sup>27</sup> Telephone conversation with Gerald Pankonin, attorney, Legal Services Division, Finance and Support agency, 11 October 2002.

<sup>28</sup> Meeting with Christine Peterson, Policy Secretary, Mary Boschult, assistant director for administration, Services

is entered into by program staff members, the level of review by the agency director depends on the total dollar value of the contract.

For contracts valued at more than \$25,000, Executive Order 00-04 requires agency directors to follow the procedures contained in the DAS procurement manual.<sup>29</sup> In addition, the directors themselves must sign these contracts.<sup>30</sup> If the contract was initiated by a program staff member, the director also expects it to be reviewed and agreed to by the division head before it is presented to him or her.<sup>31</sup>

In contrast, the directors are not required to sign, or even review, contracts valued at \$25,000 or less. Each director sets the dollar amount above which he will review, or review and sign, contracts. For example, the Health and Human Services agency director signs any contract valued at \$5,000 or more,<sup>32</sup> while the Finance and Support agency director signs contracts valued at \$10,000 or more and reviews contracts over \$5,000.<sup>33</sup> Contracts below these thresholds may be entered into by program staff members with the approval of the division administrator or deputy director.<sup>34</sup>

#### *Monitoring Contract Compliance*

The Regulation and Licensure agency does not evaluate compliance with contract requirements. Again, this function is left to the contract managers within the agency. As with the contract-award process, none of the three agencies has written guidelines to assist staff in monitoring compliance with contracts.

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agency, and Gerald Pankonin (meeting with agency representatives), 24 April 2002.

<sup>29</sup> *Procedure for Procurement of Contractual Services*, June 2000.

<sup>30</sup> Meeting with agency representatives, *supra*, note 26.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Telephone conversation with Mary Boschult, Assistant Director for Administration, Services agency, 18 October 2002.

## ***Personal-Services Contract Expenditures***

In FY1997-98, the HHSS agencies spent approximately \$49.5 million on contractual services.<sup>35</sup> By FY2000-01, these expenditures increased to approximately \$64.4 million<sup>36</sup>—an increase of 30 percent. During this same time period, the expenditures for personal-services contracts by all state agencies increased from approximately \$217.8 million to approximately \$262.7 million—an increase of almost 21 percent.

Although the money spent on personal-services contracts increased during these four fiscal years, the proportion of personal-services contract expenditures compared to total personal-services expenditures has remained fairly constant.<sup>37</sup> The HHSS agencies' personal-services contract expenditures comprised approximately 20 percent of their total personal-services expenditures in FY1997-98 and approximately 23 percent in FY2000-01.

Similarly, for all state agencies, personal-services contract expenditures made up approximately 16 percent of total personal-services expenditures in FY1997-98 and in FY2000-01. Table 1, on page 8, shows these figures and the percentages for each of the HHSS agencies.

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<sup>35</sup> This figure includes all expenditures by these agencies recorded under accounting codes 4411 to 4429, 4431, 4451, 4452, and 4434, which are designated by DAS for payments made for personal-services contracts. We have some concerns about these designations and how the codes are used, which we discuss in Section V.

<sup>36</sup> We selected FY1997-98 because it was the first full fiscal year after the HHSS merger, and FY2000-01 was the most recent complete fiscal year at the time we selected contracts for review.

<sup>37</sup> The total personal-services expenditures consist of the personal-service contract expenditures and the non-contract personal-service expenditures from the Major Account 4100 line on the DAS budget status sheets. This line includes salaries and benefits.

<b>Table 1: Personal-Services Contract Expenditures as a Percentage of Total Personal-Service Expenditures</b>		
	<b>FY1997-98</b>	<b>FY2000-01</b>
HHSS Total	20.1	22.5
R&L	16.5	14.7
Services	11.1	13.3
F&S	52.5	55.7
All Agencies	15.5	16.2

*Source: The unit calculated these percentages using figures from the annual D.A.S. budget status sheets. Table prepared by the Legislative Program Evaluation Unit.*

The size of the increase in this proportion suggests that contractual employees are not rapidly replacing state employees in either the HHSS agencies or state government as a whole.<sup>38</sup>

Finally, during this time period, personal-services contract expenditures comprised a consistently small proportion of the state's total expenditures. In FY1997-98, these expenditures made up approximately 4.5 percent of total expenditures. In FY2000-01, that figure dropped to 4.3 percent.

In the next section, we describe the contracts we selected for this evaluation.

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<sup>38</sup> We note, however, that in FY2001-02, the proportion for the HHSS agencies grew to 27 percent, primarily due to an increase in contractual services in the Finance and Support agency. According to the administrator of the financial services division, this increase is likely due to both an increased need for contractors in specific programs and recent budget cuts, which led to a reduction in the agency's full-time equivalent staff positions. (E-mail from Willard Bouwens, 16 October 2002.)

## **SECTION III**

# **CONTRACTS SELECTED FOR EVALUATION**

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Pursuant to the scope statement for this evaluation, we identified personal-services contracts entered into by the Health and Human Services agency (Services agency) and the Finance and Support agency (Finance and Support agency),<sup>39</sup> which we evaluated for compliance with the standards discussed in Section II. In this section, we describe the process we used to select contracts for evaluation and briefly outline the services provided under the contracts we selected.

### ***Contract-Selection Process***

The scope statement for this evaluation directed us to identify contracts valued at more than \$25,000 because they are subject to Executive Order 00-04. It also directed us to identify some contracts valued at \$25,000 or less, to see how they compare to the contracts governed by the executive order.

We discovered, however, that neither the HHSS agencies nor DAS is able to retroactively identify personal-services contracts by their total dollar value. Although agencies assess a contract's expected value prior to entering into the contract, this information is not subsequently maintained in a central tracking system. Consequently, the only way to determine the total contract value is to review the contract itself.

In the absence of a list linking contracts to their total dollar values, we used a two-step process to select contracts for evaluation. First, we identified subprograms in each agency that had significant (more than \$1 million) personal-services contract expenditures

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<sup>39</sup> These two agencies were selected because we concluded in a preevaluation inquiry that they spent significantly more money on personal-services contracts than did the third agency, Regulation and Licensure. (*Supra*, note 1.)

in FY2000-01. Second, we asked agency staff members to indicate which of those subprograms had contracts valued at more than \$25,000. Four subprograms met both criteria.

These four subprograms are housed in three divisions: the Child Support Operations Division and the Mental Health, Substance Abuse, and Addiction Services Division are part of the Services agency; and the Medical Services Division (Medicaid program) is operated by the Finance and Support agency. Ultimately, we selected contracts for evaluation from all of the subprograms in these three divisions.<sup>40</sup>

In FY2000-01, the three divisions had a total of 32 personal-services contracts. Of these, we selected 26 to evaluate: all contracts—19 in number—involving agency payments of more than \$25,000, and seven involving agency payments of \$25,000 or less.<sup>41</sup> A brief description of these contracts follows.

### **Child Support Operations Division**

The state's Child Support Operations Division, housed in the Services agency, conducts a variety of activities to enforce judicial child-support orders. In FY2000-01, this division spent approximately \$5,299,624 on seven per-

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<sup>40</sup> We selected contracts from all of the subprograms in these divisions, instead of just from the four subprograms which met our initial criteria, because we were concerned that the number of contracts in those four subprograms would not be sufficient to support findings and recommendations.

<sup>41</sup> Since contract periods vary, the amount paid out in one fiscal year does not necessarily reflect the total contract value. In most cases, however, the contract payments in FY2000-01 were over \$25,000, so it was clear that the total contract value met the executive order threshold. In two cases, a contract turned out to have a total value of more than \$25,000 although the payment in FY2000-01 was less than that. This distinction is discussed in more detail in Section IV.

sonal-services contracts, six of which involved payments of more than \$25,000.<sup>42</sup>

The vast majority of this division's personal-services-contract expenditures went to two companies that provided child support enforcement services in Douglas County.<sup>43,44</sup> Of the remaining five contracts, three were with companies that provided genetic testing services for paternity determination, and two were with companies that provided data-matching and reporting systems.<sup>45</sup>

### **Mental Health, Substance Abuse, and Addiction Services Division**

The Division of Mental Health, Substance Abuse, and Addiction Services, housed in the Services agency, is responsible for the state-wide administration and coordination of mental health, substance abuse, and compulsive gambling service systems. In FY2000-01, this division spent \$1,210,320 on a single contract with Magellan Behavioral Health, Inc. (Magellan).

Under this contract, Magellan administered the state's behavioral health services managed care program for indigent clients. Magellan

provided administrative services such as authorizing payment for treatments, tracking the services used by clients, and preparing reports to meet federal requirements. However, Magellan did not provide any services directly to clients.

### **Medical Services Division**

The Medical Services Division administers the state's Medicaid program, which pays for medical care to eligible individuals. In FY2000-01, this division spent approximately \$6,498,360 on 24 personal-services contracts.<sup>46</sup> We selected 18 of these contracts for evaluation: the 12 contracts that involved payments of more than \$25,000 in FY2000-01, and six that involved payments of \$25,000 or less in that year.

#### *Medicaid Managed Care Contracts*

The vast majority of personal-services contract expenditures made by the Medicaid program were for functions affiliated with the state's Medicaid Managed Care Program.<sup>47</sup> This program provides medical services for Medicaid recipients in Lincoln and Omaha. We reviewed seven contracts affiliated with the Medicaid Managed Care Program.<sup>48</sup> In FY2000-01, the program spent approximately \$5,403,900 on these contracts.

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<sup>42</sup> This figure does not include approximately \$103,539 erroneously coded as personal-services-contract payments. We discuss our concerns about these and other accounting code issues in Section V.

<sup>43</sup> The contracts were with Policy Studies Inc. (PSI), and Young, Williams, Henderson, Fuselier and Associates, P.A. (Young Williams). Usually only one company provides this service in a given fiscal year. However, the contract with PSI expired in 2001, and the agency conducted a bidding process to select its successor. Young Williams was selected as a result of that process.

<sup>44</sup> In most counties, the program is administered by the state, through its local offices. However, in Douglas County, the program is administered by a private company under contract with the department.

<sup>45</sup> The companies that provided genetic testing services are: Laboratory Corporation of America Holdings, Inc., Long Beach Genetics, and Identity Genetics, Inc. The data management companies are: (1) Technology Management Resources, Inc., which developed and administers a system for reporting newly hired workers to the CSE program and (2) Tier Technologies, which developed and administers a financial data-matching system.

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<sup>46</sup> This figure does not include approximately \$36,492 that was erroneously coded as personal-services-contract payments. We discuss our concerns about these and other accounting code issues in Section V.

<sup>47</sup> We note that the Medicaid program has very large expenditures for payments to the professionals who provide medical services directly to program recipients. In FY2000-01, the program paid providers approximately \$36.4 million in general funds. However, the contracts with these professionals—which are called “provider agreements”—are different from those we reviewed for this evaluation. Provider agreements are governed by federal law and are not subject to the executive order. We omitted these agreements entirely from our analysis.

<sup>48</sup> The seven contracts for Medicaid Managed Care are with the City of Lincoln/Lancaster County Health Department; HMO Nebraska/Blue Cross Blue Shield of Nebraska; The Medstat Group, Inc.; Sunderbruch Corp.; the Iowa Foundation for Medical Care; the Information & Service Network; and William M. Mercer and Associates.

### *Service-Utilization Review Contracts*

The other type of contractual service that accounted for significant expenditures in the Medicaid program is the external review of services used by Medicaid recipients. Under these contracts, an individual or organization reviews a certain type of service to identify patterns of potential treatment inefficiencies.<sup>49</sup> We reviewed six contracts that provided an external review of Medicaid services. In FY2000-01, the program spent approximately \$306,869 on these contracts.

### *Data Management/Administration*

The remaining five Medicaid contracts provided data management or other administrative services. In FY2000-01, the program spent approximately \$785,351 on these contracts. More than three-quarters of this amount was spent on one contract, under which a private company established and maintains an electronic “point of purchase” review system for prescription drugs.<sup>50</sup> The other four contracts provided various services including: calculating managed-care payments, advertising, and administering a grant program.<sup>51</sup>

### *Contract-Period Value*

As mentioned earlier, we identified contracts for evaluation based on payments made in FY2000-01. In many cases, these payments were for significantly less than the total contract value. In Appendix A, we list the contracts selected for evaluation, the amount paid to the contractors in FY2000-01, and the total

value of each contract during the period covered by the FY2000-01 payments, when available.<sup>52</sup> We also note that in many cases, the contract period covered by the FY2000-01 payments was an extension of an earlier contract. Consequently, this list does not reflect the total amount paid to these contractors.

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<sup>49</sup> For example, the Nebraska Pharmacists Association reviews prescription drug use by Medicaid clients to assess whether they’re receiving the appropriate therapeutic dose and, if more than one physician is involved, to be sure the medications are compatible.

<sup>50</sup> This contract is with First Health Services Corp. Among other things, this system allows pharmacists to instantly verify a Medicaid recipient’s eligibility for services when the client asks to have a prescription filled.

<sup>51</sup> These contracts are with Tucker Alan, Inc., Tricia M. Burt, Larry J. Scherer, and Thomas G. Folmer.

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<sup>52</sup> For a few contracts, all of which were entered into prior to the effective date of the executive order, we were not able to identify the total contract value even from the contract itself. In these cases, the contractor received a per-hour reimbursement, but the contract did not include a “not-to-exceed” figure limiting the total amount that could be expended under the contract.

## SECTION IV

# COMPLIANCE WITH CONTRACTING STANDARDS

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Pursuant to the scope statement for this evaluation, we assessed the Health and Human Services and the Finance and Support agencies' compliance with contracting standards set forth in the executive order and statutes, utilizing the sample of contracts we selected. In this section, we report the results of that assessment.

At the request of the program evaluation committee, we also researched whether any of the service providers who signed the contracts in our sample had ever been employees of the HHSS agencies.<sup>53</sup> At the end of this section, we report the results of this research and discuss two other issues that arose during the course of our contract review.

### ***Agency Compliance With Contracting Standards***

For the 26 contracts in our sample, we assessed whether the agencies complied with six standards contained in Executive Order 00-04 and 10 statutory standards. We reviewed the contracts and related files and had numerous discussions with program staff members, the HHSS legal division, and the Department of Administrative Services (DAS). Following is a discussion of each contracting standard, and our assessment of: (1) which contracts in our sample the standard applied to and (2) whether the agencies complied with that standard in awarding each contract.

#### **Executive Order Requirements**

As mentioned in Section II, Executive Order 00-04 requires agencies to let certain personal-services contracts by competitive bid or ob-

tain an exemption from the bidding process from DAS (DAS exemption). For contracts let by competitive bid, the agency must be able to show that it:

- followed DAS procurement procedures;
- defined the contractor's scope of work and the expected work product;
- gave adequate public notice;
- performed a cost-comparison of the bids received; and
- properly coded payments to the contractor.

Following is a discussion of each of the executive order requirements, starting with competitive bidding.

#### *Competitive-Bidding Requirement*

Agencies must put out for competitive bid, or request a DAS exemption for, any contract entered into after 1995 that was valued at more than \$25,000 for the "contract period." The "contract period" refers to (1) the duration of the original contract, absent any extensions or (2) an additional period of time added to the original contract, but only if added by *amendment*.<sup>54, 55</sup>

Twenty of the contracts in our sample were subject to the order's competitive-bidding re-

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<sup>53</sup> Legislative Program Evaluation Committee Meeting, 31 July 2002.

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<sup>54</sup> If the original contract allowed for *extensions* of the contract based on its *original terms*, any extensions that might be granted are not factored in when determining whether or not the contract falls under the executive order. If, however, the contract is extended by virtue of an *amendment to the original terms and conditions*, a new "contract period" begins when the amended contract goes into effect. The competitive bidding requirement is triggered if the value attached to that new "contract period" is more than \$25,000.

<sup>55</sup> Telephone conversation with Don Medinger, 18 October, 2002.



quirement at some point.<sup>56</sup> The agencies met the requirement for 14 contracts.

#### *Agency Compliance with the Bidding Requirement*

Of the 14 contracts for which the agency met the requirement, it:

- let eight by competitive bid;<sup>57</sup> and
- received DAS exemptions for six.<sup>58</sup>

Of the eight contracts that were let by competitive bid, the agency conducted the bidding process in six cases and asked DAS to conduct the process in one case. In the remaining case, the bidding process was conducted by another state.<sup>59</sup>

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<sup>56</sup> Of the six contracts that were not subject to this requirement, five never exceeded the \$25,000 threshold and, therefore, were never subject to the executive order. Those contracts were with Identity Genetics, Inc. (Identity Genetics), Irv Deshayes (Deshayes), Long Beach Genetics (Long Beach Genetics), Larry J. Scherer (Scherer), and Information & Service Network (ISN). The sixth contract is with the City of Lincoln/Lancaster County Health Dept. (Lincoln/Lancaster). The order does not directly exempt such intergovernmental contracts from its requirements but, according to DAS, they are, in fact, exempt. (Conversation with Don Medinger, 11 December 2002.)

<sup>57</sup> The contracts let by bid were with: Nebraska Pharmacists Assoc. (Nebraska Pharmacists); Policy Studies, Inc. (PSI); Magellan Behavioral Health, Inc. (Magellan); Young Williams, Henderson, Fuselier and Associates, P.A. (Young Williams); Technology Management Resources, Inc. (TMR); Tier Technologies (Tier Technologies); Health Maintenance Organization of Nebraska/Blue Cross Blue Shield (HMO NE/BCBS); and Lifecodes Corp. (Lifecodes). The Lifecodes contract was not in our original sample because it was not in place in FY2000-01. However, this contract essentially replaced the Laboratory Corporation Holdings of America, Inc. (Lab Corp.) contract in our sample. The Lab Corp. contract had been in place since 1988 and, in 2000, the agency decided to cancel it and conduct a competitive bidding process to award a new contract. The Lifecodes contract went into effect in October 2001. We note that, during the term of the Lab Corp. contract (1988 to 2000), no competitive bidding process ever took place, despite the fact that the order went into effect in 1995.

<sup>58</sup> The contracts that received exemptions were with: The Medstat Group, Inc. (Medstat); Nebraska Foundation for Medical Care (Nebraska Foundation); William M. Mercer and Associates (Mercer); First Health Services, Corp. (First Health); Tucker Alan, Inc. (Tucker Alan); and Tricia M. Burt (Burt).

<sup>59</sup> For this contract, which is with Tier Technologies, the HHSS agency was a member of a multi-state group that con-

For four of the six contracts that received DAS exemptions, the Finance and Support agency had previously received federal exemptions from the competitive-bidding process. The remaining two exempted contracts were originally valued at less than \$25,000, but were amended, thus triggering a new contract period which was tied to a new contract value over \$25,000.

#### *Agency Noncompliance with the Bidding Requirement*

For the remaining six contracts, the agency neither let the contracts by bid nor requested DAS exemptions. The agency reported that it had received federal exemptions from the competitive-bidding process for two of these contracts, but it was unable to produce documentation confirming these exemptions.<sup>60</sup>

In addition, two of the six problematic contracts, entered into in the late 1980s, were automatically renewed each year but were neither let for bid nor granted a DAS exemption.<sup>61</sup> It was impossible for us to determine when these contracts crossed the \$25,000-per-contract-period threshold, but they clearly had done so by FY2000-01. In that year, the two contractors were paid approximately \$33,600 and \$83,200, respectively.

One of the six problematic contracts was initially entered into in 1993 for one year and was valued at less than \$25,000.<sup>62</sup> The contract was renewed annually until 2001, when it was amended to establish a new, three-year contract period with a spending limit of \$27,000.

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tracted with a company that could provide the same service to all member states. The contract was let for bid by the lead state in the group.

<sup>60</sup> The Sunderbruch Corp. (Sunderbruch) and Iowa Foundation for Medical Care (Iowa Foundation) contracts. We also note that the agencies disagree with our inclusion of contracts governed by federal law in this analysis. This issue is discussed extensively in the agencies first response to the unit's draft report and in the unit director's review of that response.

<sup>61</sup> The Richard Brunmeier, D.D.S. (Brunmeier) and Richard Marshall, D.D.S. (Marshall) contracts.

<sup>62</sup> The Dale Ebers, M.D. (Ebers) contract.

Since the value for that new period was more than \$25,000, the agency should have requested a DAS exemption before amending the contract.

Finally, in 2001, the Finance and Support agency entered into a contract, valued at more than \$45,000, with a former HHSS-agency employee but did not conduct a competitive-bidding process or request a DAS exemption from it.<sup>63</sup>

### Other Executive-Order Requirements

The other five executive-order requirements apply only to contracts that were let by competitive bid. While eight contracts were let by competitive bid,<sup>64</sup> the remaining executive order requirements applied to only six of these.<sup>65</sup> In addition, for one contract, the agency could not produce documentation confirming that the contract met these requirements.<sup>66</sup>

Following is discussion of each of these requirements. In addition, Table 2 summarizes the results of our analysis.

#### *Use of DAS Procedures*

In awarding contracts by competitive bid, an agency may turn the process over to DAS or conduct the process internally. If the agency conducts the process internally, it must follow the DAS policies contained in the *Procedure for Procurement of Contractual Services* manual.<sup>67</sup> We found that the agency generally followed the

<sup>63</sup> The Thomas G. Folmer (Folmer) contract.

<sup>64</sup> *Supra*, note 57.

<sup>65</sup> We excluded from this analysis the Tier Technologies contract because the bidding process was conducted by another state (*supra*, note 59), and we did not have access to all of the documentation necessary to assess compliance with the contracting standards. We also excluded the Magellan contract because it was put out for bid by DAS, and the agency is not responsible for meeting the executive-order requirements when DAS conducts the bidding process.

<sup>66</sup> The Nebraska Pharmacists Assoc. (Nebraska Pharmacists) contract.

<sup>67</sup> Although the order also states that each agency may develop its own process, which must be approved by the DAS director, in practice, this has never been done. *Supra*, note 9.

Table 2. Other Executive-Order Requirements		
EO Requirement	Contracts	
	No. Applicable	No. Complied With
Followed DAS Procedures	6	5
Clear Scope & Defined Work Product	6	5
Adequate Public Notice	6	5
Cost-Analysis of Bids	6	5
Proper Coding of Payments	6	5

*Source: Unit analysis of the HHSS agencies' compliance based on data provided by the agencies. Table prepared by the Program Evaluation Unit.*

DAS process in awarding these five contracts.<sup>68</sup>

#### *Clear Scope of Work and Defined Work Product*

The executive order also requires agency directors to maintain documentation of the bidding process, which, at a minimum, must incorporate a clear statement of the scope of the work to be conducted under the contract and an adequate definition of the work product expected. We believe that the agency met these two standards if the scope of work and the work product expected were clearly explained in the request for proposal (RFP) associated with each contract. All five of the applicable contracts met these requirements.

#### *Adequate Public Notice*

The executive order requires agencies to provide adequate public notice of the RFP. We

<sup>68</sup> We qualify this finding with "generally" because we did not assess whether each contract should have and did contain each of numerous specific contract provisions that DAS recommends be considered for each contract.

found that such notice was provided in all five cases.<sup>69</sup>

### *Compare Costs of Bids Received*

When contracts are let by bid, the agencies must compare the costs of the bids they receive. In all five cases, they did so.<sup>70</sup>

### *Proper Coding of Payments*

Agencies are required to assign the proper accounting code to personal-services contract payments. We found that the agency did code the payments for the five relevant contracts to the proper groups of codes. However, we identified several policy issues related to expenditure coding, which we address in Section V.

### **Statutory Requirements**

In addition to the executive-order requirements, there are a number of statutory requirements that apply to personal-services contracts. However, as mentioned in Section II, most of these requirements apply only in certain circumstances. Following is a discussion of each of these requirements.

### *All Personal-Services Contracts*

Only two statutory requirements apply to all personal-services contracts.<sup>71</sup> First, all such contracts must include a clause prohibiting the contractor from engaging in discriminatory employment practices.<sup>72</sup> We found that all of the contracts in our sample included this clause.

Second, agencies must pay contractors for their services within a designated time pe-

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<sup>69</sup> We believe that the agency provided “adequate” public notice if it published the notice in a newspaper of general circulation.

<sup>70</sup> We note that the order does not require an agency to compare the costs of providing the service internally to the costs of hiring a contractor. We believe this is a serious omission, which we discuss further in Section V.

<sup>71</sup> These requirements also apply to contracts for goods.

<sup>72</sup> Neb. Rev. Stat. sec. 48-1122.

riod.<sup>73</sup> We were unable to assess whether the payments made in connection with the 26 contracts met this requirement because the dates needed to make the assessment are not readily available. However, we found that the agencies generally pay a very small amount of interest (less than \$250 per agency per year in FY2000-01) on late payments, which suggests that they are making contract payments in a timely manner.

### *Contracts Let by Competitive Bid*

When a state agency advertises for bids, it must meet two statutory requirements. First, the agency must establish a date and time when the bids will be opened.<sup>74</sup> We found that in four of the five applicable cases,<sup>75</sup> the agency set the date and time at which the bids would be opened. In the fifth case, the agency set the date, but not the time, for bid opening.<sup>76</sup>

Second, the agency must provide a preference in favor of Nebraska bidders if someone from Nebraska and someone from another state that provides a resident-bidder preference bid on the same contract.<sup>77</sup> Only one of the five contracts attracted a Nebraska bidder. We found that the agency did not assess whether anyone from another state with such a preference had also bid on this contract. However, we determined that no one from such a state had done so, the agency’s omission had no effect.

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<sup>73</sup> Neb. Rev. Stat. secs. 81-2401 to 81-2408 constitute the Prompt Payment Act. In most cases, this statute requires an agency to pay a creditor within 45 days of the receipt of goods or services or receipt of the bill, whichever occurs later.

<sup>74</sup> Neb. Rev. Stat. sec. 73-101. As mentioned in Section II, it is not perfectly clear that this requirement applies to all contracts let by bid. We discuss this further in Section V.

<sup>75</sup> As explained earlier, we could only assess five contracts in our sample for compliance with competitive bidding requirements. *Supra*, note 66.

<sup>76</sup> The TMR contract.

<sup>77</sup> Neb. Rev. Stat. sec. 73-101.01.

### *Contracts that Would Replace State Employees With Contract Employees*

If a contract would replace state employees with contract employees, the agency must follow a detailed process for assessing the costs associated with such a change.<sup>78</sup> In addition, the agency director must obtain the approval of the Director of Administrative Services before entering into the contract. None of the contracts in our sample replaced state employees with contract employees. However, we identified a policy issue related to this requirement, which is discussed in Section V.

### *Contingent-Fee Contracts*

If a contractor will be paid on a contingent-fee basis and is expected to earn more than \$25,000, the agency must provide public notice.<sup>79</sup> In the absence of such notice, the contract is void. There was only one contingent-fee contract in our sample and the agency did provide public notice. However, we identified a policy issue related to this requirement, which is discussed in Section V.

### *Contracts for Certain Services*

Four statutory provisions apply only to personal-services contracts that provide specific types of services. First, all contracts that provide health and human services directly to clients must contain a clause subjecting the contractor to the authority of the Office of the Public Counsel.<sup>80</sup> This provision applied to seven of the contracts we reviewed, and all contained this clause.

None of the other three statutory requirements for specific types of services applied to contracts in our sample. These requirements apply to contracts:

- with private-sector legal counsel;<sup>81</sup>
- with collection agencies;<sup>82</sup> and
- for architecture, engineering, landscape architecture, and land surveying services.<sup>83</sup>

### ***Former Employees and Other Issues***

As mentioned earlier, the program evaluation committee asked us to determine whether any contractors in our sample had previously been HHSS-agency employees. We determined that four of the 26 contractors were former HHSS employees.<sup>84</sup>

For these four contracts, the agency should have met the executive order's competitive-bidding requirement. We found that the agency met this requirement for only two of the four contracts.<sup>85</sup>

In the course of assessing the contracts in our sample for compliance with existing standards, we also identified two issues we felt were noteworthy. Following is a discussion of these issues.

First, we found numerous cases in which the original contract or amendments thereto were signed after the effective date of the contract or amendment.<sup>86</sup> We also identified two contracts that were never signed by at least one party.<sup>87</sup>

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<sup>81</sup> Neb. Rev. Stat. sec. 84-205(5).

<sup>82</sup> Neb. Rev. Stat. sec. 45-623.

<sup>83</sup> Neb. Rev. Stat. secs. 81-1701 to 81-1721.

<sup>84</sup> To assess this, we provided a list of individuals who had signed the contracts in our sample to the HHSS Human Resources manager, who informed us as to which people on the list had ever been employees of the HHSS agencies.

<sup>85</sup> The agency did not meet this requirement for the Ebers and Folmer contracts.

<sup>86</sup> In most instances, the difference between the signature date and the effective date were less than one month. However some were considerably longer. For example, two amendments to the Medstat contract were never signed. More than a year after those amendments had apparently been agreed to, they were rescinded and replaced with signed amendments.

<sup>87</sup> One was the Deshayes contract, entered into in 1988 and still in effect in FY2000-01, which had never been signed by

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<sup>78</sup> Neb. Rev. Stat. secs. 73-301 to 73-307.

<sup>79</sup> Neb. Rev. Stat. secs. 73-201 to 73-204. A contingent-fee contract is one in which the contractor is paid a portion of any revenue he or she raises.

<sup>80</sup> Neb. Rev. Stat. sec. 73-401.

Second, we identified one contract that may violate Internal Revenue Service (IRS) guidelines regarding the definition of “independent contractor.”<sup>88</sup> Under these guidelines, the IRS assesses the level of independence a contractor has from the contracting agency. If the IRS believes the contractor is not sufficiently independent, it may find that the contractor is actually functioning as an agency employee. In that case, the agency must pay benefits and fees that do not apply to independent contractors.

The case we identified involves a former Finance and Support agency employee, who retired and was immediately retained to complete a project he had commenced during his tenure with the state.<sup>89</sup> We found that his contract provides him with equipment and services that reduce his independence, and that could cause the IRS to determine that he functions as an agency employee.<sup>90</sup> An internal memo to the Director of Finance and Support also expressed concerns about this issue.<sup>91</sup> According to the director, he reviewed these concerns but, following additional conversations with the agency’s legal division, be-

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the contractor. The other was the most recent version of Lab Corp. contract, which was not signed by the state or the contractor. In addition, this contract had no beginning or ending dates.

<sup>88</sup> These guidelines are contained in the *Employer’s Supplemental Tax Guide*, Publication 15-A, Internal Revenue Service, Revised January 2002.

<sup>89</sup> The Folmer contract.

<sup>90</sup> In addition to the contractor’s fee, the contract provides for office space, a computer, a telephone, office supplies, administrative support, and travel reimbursement under the state travel policies. Because the IRS weighs the circumstances in each case, we cannot say with certainty how they would rule in this particular case.

<sup>91</sup> The memo raises a number of questions and concerns for the director to consider in deciding whether or not to sign the contract, including the same issues that caused our concern. The memo also noted that a standard clause defining the contract as independent is absent from this contract. (Memorandum from Gerald Pankonin, an attorney in the Finance and Support agency Legal Division, to Steve Curtiss, Director of Finance and Support and Robert Seiffert, Medical Services Division administrator, 14 December 2001.)

lieved the provisions of the contract were justified and would withstand an IRS challenge.<sup>92</sup>

## Summary

The agencies met the executive order’s competitive-bidding requirement for 14 of the 20 applicable contracts, or 70 percent.<sup>93</sup> In addition, with minor exceptions, the agencies met the other executive-order requirements and statutory requirements for the contracts we reviewed.

However, we did identify several problems, including:

- contracts for which the agency did not request DAS exemptions from the competitive-bidding process even though they reported receiving federal exemptions;
- the agency’s inability to produce documentation to confirm all the cases in which it reported receiving federal exemptions;
- contracts for which the agency neither met the competitive-bidding requirement nor requested DAS exemptions;
- a contract with a former agency employee that may violate IRS guidelines regarding contractor independence;
- contracts that were automatically renewed for more than a decade each; and
- contracts unsigned by at least one party.

In the next section, we assess the adequacy of the executive order and statutory standards for personal-services contracts.

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<sup>92</sup> Telephone conversation with Steve Curtiss, Director of Finance and Support, 28 October 2002.

<sup>93</sup> We note that, had the agency requested DAS exemptions for the additional two contracts for which they reportedly received federal exemptions, this percentage would increase to 80 percent.

## SECTION V

# ASSESSMENT OF CONTRACTING STANDARDS

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In the previous section, we looked at how the personal-services contracting standards applied to our sample contracts. Pursuant to the scope statement for this evaluation, we also assessed the adequacy of those standards, which is the topic of this section.

### *Appropriateness of Regulating Personal-Services Contracts By Executive Order*

In assessing whether an executive order is an appropriate means by which to regulate personal-services contracts, we examined the history of executive orders generally and in Nebraska. Because executive orders are difficult to enforce and subject to change at the governor's discretion, we concluded that an executive order is not an adequate means by which to regulate personal-services contracts. Instead, these contracts should be governed by a statutory framework. A discussion of these issues follows.

An executive order is an administrative directive used to interpret or implement a constitutional or statutory provision.<sup>94</sup> In Nebraska, the governor's authority to issue such orders is derived from the constitutional vesting of the "supreme executive power" in the governor.<sup>95</sup>

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<sup>94</sup> Black's Law Dictionary, 6<sup>th</sup> ed., p. 569. In Nebraska, as in many other states, the governor's authority to issue executive orders and the enforceability of such orders are not defined in the constitution or in statute.

<sup>95</sup> Constitution of Nebraska, article IV, sec. 6. A governor's authority in this area is generally understood to parallel the President's authority at the federal level. (38 Am Jur 2<sup>nd</sup> sec. 1) According to the state Attorney General's office, there has never been a challenge to the governor's authority to issue executive orders. (Conversation with Dale Comer, Assistant Attorney General, 2 August 2002.)

In theory, executive orders have the force of law, although this has never been tested in a Nebraska court.<sup>96</sup> Unlike statutory law, however, from a practical standpoint, an executive order is enforceable primarily by the governor, who can discipline or fire an agency director who disregards it.

Finally, executive orders are subject to change or termination at the governor's pleasure. It is unclear whether an executive order expires at the end of the issuing-governor's term or remains in effect until rescinded.<sup>97</sup> Each new governor is free to address orders issued by previous administrations either by reissuing or terminating them.<sup>98</sup>

### *Adequacy of Executive Order 00-04 Standards*

As noted in Section IV, Executive Order 00-04 requires agency directors to let most personal-services contracts valued at more than \$25,000 by competitive bid and to document the process used for awarding each contract. We assessed whether this order: (1) provides sufficient guidance to agencies for personal-services contracts valued at more than \$25,000, (2) contains standards consistent with those typically found in a government-contracting setting, and (3) establishes a reasonable threshold (\$25,000) for the competitive-bidding requirement. Following is a discussion of each of these issues.

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<sup>96</sup> 81A Corpus Juris Secundum sec. 130 and conversation with Dale Comer, *Id.*

<sup>97</sup> The confusion arises only for orders that do not contain a sunset date. An article in a legal journal argues that such orders remain in effect until they are rescinded. (81A Corpus Juris Secundum sec. 130.) However, in Nebraska, there is no consensus on this issue. (Telephone conversations with Greg Lemon, Chief Deputy Secretary of State, 22 July 2002 and Lauren Hill, Director of Policy Research, 1 August 2002.)

<sup>98</sup> Conversation with Lauren Hill, *Id.*

## Sufficiency of Executive Order 00-04

To determine whether Executive Order 00-04 provides agencies with adequate guidance, we evaluated whether the order is clear and comprehensive. We found the order lacking in both areas.

Two of the order's provisions are unclear. First, the order does not explicitly state that the competitive-bidding requirement is triggered when a contract is amended, and it should do so. Second, the order states that agencies may use a bidding process that differs from the one established DAS, if the alternate process is approved by the Director of Administrative Services. However, DAS does not, in fact, permit agencies to develop their own processes. Because we do not believe allowing agencies to develop alternative processes is a good idea, we believe this requirement should be removed.

In addition, we identified five components of a sound contract-management process that are not addressed in the order. These components, if incorporated into the order, would require agencies to:

- assess and document the costs and benefits of providing the service in-house compared to contracting out for the service;<sup>99</sup>

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<sup>99</sup> One of the contracts in our sample illustrated the need for such an analysis. The contract, with Policy Studies, Inc. (PSI), was for child support enforcement services in Douglas County. The contract with PSI began in 1993, and it was subject to considerable discussion at the time because it replaced many state employees with contract employees. When the contract was renewed in 1998, program staff members prepared a proposal to cancel the contract and bring the work back inside the agency. The proposal suggested that the state could save money by doing so. We were unable to assess the validity of this claim because there was no evidence that the potential in-house costs had been compared to the potential contract costs. Although we were told that the HHSS administration reviewed the proposal and rejected it, the agency could not produce documentation to confirm this.

- use an established standard for selecting contracts;<sup>100</sup>
- monitor contractor compliance and track payments to the contractor;<sup>101</sup>
- maintain documentation of the contract-awarding, monitoring, and payment tracking processes;<sup>102</sup> and
- include dollar limits and termination dates in all contracts.

Finally, the order gives DAS numerous responsibilities but little authority to carry them out.<sup>103</sup>

## Contracting Standards Typical in a Government Setting

To determine what contracting standards are typical in a government setting, we reviewed program evaluations from other states pertaining to personal-services contracting and examined the standards established by two national procurement-officials organizations and the American Bar Association (ABA).<sup>104</sup> We also reviewed Nebraska's commodities contracting statutes.

The five components we identified as lacking in Executive Order 00-04 are considered critical elements in all of the standards we reviewed. In addition, these standards all recommend that contracting functions be cen-

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<sup>100</sup> A commonly used standard is the "lowest responsible bidder" standard, which requires an assessment of factors such as the contractor's past performance in addition to the amount of the bid.

<sup>101</sup> These two processes assure that state dollars are spent economically and efficiently.

<sup>102</sup> Such documentation should be maintained to permit verification that the agency and contractor are meeting their responsibilities

<sup>103</sup> For example, DAS is directed to establish a system for reviewing exemptions from competitive bidding, but it does not have the authority to actually prohibit an agency director from proceeding without conducting a competitive bidding process. In addition, while the order directs DAS to monitor compliance with the order, it does not require agencies to report all their contracts to DAS.

<sup>104</sup> The national standards we reviewed were established by the National Association of Procurement Officers, the National Institute of Government Purchasing. The American Bar Association has developed a model procurement code.

tralized either within each agency or in the state's procurement office.

The state evaluation reports we reviewed favored centralization at the agency level, while the national procurement organizations favored placing this responsibility in a central procurement office. In addition, the American ABA's model procurement code recommends the latter approach. The ABA reports that at least 16 states have adopted its model legislation, including this requirement.

### **Reasonableness of the \$25,000 Threshold**

We also assessed whether \$25,000 is a reasonable threshold to trigger the executive order's competitive-bidding requirement. We found no consensus on this issue. The thresholds reported in the state reports we reviewed ranged from \$10,000 to \$100,000.<sup>105</sup>

### ***Applicability of Statutory Standards to Contracts in Our Sample***

As mentioned in Section IV, we identified several policy issues relating to existing personal-services contract statutes. Following is a brief discussion of those issues.

#### **Contracts Let by Competitive Bid**

As noted in Section IV, there is one statutory requirement that we believe applies to all contracts let by competitive bid; however, this provision is subject to other interpretations. The statute requires agencies to set the date and time by which bids must be received and opened. It is possible to read this section to apply only to contracts governed by statutes.<sup>106</sup> Since personal-services contracts are

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<sup>105</sup> We did not conduct a survey of all states and, therefore, we don't know if these limits are representative of those in all states.

<sup>106</sup> Neb. Rev. Stat. sec. 73-101. The relevant portion of this section states that whenever an agency advertises for bids "in pursuance of any statutes of the State of Nebraska, on any road contract work or any public improvements work, or for supplies, construction, repairs, and improvements, and in all

governed primarily by an executive order, this interpretation would make this section inapplicable to such contracts.

### **Contingent-Fee Contracts**

For the contingent-fee contract in our sample, the agency provided the public notice required by statute. However, we question whether this statute is producing the result contemplated by the Legislature. We believe the Legislature intended for this notice to specifically mention the contingent-fee nature of the contract.<sup>107</sup> This information was not contained in the RFP notice for the contract in our sample because it is not typical to include it.

### **Contracts that Replace State Employees With Contract Employees**

None of the contracts in our sample directly replaced state employees with contract employees. In addition, DAS reports that no agency has requested the Director of Administrative Services' approval for such a contract.<sup>108</sup> Consequently, while this statute sets forth a comprehensive process for contract approval, it has had no direct effect.<sup>109</sup>

### ***HHSS Agencies' Contracting Processes***

In addition to assessing the contracting standards for personal-services contracts, we explored whether each of the HHSS agencies used a bidding process that adequately met

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other cases where bids for supplies or work, or any character whatsoever are received. . . ." The phrase "in pursuance of any statutes of the State of Nebraska" may render the date/time requirement inapplicable to most personal-services contracts, which are governed primarily by executive order.

<sup>107</sup> Legislative history, LB 519.

<sup>108</sup> Telephone conversation with Mike McCrory, Administrator, DAS Personnel Division, 11 October 2002.

<sup>109</sup> We cannot rule out the possibility that the statute has had an indirect effect by discouraging agencies from replacing state employees with contract employees in order to avoid the rigorous statutory process. We also cannot rule out the possibility that agencies have avoided the requirements of this section by simply waiting for vacancies to occur before pursuing a contract in that area.



the guidelines established by DAS. As we indicated in Section IV, for the contracts we reviewed, the two agencies generally followed DAS procedures. However, those procedures relate primarily to the contract-award process. We believe there are other aspects of the agencies' contracting processes that warrant improvement.

First, as we mentioned in Section II, the legislation that created the HHSS required the Finance and Support agency to develop systems for tracking and managing contracts. This legislation also required the Regulation and Licensure agency to monitor programs for compliance with contractual requirements. Although some efforts have been made to develop these systems, the statutory mandate remains largely unmet.

In the absence of centralized tracking, managing, and monitoring systems, these responsibilities fall almost entirely to individual program staff members. Because of this, the quality of these efforts varies considerably. We believe these functions are too important to be exclusively left up to program staff members; they should be centralized within the agencies. At a minimum, the agencies should require that all contracts: (1) be filed in a central location and (2) be reviewed, before they are signed, by an agency staff member from outside the program area (preferably from the legal division).

Second, we believe there should be a single set of written policies—relating to personal-services contract awarding, monitoring and tracking—that apply to all three HHSS agencies. At a minimum, these policies should address:

- the level of review and signatures required for each contract;

- the method of monitoring contractor performance and how this will be documented;<sup>110</sup>
- the length of time documentation related to the contract will be maintained;<sup>111</sup>
- the point in a contract at which the decision to renew should be considered<sup>112</sup> and the documentation necessary to support the renewal; and
- the system for tracking payments to contractors.

### **Agencies' Process for Contracts Valued at \$25,000 or Less**

We were also asked to describe the processes the agencies use when contracts under \$25,000 are involved. Since such contracts are not governed by the executive order, we were asked to assess whether they should be subject to either statutory or executive-order standards. We believe there should be additional guidance for these contracts.

As we discussed in Section II, both directors of the agencies we looked at review some contracts under the \$25,000 threshold. We support this effort by the directors and believe that, as with the larger contracts, smaller contracts should, at a minimum, be filed in a central location and reviewed by a non-program staff member.

In reviewing smaller contracts, it is important to assess whether the contract amount is being set below the competitive-bidding threshold to avoid the requirements of that process. Smaller contracts should also be reviewed before they are amended to establish a new con-

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<sup>110</sup> We recognize that the methods of monitoring contracts may vary—some may require more formalized monitoring than others. But there should be a minimum level of monitoring that applies to all contracts. In addition, the results of all monitoring efforts should be documented. (See appendix B for an example of a simple computerized table used in conjunction with the Magellan contract.)

<sup>111</sup> The DAS policy is to maintain all records related to a contract for five years after the final payment is made.

<sup>112</sup> For example, six months before the contract will expire.

tract period to ensure that the agency conducts a bidding process or requests a DAS exemption, as necessary.

### ***Other Issues***

Finally, in the course of assessing the contracting standards, we identified three additional significant issues. First, with one exception, neither the executive order nor the statutes set forth consequences for agencies that violate the contracting standards.<sup>113</sup> Thus, even when violations are identified, there is no substantive effect on the contracting agency.

Second, the lack of a central source of information on personal-services contracts is a significant problem. Neither the HHSS agencies nor DAS maintains even basic information on these contracts.<sup>114</sup> Consequently, it is virtually impossible to determine, at any given time, the number of personal-services contracts that have been entered into, the total amount paid under these contracts, or the number of these contracts that are subject to the executive order's competitive-bidding requirement. Without this information, it is impossible to know the extent to which personal-services contracts are being utilized by state agencies, including those under the HHSS umbrella.

Third, the existing data on personal-services contract payments has serious limitations. The accounting codes used to designate payments are insufficient in number and inadequately defined.<sup>115</sup> In addition, there is no meaningful

way to determine whether the appropriate code is assigned to these payments.<sup>116</sup>

### ***Summary***

Based on our analysis, we conclude that:

- an executive order is an inadequate way to govern personal-services contracting;
- the standards in the existing order have several serious deficiencies and, because of this, they are not comparable to typical governmental standards;
- there should be a statutory framework governing personal-services contracts.;
- several existing statutory provisions should be reviewed and possibly amended to clarify the Legislature's intention; and
- a significant policy issue exists concerning whether the responsibility for personal-services contracts should be centralized in DAS or given to each agency. In either case, written policies that apply to the three HHSS agencies should be developed.

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<sup>113</sup> The exception is the statutory requirement that a contingent-fee contract is void unless the agency provided prior public notice of the request for proposals.

<sup>114</sup> We consider the basic information to be the name of the contractor, the service provided, the contract period, and the value of the contract for that period

<sup>115</sup> If more numerous and specific accounting codes were used, it would be much easier to discern what payments are for. At present: (1) the accounting codes used for personal-services contracts are also used for payments to individuals who are not under contract, and (2) there is no way to distinguish between different types of contracts. For example, payments to students participating in a state medical-student

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loan program are not separated from payments made to consultants. With regard to the need for better-defined accounting codes, it is not always clear where payments for certain types of contracts are recorded. For example, payments for professional services, such as engineering and landscaping, may be coded with other personal-services contracts, or they may be coded to other categories.

<sup>116</sup> According to DAS, each agency is responsible for checking the accuracy of these codes. (Meeting with Don Medinger, and other members of the Materiel Division staff, 3 October 2002.)

# Appendix A

**Appendix A: Contracts Reviewed for this Evaluation, the FY2000-01 Payments, and Total Contract-Period Value**

<b>Contractor</b>	<b>Service Provided</b>	<b>FY2000-01 Payments</b>	<b>Total Contract-Period Value<sup>1</sup></b>	<b>Contract Period</b>	<b>Previous Contract Start Date</b>
<b>Personal-Services Contracts in the Child Support Operations Division</b>					
Policy Studies Inc.	Child Support Enforcement in Douglas County	\$4,071,954	\$14,483,760	4/1/98 to 3/31/01	1993
Young, Williams, Henderson, Fuselier and Associates, P.A.	Child Support Enforcement in Douglas County	\$764,379	\$13,414,728	4/1/01 to 3/31/04	None
Laboratory Corporation of America Holdings	Genetic Testing	\$231,164	NA <sup>2</sup>	NA	1988 <sup>3</sup>
Long Beach Genetics	Genetic Testing	\$17,704	NA	NA	1997
Identity Genetics, Inc.	Genetic Testing	\$1,410	NA	NA	1995 <sup>4</sup>
Technology Management Resources, Inc.	Data Management	\$177,958	\$513,060	10/1/00 to 9/30/03	1997
Tier Technologies	Data Management	\$35,056	\$406,930	12/1/00 to 11/30/03	None
<b>Personal-Services Contract in the Mental Health, Substance Abuse, and Addiction Services Division</b>					
Magellan Behavioral Health, Inc.	Administration of Behavioral Health Services Program	\$1,210,320	\$2,420,618	1/1/00 to 12/31/01	1996

<sup>1</sup> This is the value for the contract period that covered the FY2000-01 payments. Because some of these contracts were in place before this period and some were renewed after it, this amount does not reflect the total amount paid under each contract.

<sup>2</sup> NA indicates that the contract had no termination date and, therefore, no defined contract period. These contracts were subject to cancellation by either party upon 60 days written notice.

<sup>3</sup> This company originally did business as Roche Biomedical.

<sup>4</sup> This company originally did business as Biogenetic Services, Inc.

**Appendix A: Contracts Reviewed for this Evaluation, the FY2000-01 Payments, and Total Contract-Period Value**

<b>Contractor</b>	<b>Service Provided</b>	<b>FY2000-01 Payments</b>	<b>Total Contract-Period Value<sup>1</sup></b>	<b>Contract Period</b>	<b>Previous Contract Start Date</b>
<b>Personal-Services Contracts in the Medical Services (Medicaid) Division</b>					
HMO Nebraska/Blue Cross Blue Shield of Nebraska	Managed Care (Primary Care Case Management)	\$1,753,932	DK <sup>5</sup>	7/1/99 to 6/30/01	1995
City of Lincoln/Lancaster County Health Department	Managed Care (Recipient Enrollment Assistance)	\$2,086,450	\$4,472,900	7/1/99 to 6/30/01	1997
The Medstat Group, Inc.	Managed Care (Data Management)	\$829,920	DK	7/1/99 to 6/30/01	1995
Iowa Foundation for Medical Care	Managed Care (Quality Review)	\$88,323	\$751,035	1/1/00 to 9/30/01	None
William M. Mercer and Associates	Managed Care (Actuarial Rate Setting)	\$194,872	\$425,000	1/1/01 to 12/31/01	1993
Sunderbruch Corp.	Managed Care (Quality Review)	\$447,703	DK	7/1/00 to 6/30/01	1999
Information & Service Network	Managed Care (Educational Videos)	\$2,700	\$11,100	2/26/99 to 12/31/99 <sup>6</sup>	None
Nebraska Pharmacists Association	Utilization Review (Prescription Drugs)	\$115,035	\$460,139	1/1/98 to 12/31/02	None
Richard Brunmeier, D.D.S.	Utilization Review (Dental)	\$83,239	NA	NA	1989
Nebraska Foundation for Medical Care, Inc.	Utilization Review (Hospital and other services)	\$44,542	Over \$200,000	5/1/01 to 7/31/02	None

<sup>5</sup> For some contracts, the contract value for this period was not readily available.

<sup>6</sup> The contract had expired by FY2000-01. According to the agency, a payment was made that year as a result of an earlier billing error.

**Appendix A: Contracts Reviewed for this Evaluation, the FY2000-01 Payments, and Total Contract-Period Value**

<b>Contractor</b>	<b>Service Provided</b>	<b>FY2000-01 Payments</b>	<b>Total Contract-Period Value<sup>1</sup></b>	<b>Contract Period</b>	<b>Previous Contract Start Date</b>
Richard Marshall, D.D.S.	Utilization Review (Dental)	\$33,593	NA	NA	1988
Dale Ebers, M.D.	Utilization Review (Eligibility Determinations)	\$23,640	\$27,000	1/1/01 to 12/31/03	1993
Irv Deshayes	Utilization Review (Audiology)	\$6,820	NA	NA	1988
First Health Service Corp.	Other/Point of Purchase System	\$634,789	DK	1/1/00 to 12/31/01	1995
Tucker Alan, Inc.	Other/Calculate Treatment Payment Rates	\$107,176	\$130,000	7/27/00 to 12/31/01	1994
Thomas G. Folmer	Other/Grant Facilitator	\$6,912	\$45,696	1/1/01 to 12/31/01	None
Tricia M. Burt	Other/Advertising	\$20,758	\$35,000	1/1/01 to 12/31/01	1997
Larry J. Scherer	Other/school-based Medicaid eligibility determination	\$15,816	\$24,999	1/1/01 to 6/30/01	2000
<b>All Contracts</b>		<b>\$13,006,165</b>	NA		

*Source: Unit review of contracts and related files.. Table prepared by the Program Evaluation Unit.*

## Appendix B

**Magellan Behavioral Health  
Performance Report  
For September, 2001**

**I. System Transition**

<b>Task</b>	<b>Start</b>	<b>Projected Completion</b>	<b>Resource</b>	<b>Status</b>
Provide a System Turnover Plan		11/1/99		Completed
Identify Work Team	1/8/00	1/12/00	Marsha McMann, HHS, Current Contractors	HHS has determined to place the activities for the Comprehensive ASO committee on hold to focus on other priorities at this time.
Convene first meeting	1/15/00	1/20/00		HHS has determined to place the activities for the Comprehensive ASO committee on hold to focus on other priorities at this time.
Identify/Assign workgroups	1/15/00	1/20/00		HHS has determined to place the activities for the Comprehensive ASO committee on hold to focus on other priorities at this time
Set meeting schedules	1/15/00	1/20/00		HHS has determined to place the activities for the Comprehensive ASO committee on hold to focus on other priorities at this time
Set reporting sched.	1/15/00	1/20/00		HHS has determined to place the activities for the Comprehensive ASO committee on hold to focus on other priorities at this time
Readiness review by HHS and RPA's	12/30/99	12/30/99	HHS, RPA's	Completed



**II. Training and Technical Support**

<b>Task</b>	<b>Start</b>	<b>Projected Completion</b>	<b>Resource</b>	<b>Status</b>
Provide Division with Current Training Materials	1/1/00	1/20/00	Vicki Wall	Completed 1/25/00
Develop training agendas/schedules	2/00	Ongoing every other month at NM	Magellan, RPA's HHS	See training report.
Division approval of All training materials	As Needed			Revised Plan delivered in November 2000.
Training of HHS in Utilization Manage.	2/99	12/01	Magellan	Revised Plan delivered in November. Updated training materials submitted July 23, 2001.
Training of NBHS in data analysis and management	1/00	12/31/01	Magellan	All regions have been trained in using the current reports.
Training needs assessed	1/00	Ongoing	Magellan, NM and HHS	See monthly training report.
Regional Specific training developed and implemented	4/1/00	Ongoing	Magellan, Rap's HHS	See training report.
Consumer review of training materials	4/1/00	6/00	Magellan, HHS, Rap's	See recommendations from the committee.
Training materials posted on the internet	4/00	Ongoing	Magellan	Newsletter posted on the website 5/31/00.
Training materials submitted for CEU's				All formal training plans will be submitted to HHS for approval for CEU's
Rap's/Field Reps will be notified of all technical assistance requests.	1/1/00	Ongoing	Magellan	All requests for technical assistance will be copied to the RPA and HHS Field Representative.

*Part III*

*Committee Findings and Recommendations  
and  
Fiscal Analyst's Opinion*

# Program Evaluation Committee Recommendations

## Health and Human Services Personal-Services Contracts

On 17 December 2002, in accordance with Neb. Rev. Stat. sec. 50-1211(1) of the Legislative Program Evaluation Act, the Legislative Program Evaluation Committee (committee) convened to consider the findings and recommendations contained in the Program Evaluation Unit's (unit's) final draft report entitled *HHSS Personal-Services Contracts* and the department's response to that report. The committee discussed each of the findings and recommendations contained in Section VI of the report. The committee adopted the following recommendations.

Findings		Recommendations
<b>CONTRACTING STANDARDS</b>		
	<b>Executive Order</b>	
1	An executive order is an inadequate tool for regulating personal-services contracting. Such orders are difficult to enforce and can be changed or terminated at a governor's discretion. Consequently, more statutory direction is necessary.	<b>Recommendation 1 (relating to Findings 1-3 and 5-11.)</b> The Legislative Program Evaluation Committee (committee) will introduce or support legislation to govern personal-services contracts. The committee believes that this legislation should: <ul style="list-style-type: none"> <li>➤ include the key components of a sound contract-management process (as discussed in Section V of this report) relating to contract awarding, monitoring, and tracking;</li> <li>➤ centralize the contracting process either at the agency or DAS level;</li> <li>➤ require all agencies to develop written policies on personal-services contract awarding, tracking, and monitoring processes, including how these processes will be documented, and train their staff on those policies;</li> <li>➤ contain consequences for non-compliance;</li> <li>➤ propose clarification or elimination, as appropriate, of existing statutes relating to: (1) replacing state employees with contract employees; (2) providing notice of the contingent-fee nature of a contract; (3) providing public notice of requests for proposals; and (4) the resident-</li> </ul>
2	Executive Order 00-04 provides inadequate guidance to agencies. It is silent on several components critical to a sound contract-management process. Because of this, we found the order to be insufficient in the context of typical government contracting guidelines.  In addition, the order grants DAS insufficient authority. In particular, it does not authorize DAS to reject an agency's request for exemption from the competitive-bidding process.	
3	Two national organizations concerned with government contracting, and the American Bar Association, suggest centralizing the responsibility for personal-services contracts in the state's procurement office. However, some state evaluation reports suggest centralizing this responsibility within each agency.	

Findings		Recommendations
		<p>bidder preference; and</p> <ul style="list-style-type: none"> <li>➤ reorganize existing personal-services statutes, and combine new statutory requirements, into a single chapter.</li> </ul> <p>In addition, if the legislation:</p> <ul style="list-style-type: none"> <li>➤ gives DAS the authority to grant exemptions from the competitive-bidding process, it should also give DAS the authority to deny such exemptions; and</li> <li>➤ establishes a total dollar value below which the statutory standards are inapplicable, it should also require some review of contracts below that threshold to ensure that an agency does not divide a larger contract to avoid complying with the standards.</li> </ul>
4	The HHSS agencies are required by law to develop processes for awarding contracts, tracking contract expenditures, and monitoring compliance. To-date, these requirements are largely unmet.	As statutorily required, the HHSS agencies should develop a system-wide process for awarding contracts, tracking contract expenditures, and monitoring compliance. All policies should be in writing, and staff members should receive contract-management training.
5	We found no consensus with regard to what dollar figure is a reasonable threshold in terms of requiring a competitive-bidding process for personal-services contracts.	The committee believes that if proposed legislation includes such a threshold, it should also include some review of contracts under the threshold amount to ensure that an agency does not divide a larger contract to avoid the competitive-bidding process. (See Recommendation #1.)
	<b>Statutory Standards</b>	
6	Existing statutes need to be reorganized.	See Recommendation #1.
7	The statute on replacing state employees with contract employees provides for a rigorous approval process, but it is rarely applicable because it applies only when an employee is directly replaced.	
8	The public notice requirement for contingent-fee contracts may not be producing the result intended by the Legislature.	
9	It is not clear whether the public lettings statute, which requires an agency to	

Findings		Recommendations
	establish a date and time for bid receipt and opening, applies to all personal-services contracts.	
10	The Nebraska resident-bidder preference rarely applies.	
	<b>Executive Order and Statutes</b>	
11	With one exception, neither the order nor the statutes provide consequences for noncompliance.	See Recommendation #1.
<b><i>HHSS AGENCIES' COMPLIANCE WITH THE STANDARDS/OTHER ISSUES</i></b>		
12	The agencies met the executive order's competitive-bidding requirement for 14 of the applicable 20 sample contracts.	The HHSS agencies should continue to meet these requirements.
13	<p>The agencies did not meet the order's competitive-bidding requirement for six of the 20 sample contracts. The six included:</p> <ul style="list-style-type: none"> <li>➤ contracts for which the agency did not request DAS exemptions from the competitive-bidding process even though they reported receiving federal exemptions;</li> <li>➤ contracts for which the agency neither met the competitive-bidding requirement nor requested DAS exemptions;</li> <li>➤ a contract with a former agency employee that may violate IRS guidelines regarding contractor independence;</li> <li>➤ contracts that were automatically renewed for more than a decade each; and</li> <li>➤ contracts unsigned by at least one party.</li> </ul> <p>In addition, too much of the contract awarding, tracking, and monitoring responsibilities fall to individual program staff members.</p>	<p>To address the specific problems we identified, the agencies should in the future:</p> <ul style="list-style-type: none"> <li>➤ Request DAS exemptions even if federal exemptions were granted;</li> <li>➤ Be diligent about following the rules. This is especially important when a contract involves a former employee, in order to avoid even the appearance of a conflict of interest;</li> <li>➤ Have DAS review contracts in which there may be a concern about contractor independence;</li> <li>➤ Prohibit the automatic renewal of contracts; and</li> <li>➤ Ensure that contracts are signed in a timely fashion.</li> </ul> <p>To address our broader concerns, the agencies should, at a minimum, require all personal-services contracts to be filed in a central location and to be reviewed by an agency staff member from outside the program area.</p>
14	For some contracts, the agency reported that it had received a federal exemption from the competitive-bidding process but it was unable to produce	The HHSS agencies should maintain such documentation, preferably in a central location.

Findings		Recommendations
	documentation to confirm those exemptions.	
15	For the contracts in our sample, the HHSS agencies substantially met the other executive order and statutory requirements.	The HHSS agencies should continue to meet these requirements.
<b>GENERAL ISSUES</b>		
16	Neither the HHSS agencies nor DAS has a centralized data system that adequately tracks contracts. However, DAS is in the process of developing the Nebraska Information System, which DAS expects will significantly improve the availability of information on personal-services contracts.	<p>The committee should consider asking DAS to report regularly to the committee on its progress in developing the contract-management component of the Nebraska Information System.</p> <p>In the meantime, the HHSS agencies should take steps to compile and maintain basic contract information. At a minimum, the agencies should be able to provide, for all current personal-services contracts: the contractor's name, service provided, contract term, contract value, and the amount paid to the contractor. (If payment information cannot be compiled retrospectively, the agencies should begin collecting it within the current fiscal year.)</p>
17	<p>There are several serious problems with the current coding of personal-services contract payments:</p> <p>(1) agencies have been allowed to define some contract codes for themselves;</p> <p>(2) contract codes are inadequately descriptive;</p> <p>(3) employees can easily miscode a contract payment; and</p> <p>(4) the agencies' check on this coding is inadequate.</p>	DAS should not permit agencies to define their own codes—all codes should be standardized by DAS. DAS needs to create more codes that are more specifically descriptive. In addition, someone within the contracting agency must be responsible for ensuring that personal-services contract payments are properly coded.

# State of Nebraska

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DEC 23 2002

LEGISLATIVE RESEARCH

December 23, 2002

Cynthia Johnson, Director  
Legislative Research  
Room 1201, State Capitol  
Lincoln, NE 68509

Dear Cynthia:

The Legislative Fiscal Office has reviewed the Program Evaluation Committee's final recommendations for the Health and Human Services Personal-Service Contracts evaluation. It is the estimate of the Legislative Fiscal Office that most of the current recommendations can be carried out using existing budgetary and staffing resources.

The recommendation that the contracting process be centralized at the agency or DAS level may increase expenditures for the DAS Materiel Division if the process is centralized at that level. It is possible that an additional full-time-equivalent staff position may be needed depending on review and approval thresholds yet to be established.

If you have any questions, please contact me or Kathy Tenopir of the Legislative Fiscal Office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Calvert".

Michael Calvert, Director  
Legislative Fiscal Office

# *Part IV*

## *Background Materials*



## **Background Materials**

Prior to publication of the final report, the unit provided the HHSS agencies with a draft of the evaluation report for their comments. This section includes the unit's findings and recommendations, which appeared in the draft evaluation report, and the agencies' response to them. (The full draft evaluation report is on file in the Legislative Research Division.) The Program Evaluation Unit Director's review of the agencies' response is also included in this section.

# UNIT DRAFT FINDINGS AND RECOMMENDATIONS

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Pursuant to the scope statement for this evaluation, the Legislative Program Evaluation Committee (committee) directed the Program Evaluation Unit (unit) to examine a number of issues relating to personal-services contracts entered into by

the Health and Human Services System's Health and Human Services agency and its Finance and Support agency.

Our findings and recommendations follow.

Findings		Recommendations
<b><i>CONTRACTING STANDARDS</i></b>		
	<b>Executive Order</b>	
1	An executive order is an inadequate tool for regulating personal-services contracting. Such orders are difficult to enforce and can be changed or terminated at a governor's discretion. Consequently, more statutory direction is necessary.	The Legislative Program Evaluation Committee (committee) should consider introducing legislation to govern personal-services contracts.
2	Executive Order 00-04 provides inadequate guidance to agencies. It is silent on several components critical to a sound contract-management process. Because of this, we found the order to be insufficient in the context of typical government contracting guidelines.  In addition, the order grants DAS insufficient authority. In particular, it does not authorize DAS to reject an agency's request for exemption from the competitive-bidding process.	If the committee chooses to introduce legislation governing personal-services contracts, it should include provisions addressing the key components of a sound contract-management process (as discussed in Section V of this report) relating to contract awarding, monitoring, and tracking.  If DAS is given the authority to grant exemptions from the competitive-bidding process, it should also be given the authority to reject exemption requests.
3	Two national organizations concerned with government contracting, and the American Bar Association, suggest centralizing the responsibility for personal-services contracts in the state's procurement office. However, some state evaluation reports suggest centralizing this responsibility within each agency.	If the committee chooses to introduce legislation, it should consider requiring that the contracting process be centralized either at the agency or DAS level.

Findings		Recommendations
4	The HHSS agencies are required by law to develop processes for awarding contracts, tracking contract expenditures, and monitoring compliance. To-date, these requirements are largely unmet.	As statutorily required, the HHSS agencies should develop a system-wide process for awarding contracts, tracking contract expenditures, and monitoring compliance. All policies should be in writing, and staff members should receive contract-management training.
5	We found no consensus with regard to what dollar figure is a reasonable threshold in terms of requiring a competitive-bidding process for personal-services contracts.	If the committee believes a threshold should be established in statute, it should also consider requiring the review of contracts under the threshold amount to ensure that larger contracts are not being divided to avoid the competitive-bidding process.
<b>Statutory Standards</b>		
6	Existing statutes need to be reorganized.	The committee should consider introducing legislation to reorganize existing statutes and put them into a single section on personal-services contracts.
7	The statute on replacing state employees with contract employees provides for a rigorous approval process, but it is rarely applicable because it applies only when an employee is directly replaced.	If the committee likes this process, it should consider introducing legislation to amend the statute to make it apply in more situations. The committee could consider making the process applicable to: <ul style="list-style-type: none"> <li>➤ all personal-services contracts;</li> <li>➤ situations in which a former state employee did the work contemplated by the contract in the last 12 months; or</li> <li>➤ situations in which state employees are already doing work comparable to that which would be provided under the contract.</li> </ul>
8	The public notice requirement for contingent-fee contracts may not be producing the result intended by the Legislature.	If the committee believes that the public notice should reveal the contingent-fee nature of the contract, it should consider introducing legislation to accomplish this goal.
9	It is not clear whether the public lettings statute, which requires an agency to establish a date and time for bid receipt and opening, applies to all personal-services contracts.	If the committee believes all personal-services contracts should come under this statute, it should consider introducing legislation to explicitly require this.

Findings		Recommendations
10	The Nebraska resident-bidder preference rarely applies.	The committee may want to consider legislation to eliminate the Nebraska resident-bidder preference or to create a resident-bidder preference that would be applicable in more situations.
<b>Executive Order and Statutes</b>		
11	With one exception, neither the order nor the statutes provides consequences for noncompliance.	The committee should consider introducing legislation establishing consequences for agency noncompliance with contracting standards. In instances in which the standards are not met, the proposed statute could (1) make the contract void, as is done in the contingent-fee contract section; or (2) prohibit DAS from making payments, as is done for commodities contracts.
<b><i>HHSS AGENCIES' COMPLIANCE WITH THE STANDARDS/OTHER ISSUES</i></b>		
12	The agencies met the executive order's competitive-bidding requirement for 14 of the applicable 20 sample contracts.	The HHSS agencies should continue to meet these requirements.
13	<p>The agencies did not meet the order's competitive-bidding requirement for six of the 20 sample contracts. The six included:</p> <ul style="list-style-type: none"> <li>➤ contracts for which the agency did not request DAS exemptions from the competitive-bidding process even though they reported receiving federal exemptions;</li> <li>➤ contracts for which the agency neither met the competitive-bidding requirement nor requested DAS exemptions;</li> <li>➤ a contract with a former agency employee that may violate IRS guidelines regarding contractor independence;</li> <li>➤ contracts that were automatically renewed for more than a decade each; and</li> <li>➤ contracts unsigned by at least one party.</li> </ul> <p>In addition, too much of the contract awarding, tracking, and monitoring responsibilities fall to individual program</p>	<p>To address the specific problems we identified, the agencies should in the future:</p> <ul style="list-style-type: none"> <li>➤ Request DAS exemptions even if federal exemptions were granted;</li> <li>➤ Be diligent about following the rules. This is especially important when a contract involves a former employee, in order to avoid even the appearance of a conflict of interest;</li> <li>➤ Have DAS review contracts in which there may be a concern about contractor independence;</li> <li>➤ Prohibit the automatic renewal of contracts; and</li> <li>➤ Ensure that contracts are signed in a timely fashion.</li> </ul> <p>To address our broader concerns, the agencies should, at a minimum, require all personal-services contracts to be filed in a central location and to be reviewed by an</p>

Findings		Recommendations
	staff members.	agency staff member from outside the program area.
14	For some contracts, the agency reported that it had received a federal exemption from the competitive-bidding process but it was unable to produce documentation to confirm those exemptions.	The HHSS agencies should maintain such documentation, preferably in a central location.
15	For the contracts in our sample, the HHSS agencies substantially met the other executive order and statutory requirements.	The HHSS agencies should continue to meet these requirements.
<b><i>GENERAL ISSUES</i></b>		
16	Neither the HHSS agencies nor DAS has a centralized data system that adequately tracks contracts. However, DAS is in the process of developing the Nebraska Information System, which DAS expects will significantly improve the availability of information on personal-services contracts.	<p>The committee should consider asking DAS to report regularly to the committee on its progress in developing the contract-management component of the Nebraska Information System.</p> <p>In the meantime, the HHSS agencies should take steps to compile and maintain basic contract information. At a minimum, the agencies should be able to provide, for all current personal-services contracts: the contractor's name, service provided, contract term, contract value, and the amount paid to the contractor. (If payment information cannot be compiled retrospectively, the agencies should begin collecting it within the current fiscal year.)</p>
17	<p>There are several serious problems with the current coding of personal-services contract payments:</p> <p>(1) agencies have been allowed to define some contract codes for themselves;</p> <p>(2) contract codes are inadequately descriptive;</p> <p>(3) employees can easily miscode a contract payment; and</p> <p>(4) the agencies' check on this coding is inadequate.</p>	DAS should not permit agencies to define their own codes—all codes should be standardized by DAS. DAS needs to create more codes that are more specifically descriptive. In addition, someone within the agency must be responsible for ensuring that personal-services contract payments are properly coded.



December 2, 2002

Cynthia Johnson, Director  
Nebraska Legislative Research Division  
Program Evaluation Unit  
P.O. Box 94945  
State Capitol  
Lincoln NE 68509-4945

Dear Ms. Johnson:

Thank you for the opportunity to review the October 28, 2002 draft report on HHSS Personal Services Contracts prepared by the Program Evaluation Unit in Legislative Research. Our comments are included with this letter. The comments on Technical and Policy issues are in order of the report sections. The typographical changes are few and follow these comments.

We appreciate the statement in finding #15 that we are in substantial compliance with the requirements in statutes and the Executive Order. We have noted that, as shown on the table on page 7, the amount and percentage of personal services contracts has not substantially grown. We appreciate the additional observation from the study staff, in an update meeting during the course of the study, that they could see that our work on contract processes and compliance with Executive Order have improved over the past few years. The improvements were made even though budget and staffing reductions were experienced with the merger in 1997 and in subsequent appropriations.

Some of the work of the merger is ongoing. As noted in the study, we do not yet have a single contracting policy and procedure for the total HHS System. Each agency Director has, however, established standards and clearly communicated them to the staff of their agency. Our work to achieve the formal single System policy will continue.

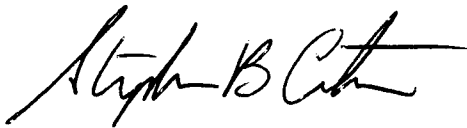
We want to recognize the professional manner in which Martha Carter and Andre' Mick handled their work on the study. They were respectful of staff, staff time and work space and were responsive to questions and discussions about their work.

If you have questions about our response, please contact Mary Boschult at 471-9197. She has coordinated our activities on this study.

Respectfully,



Ron Ross, Director  
Health and Human Services



Steve Curtiss, Director  
Health and Human Services Finance and Support

Copies of letter and comments sent to:

- Senator Pat Engel, Chairperson, Program Evaluation Committee
- Senator Chris Beutler, Vice Chairperson, Program Evaluation Committee
- Senator George Coordsen, Member, Program Evaluation Committee
- Senator Marian Price, Member, Program Evaluation Committee
- Senator Roger Wehrbein, Member Program Evaluation Committee
- Michael Calvert, Legislative Fiscal Analyst

**HEALTH AND HUMAN SERVICES SYSTEM COMMENTS ON  
OCTOBER 28,2002 DRAFT REPORT ON PERSONAL SERVICES  
CONTRACTS BY LEGISLATIVE RESEARCH PROGRAM  
EVALUATION UNIT**

TECHNICAL AND POLICY COMMENTS  
SECTION I

1. Page 3. We agree that the only definition of "personal services" in statute was created in LB519(June-6-1995) and is qualified to those contracts "for human labor and not goods or personal property" that replace work currently done by state employees at the effective date of the contract. The June 1995 guidelines distributed at the implementation of Executive Order 95-04 explain that it is to cover " the procurement of any professional consultant service and other similar specialized services of any type or nature whatsoever; any procurement which has the primary and major objective to obtain a professional consultant report or service..." The issuance of Executive Order 95-4 on 4-6-1995 actually pre-dates the statute by about 30 days. This Executive Order and the guidelines and interpretation issued at the time sets the base for the practices found today.
2. Page 4. In footnote #7 it should be noted that agencies may also have direct purchase authority through the DAS Material Division.
3. Page 4. Regarding footnote # 9, the Executive Orders require agencies to follow the DAS manual only with regard to "contracts not currently covered by state or federal law...". This language is consistent with the verbal instruction from DAS Materiel in the implementation of the 1995 Executive Order that it would be acceptable to follow federal standards for the program of funding being used.
4. Page 5. In the discussion of consequences we take exception to the statement that there are no consequences for a Director who enters into a contract without conducting a bidding process and without requesting a DAS exemption. Consequences may not be enumerated within the executive order or the DAS policy, but the scrutiny of public agency and public official performance is deep and vast. Continued disregard of a Governor's executive order, failure to maintain working relationships



with other agencies or abuse and disregard of fiscal policy or accountability could result in termination from one's position as the Director, or a similar personnel action for classified staff within the agencies.

5. Page 5. We believe the section on "Statutes Applicable to Personal-Services Contracts" provides a good summary of the different kinds of statutes that would or could apply to contracts for personal services depending on the type of services in the contract. The place in statute that speaks specifically to personal services contracts is section 73-301 et.seq. and relates to contracts that would replace state employees.
6. Page 6. Finance and Support's Financial Services Division has continued an existing mainframe database to track contracts. Most program divisions do file copies of their contracts in this database. The system is limited in the type and volume of information it can hold and track. The 24-hour facilities maintain their own databases and these listings have been collected in the Services Agency Director's office twice since the merger of the system in 1997. The NIS will include a contract tracking and management function that will replace the current databases. It will be required use for all divisions.
7. Regulation and Licensure monitors performance under state and federal law of recipient eligibility determination in a range of public assistance programs including Medicaid, ADC/TANF, Food Stamps and Energy Assistance. The federal funding contracts require HHSS as the contractor to perform these random reviews of accuracy under state and federal law. This accuracy is also tested by the auditors hired by the State Auditor to do the state single audit required for these federal funds.
8. The current NAS system is able to produce the amount paid to any contractor or entity. It is not able to provide the amount specific to a single contract. For example, if a cleaning company has a contract to clean the Gering office and is also contracted to clean the Bridgeport office, NAS will track the payments to the cleaning company but NAS does not differentiate which contract it is paid on. NIS is intended to track the authorization and payment specific to the contract.

9. Each of the three HHSS agencies have clearly understood expectations on contracting. It is not, in all cases, organized into a single agency encompassing policy. Resources were not appropriated or allocated to make complete system operating changes after the merger, and budget and staffing reductions were part of the merger expectations. The System therefore made a decision to continue past operating policy until the issue or policy would be addressed. The implementation of NIS should finally allow a comprehensive system to be put in place. Past practice is used for generating, routing, review and signature on the contracts. Although a contract can be generated in any program division, substantiated contracts cannot be fully approved and executed there. In the Service agency, contracts over \$5000 are forwarded to the Director for review, approval and signature. Contracts less than \$5000 can be written in the program division but can only be signed by the Division Administrator or Deputy Director. In Finance and Support all contracts are reviewed by the Director, and those over \$10,000 must be signed by the Director.
10. Footnote #32. Contracts under the \$5000 or \$10,000 limit can be written and approved at the program division level but must be signed by the Division Administrator or Deputy Director, who reports directly to the Director.
11. Page 7. The contracts referenced in this section of statute were intended to be those that the agency enters into related to federal funding. Regulation and Licensure does perform reviews of eligibility accuracy in Medicaid, ADC/TANF and Food Stamp and Child Support cases. This is part of the agreement of the state with U.S. HHS for the federal funding for these programs.
12. Page 7. We are unable to determine how the total dollar figures were arrived at. We are willing to review with you what criteria were used to define personal services contracts and how the numbers were calculated.

### SECTION III CONTRACTS SELECTED FOR EVALUATION

1. The explanation of the program areas and contracts included in the review is clear.

## SECTION IV COMPLIANCE WITH CONTRACTING STANDARDS

1. Page 13. The language used in both executive orders is “cost comparison to ensure reasonable fees” rather than “cost analysis” used here. While they are similar in principle the term cost analysis implies a much more lengthy and detailed process. For example, a reasonable fee could be determined by comparing the per piece charges for laundry at a Veterans’ Home or the rate to clean the Kearney office per day or per week.
  
2. Page 14. Contracts with Peer Review Organizations (Iowa Foundation for Medical Care, Sunderbruch, Nebraska Foundation for Medical Care ) are required functions of the Medicaid program. The U.S. Department of Health and Human Services authorizes certain entities to perform this function. At one time, the U.S. HHS Center for Medicare and Medicaid Services (formerly known as Health Care Financing Administration) designated Iowa Medical Foundation/Sunderbruch as the sole Professional Review Organization for Nebraska. This was identified in general federal publications such as the Federal Register but was not documented through specific correspondence to our state. At a later date the federal government placed a moratorium on the designation of specific entities while the process went under review. We are unable to readily provide documentation of this exemption for the period of this study, but we have attached documentation for the current contract. The enhanced federal funding rules and Peer Review requirements are found in the Code of Federal Regulations at 42CFR433.15 and 42CFR475.107. For these reasons we believe these contracts for the time period should be considered as exempt from the bidding process for the purposes of this study.
  
3. In the implementation of the 1995 Executive Order, we were instructed that contracts and agreements with governmental entities, such as counties, the University or other state agencies, were exempt from the order. A copy of this instruction is attached. In addition, a letter from U.S. HHS explains the same exemption from competitive bidding. A copy is attached to our comments. We believe the contract with Lincoln/Lancaster should be considered exempt from the Executive Order requirements for the purposes of this study.

4. Page 14. Footnote #14. The contract with the Nebraska Pharmacists Association for Drug Utilization Review was bid in 1997. The RFP was handled by DAS. A copy of the notice is attached to our comments.
5. Page 15. In footnote #67, and also in the text and table above, the note should show that the RFP for the contract that was awarded to TMR was sent by FAX to the Omaha World Herald on July 31, 1997. A copy is enclosed.
6. Page 15. We understand the Executive Order requirement to submit a RFP to DAS applies when the agency is requesting DAS to handle the RFP dissemination and notices. The particular section was to clarify that it is the responsibility of the agency and not DAS to create the RFP because they have the technical and program purpose information. It is not a requirement to submit the RFP to DAS if the agency is handling the process. In addition, records were located to show that the bid deadline for the RFP related to Tier Technologies was 2:00 p.m. on December 16, 1999. The bid deadline for the RFP related to TMR was August 25, 1997. It does appear that an hour of the day was not specified.
7. The section on page 17 on contracts with former employees indicates 5 contracts are with former employees. Only 4 of the signors of the contracts were employees of the System . The Robert Wells that signed the PSI contract is not the same Robert Wells that worked at the Beatrice Developmental Center (BSDC). Dr. Dale Ebers was an employee and did agree to consult part-time doing medical reviews for the Medically Handicapped Childrens' Program and the State Disability Program, his area of expertise. The current contract is \$27,000 for a 3-year time frame. Thomas Dolan was an employee and left the agency in 1996 to lead the Nebraska Pharmacists Association. The contract for Drug Utilization Review was RFP'd through DAS in 1997. Mr. Dolan signed as the leader of the Association. When Thomas Folmer retired he was asked to work on the project to support the transition of excess nursing home capacity to less institutionalized types of living arrangements. Nursing home cost analysis and Medicaid and state funding parameters are his unique area of expertise. He is provided office space to be able to access Medicaid records that cannot leave the office and works hours to be accessible to nursing home administrators. Thomas Ruffino left the agency in 1990.

His current company, TMR was awarded a contract for new hire reporting in 1997. This contract, as noted above, was RFP'd by the agency and notice was published in the Omaha World Herald.

8. We were unable to locate a copy of the Irving DeShayes contract with both parties' signatures. This is being corrected.
9. On page 18, for reasons mentioned earlier, we believe the number of contracts should be 17 of 21 rather than 12 of 21 in the summary section. We also interpret that the language in the Executive Order which indicates that contracts not otherwise covered by state or federal law would remove the need to request an exemption from DAS if the federal government has already granted it, or if other statutes cover or regulate the contractual relationship. Existing contracts to secure professional medical consultation (Ebers, Marshall, Brunmeier) were originally initiated prior to the first Executive Order. The contracts were initiated with experts known by, or recommended to the agency, who could review medical necessity for dental, hearing or other services as is done by private insurance companies. The rates HHSS is able to pay are below market rates. These contracts, however, will be reviewed to assure that they meet the requirements of the Executive Order.

#### SECTION V- ASSESSMENT OF CONTRACTING STANDARDS

1. Page 19-20. We believe the Executive Order is sufficient and appropriate as direction on contracting. It is an administrative tool that can be issued quickly and adjusted easily if it is needed. By its nature, it does not contain every detail of expectation and process, but DAS has been helpful since 1995 in offering technical assistance and consultation.
2. Page 20. In reference to footnote #6, a detailed cost analysis was completed to compare alternate models of delivery of child support services in Douglas County. The analysis supported our course of action; however, we are unable to locate a copy of it at this time.
3. Page 20. NAS is able to track and collect information on payments made to contractors. It is not able to connect the payments to the specific contract if there is more than one contract. We look forward to the implementation of NIS to be able to do this. We do not have sufficient staff to create another "shadow" accounting/tracking system to do this in

the interim. We rely on the program administrators managing the contracts to monitor the services, the payments and the contract limits when they authorize the payments to be made.

4. Page 22. The report indicates that the legislation required the Finance and Support agency to "develop systems for tracking and managing contracts." The statutes actually state that the agency shall "Develop and manage a consistent accounting, contracting, disbursement and fiscal compliance system" and consolidate operational support services such as ..... contract management. Staff have continued to work toward this goal. The implementation of NIS will allow us to complete this project.
5. Page 22. The legislation required the Regulation and Licensure agency to "evaluate services or programs to determine compliance with state, federal or other contractual requirements." This language addresses programs such as the Program Evaluation Review (PER) which reviews the eligibility accuracy of public assistance programs such as Medicaid, ADC/TANF, Food Stamps, and Energy Assistance. These are requirements in the contracts we enter into with Federal Agencies to receive federal funding for programs for Nebraska.
6. Page 22. We concur with the value of a central review and tracking process in HHSS as an effective management tool. This review is done in each agency for most contracts now. Contracts submitted to a Director for approval and signature are currently reviewed by the Director or another person designated by the Director who is outside the program division. We believe the central filing should continue to be in HHSS and should be used for all HHSS contracts including the personal services contracts.

#### SECTION VI FINDINGS AND RECOMMENDATIONS.

1. HHSS disagrees with the finding that the Executive Order is an inadequate tool for regulating personal services contracting. It is a strength that the Executive Order can be changed with the stroke of the Governor's pen. Such immediate action can effectively address problems quickly without the need to wait for statutory change. The ability to take speedy action is especially important considering the history of this Executive Order. The original version of Executive Order 00-04 was issued by then Governor Nelson in 1995 as a result of public

dissatisfaction over a consultant's contract with the former Department of Health. The Executive Order has been in effect since that time.

Governor Johanns formally reissued the Executive order in 2000 to resolve any concerns about its continued validity following a change of administration. HHSS also takes issue with the conclusion that the Executive Order is difficult to enforce. As stated within the body of the Executive Order, all agency Directors are held responsible to the Governor for compliance with its terms. The ultimate consequence of ignoring the Executive Order could be dismissal by the Governor-- a result that is unlikely to be feasible within a statutory framework.

2. Section V of the report identifies "five components of a sound contract management process" that are not addressed in the Executive Order. These five components are: a) assess and document the costs and benefits of providing the service in-house compared to contracting out for the service; b) use an established standard for selecting contracts; c) monitor contractor compliance and track payments to the contractor; d) maintain documentation of the contract awarding, monitoring and payment tracking processes; and e) include dollar limits and termination dates in all contracts. HHSS takes issue with the implication in the report that because these "five components" are not set forth in the Executive Order, they are absent from the contracting processes at HHSS. This is not an accurate conclusion.

Each Director in the HHS System weighs the pros and cons before making a decision to contract to an outside source. There are a variety of issues that come into play regarding such decisions beyond the costs and benefits of providing the services in-house. There may be a need for skills and expertise that exist only in the private sector. The needs may be satisfied by contracting for a relatively short period of time or for part-time services of a number of people. It may require timely access to a complete infrastructure that would be time-consuming and costly to replicate. There are also considerations of space to house new employees and numerous other practical considerations that may weigh in favor of utilizing private contractors.

The lowest responsible bidder standard is uniformly used by HHSS whenever it issues an RFP for contracts. Were it otherwise, unsuccessful bidders would regularly be filing legal challenges against HHSS contract awards and that is not happening. By suggesting that agencies use an

established standard, it implies that agencies are not using any standard whatsoever. This is not an accurate conclusion.

If suggesting that the Executive Order include language requiring the documentation of contract awards, contractor monitoring and payment tracking, implies that agencies are not fulfilling these responsibilities, we believe this is an inaccurate conclusion.

HHSS takes issue with the finding that the Department of Administrative Services (DAS) cannot reject requests for exemptions from competitive bidding requirements. By giving DAS the authority to grant exemptions from competitive bidding requirements, it is implicit that DAS also has the authority to deny a request.

3. HHSS is a large and diversified system responsible for many programs, services and employees. The handling of processes and management of individual contracts needs to occur as close to the activity or service as possible. However, we concur with the recommendation that there be a clearer central function responsible for review, monitoring and standard setting for contracts within each agency. Technical assistance from DAS in contracting and purchasing has long been, and continues to be appreciated. Implementation of NIS will make comprehensive monitoring more feasible and efficient.
4. HHSS generally agrees with this finding and recommendation; however, the wording goes beyond the language of the statute. Implementation of the Nebraska Partnership for Health and Human Services Act is an ongoing process. A single policy for all three agencies is a goal of HHSS to achieve a consistent contracting and contract management process.
5. HHSS notes that DAS Director Lori McClurg is on record at the Legislative Committee hearing on LR399 that the threshold level should be raised to \$50,000. It should be recognized that contracts with a provider may be specific to the product or service to be delivered, so there may be very legitimate reasons to have multiple contracts with one contractor. NIS will have the capacity to identify multiple contracts, if they exist, and offer the opportunity to review them for compliance with policy and standards.



6. Some of the existing statutes are specific to types of services, processes or even specific to the ombudsman's access. Therefore, it may be difficult to organize the statutes into one place in the law. The report does an excellent job of summarizing and cross-referencing the statutes. It has been helpful to us to have this in one document. We appreciate the efforts of Legislative Research Program Evaluation staff in completing this arduous task.
7. This statutory contract review process is elaborate, cumbersome and complicated. To apply this to all contracts would significantly increase the cost of state government. It would increase staffing needs in DAS and in every agency. It may also raise serious legal considerations such as the rights of an agency and/or the proposed contractor should they disagree with the assessment of the DAS Director. It could be argued that a decision by the DAS Director to deny approval of a contract would be an adverse agency decision subject to judicial review.
8. No comment.
9. No comment.
10. No comment.
11. HHSS, as noted in the response to recommendation #1, believes there are consequences for noncompliance with the Executive Order. Further, the legal and practical implications resulting from the consequences suggested in the report should have further study. For example, rendering a contract void by statute is only effective so long as none of the parties has performed. What if the State does not follow its own contracting standards and subsequently seeks to evade its obligations under a contract by alleging it is void as a matter of law? There is longstanding legal authority in Nebraska that holds a governmental entity responsible for the reasonable value of the goods or services it received under a contract. The merits of any statutorily mandated noncompliance consequences should be balanced against the potential chilling effect that such consequences would have on the competitive nature of the bidding process. A potential bidder for a State contract must weigh the risk that the government could subsequently declare a

contract void or have contract payments shut off for a violation of the contractual procedures.

12. As noted in SECTION IV comments, documentation and justification have been included to demonstrate that 5 additional contracts meet the bidding requirements. Therefore, 17 of the 21 contracts met the bidding requirements. Appropriate action will be taken on the remaining 4 contracts so that they meet the requirements of the Executive Order.
13. As noted in comments to Recommendation #12, appropriate action will be taken to ensure that the 4 remaining contracts meet the requirements of the Executive Order and IRS requirements. We do not agree that it should be necessary to request DAS exemptions after federal exemptions are granted. Although satisfaction with the quality of contractor performance is considered by program managers when payments are authorized and all contracts contain a termination clause, we agree that contracts should be time limited. The contract duration should be appropriate to the type of service and market environment of the service. We agree there should be a central filing point for all contracts, including personal services contracts. All contracts forwarded to an agency Director for approval and signature are currently reviewed by a person outside the program area. This will continue to be done.
14. We agree that documentation of exemptions should be filed with the contract in the central filing location.
15. We appreciate the recognition HHSS has substantially met the requirements of the Executive Order and statutes. There is no doubt that HHSS' record keeping and document retention procedures need improvement.
16. HHSS supports the DAS efforts to improve contract tracking and management information through the NIS. We will continue to use our existing tracking system that contains most of the basic information described. The current NAS system can produce data on amounts paid to contractors but it cannot track the payments to specific contracts. We will look forward to the NIS ability to track payments by contract. Without NIS, we would need significant additional staffing to track these

payments to the contract for the System. At this time the program contract managers monitor payments and contract limits.

17. We are available to work with DAS to improve payment and coding procedures. The current NAS system tracks thousands of payments every day for all state agencies. To meet the needs of specific agency missions ranging from building roads to operating a psychiatric hospital, some specialization will no doubt be necessary.

### **TYPOGRAPHICAL**

#### **ACKNOWLEDGEMENTS**

Page v and throughout. Correct spelling is Mary Boschult

Page v. Correct spelling is Ron Sorensen

#### **SECTION III**

Page 3. In footnote #4 the correct title for Dr. Raymond is Chief Medical Officer.

*The attachments that follow this section in the printed report are available as printed copies from the Legislative Research Division, Room 1201, State Capitol.*

# UNIT DIRECTOR'S REVIEW OF AGENCY RESPONSE

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*On 2 December 2002, the directors of the Health and Human Services and Finance and Support agencies submitted a response to the Program Evaluation Unit's report prepared in conjunction with this evaluation. Neb. Rev. Stat. sec. 50-1210 of the Nebraska Legislative Program Evaluation Act requires the Program Evaluation Unit Director to "review the response, prepare a brief written evaluation of it, and forward the evaluation to the committee for review." The director's evaluation of the response follows.*

The agencies disagree with several of the unit's findings and recommendations and raise other substantive issues that are not directly related to the findings and recommendations. In addition, the agencies suggested several technical corrections. We first address the issues related to the findings and recommendations and then the other substantive issues. The technical changes are listed at the end of this review.

## ***Issues Related to Findings and Recommendations***

**Comments relative to Finding 1:** The agencies disagree with our finding that an executive order is an inadequate tool for regulating personal-services contracting. They point out that such orders are enforceable through disciplinary action or termination of staff members and agency directors. Finally, they suggest that it is beneficial for the governor to be able to change the order as needed, rather than waiting for the Legislature to make statutory changes.

We agree that the primary means of enforcing an executive order is through personnel action and we will clarify that in the draft report. However, we believe that statutory standards are easier to enforce because compliance with such standards may be challenged in court. (We acknowledge that it *may* also be possible to file a lawsuit to compel enforcement of an executive order, although this is certainly not a common practice.)

In addition, we disagree that the governor's ability to change an order quickly makes it a better vehicle for establishing the state's personal-services contracting policy. We remain unconvinced that this particular policy issue needs to be addressed outside the legislative process, which permits public input and involves both the legislative and executive branches. Consequently, we believe that, at a minimum, the basic requirements and standards for personal-services contracting should be set in statute. If policymakers determine that some aspects of this process require flexibility beyond that afforded by statute, they may permit those to be addressed in rules and regulations.

**Comments relative to Finding 2:** The agencies agree with our assessment that Executive Order 00-04 lacks several key components of a sound contract-management process. They are concerned, however, with potential implications of this finding as it relates to the HHSS agencies' policies.

Our assessment that the existing order lacks several key components of a sound contract-management process was in direct response to our committee's question about the adequacy

of the order. It does not directly relate to the HHSS agencies' contracting policies. However, as described in the report, we do have some concerns about the HHSS agencies' policies. Because the agencies raised these issues in response to this finding, we will include our comments here as well.

(1) We found that the order should require agencies to assess and document the costs and benefits of providing the service in-house compared to contracting for the service. The agencies state that factors other than the potential cost must also be considered when deciding whether or not to contract for a service.

We appreciate that cost is only one of the factors agencies consider in the contracting decision. However, it is a factor of significant interest to policymakers. Because of this, we believe agencies should be able to demonstrate they made a good-faith effort to compare in-house costs with those that would be incurred by contracting out. (This information was not available for the contracts we reviewed. Of the 26 contract files we reviewed, only one contained any reference to the cost of providing the service in-house—and, in that case, the agency was unable to produce any documentation to verify that a cost comparison was conducted.) If the agencies are already conducting these comparisons, they should retain documentation of them. If they are not conducting these comparisons, they should be, and they should retain documentation of the factors analyzed and the results of the comparisons. If, after conducting a cost analysis, an agency enters into a contract despite a higher potential cost, it should document the reasons for doing so.

(2) We found that the order should establish a standard for agencies to use when selecting contractors. The agencies were concerned that we were implying they currently do not use a standard in awarding contracts and stated that they generally use the “lowest responsible bidder” standard. We did not intend that implication, and we support the use of the lowest responsible bidder standard. Our point was that the existing order provides no direction to agencies about what standard to use, and that this is a significant failing.

(3) We found that the order should require agencies to document contract awards, contract monitoring, and payment tracking, and the agencies are concerned that we were implying that they are not doing these things. As we explain in the report, we believe that the HHSS agencies' documentation processes are insufficient because (1) the agencies have no written policies about what should be documented or how long documentation should be retained, and (2) the quality and completeness of the existing documentation varies considerably. Even the agencies' response ultimately acknowledges this problem, stating that: “There is no doubt that HHSS' record keeping and document retention procedures need improvement.” (p. 11)

Finally, the agencies disagree with our finding that DAS has insufficient authority to reject requests for exemptions from the competitive-bidding requirement. The response states that such authority is implicit in the order. However, according to DAS, they may review exemption requests but they are not authorized to reject them. If it was intended that the order give them this authority, it should be revised to do so directly.

**Comments relative to Recommendation 3:** The agencies agree that centralization is needed in the contract-award, management, and tracking processes, but they believe these

processes should be handled at the agency level, not by DAS. Where this responsibility should be centralized is ultimately a policy decision for the Legislature to address. Our only additional comment is that we are concerned that the agencies state they will continue to rely on their existing processes for contract review when we have identified serious deficiencies in these processes. If responsibility for personal-services contracts remains at the agency level, the agencies should be required to develop a more systematic approach than currently exists.

**Comments relative to Recommendation 4:** While the agencies generally agree with our recommendation that they establish a system-wide process for awarding contracts, tracking expenditures, and monitoring contract compliance, they express two concerns about our analysis of existing statutes relating to the agencies' responsibilities for developing such processes. First, they indicate that a provision we interpreted as requiring the Regulation and Licensure agency to monitor all contract compliance "was intended" to apply only to monitoring of federal requirements. We note that this qualification is contained neither in the statute nor is it referenced in the legislative history of the bill that enacted it. Second, the response suggests a difference between the statutory language and the language we used to describe the Finance & Support agency's responsibilities regarding contracting. It is true that we summarized the statute rather than including its wording verbatim, but we fail to see a substantive distinction between the two.

On more than one occasion during the evaluation, we asked the agencies to provide information about how these statutory sections had been implemented, but we never received an answer. In our opinion, the key point here is that the Legislature intended for HHSS to develop a single, system-wide policy for dealing with contracts—an intention the agencies appear to agree with, stating: "A single policy for all three agencies is a goal of HHSS to achieve a consistent contracting and contract management process." (p.9)—but no such policy has been developed.

While the agencies state that they have been working to meet these statutory requirements, we found little evidence of this. Each of the HHSS agencies has its own way of handling these contracts, and none have written policies or guidelines about contract awards, management, or tracking. While the Finance and Support agency has a contract database, it is, by the agency's own admission, incomplete and of limited use for management purposes. We appreciate that NIS is expected to help with this, but NIS is only a tracking system. The agencies need to establish policies and procedures for personal-services contracting and train their staff accordingly.

**Comments relative to Recommendations 7 and 11:** These findings relate to potential statutory changes to (1) expand the review process that currently applies only to contracts in which state employees are to be directly replaced with contract employees, and (2) include consequences for noncompliance with statutory contracting standards. The agencies did not directly disagree with these suggested changes but expressed a number of concerns about them. We believe both of these changes are worthy of legislative consideration but agree that additional input is a good idea.

**Comments relative to Finding 12:** The agencies disagree with our assessment of five contracts that we found did not meet the order’s competitive-bidding requirement. We address each of these contracts individually.

- For the Nebraska Pharmacists Association contract, the agencies have now provided documentation that was unavailable during the evaluation confirming that this contract was let for bid. We will note that this contract met the competitive-bidding requirement.
- For the Nebraska Foundation for Medical Care, Inc. contract, we have reconsidered our position and agree to categorize it as exempt from the order’s competitive-bidding requirement. While the agencies could not produce documentation of the original federal exemption from the bidding process, they did provide documentation confirming such an exemption, as well as a DAS exemption, for the current version of the contract.
- For the City of Lincoln/Lancaster County Health Department contract, the agencies assert that contracts with other governmental entities are not governed by the order. They attached to their response a 1995 DAS memo that supports this claim. After receiving the agency’s response, we posed this question to Mr. Don Medinger, DAS Material Division Administrator. According to Mr. Medinger, the 1995 memo is no longer in effect and has been replaced by the *State Purchasing Bureau Procurement Manual*. Nevertheless, he agreed that intergovernmental contracts are outside the order’s purview. He stated that agencies are statutorily authorized to enter into intergovernmental agreements and that the order does not apply to contracts governed by state law. Based on this new information, we will exempt the Lincoln/Lancaster contract from the analysis of compliance with the executive order standards.
- We are unwilling to categorize the remaining two contracts, with the Iowa Foundation for Medical Care and the Sunderbruch Corp., as exempt from competitive-bidding requirement. According to the agency, the state did not need a letter exempting these contracts from the bidding process because they fit a general exemption that was published in the federal register. Unfortunately, the agency cannot produce the language of this exemption, and the existing regulations do not contain it. In the future, the agency should maintain as part of its documentation even general language related to federal exemptions. In addition, we believe that the simplest way to avoid this kind of confusion is for the agency to request a DAS exemption, even if it has already received a federal exemption. The DAS review would provide a check on the agency’s claim that a federal exemption was applicable and, as we stated in the report, it would be unusual for DAS to reject such a request. (This issue is discussed further in connection with Finding 13 below.)

Finally, we appreciate the agencies’ statement that they will make necessary changes in the contracts that did not meet the executive-order or statutory standards. We also note that the agencies state that three of these four contracts were entered into prior to the date of the original order. As we stated in the report, these contracts should have been brought into



compliance with the order when they were amended. In addition to our concern about these particular contracts, we have a broader concern that the HHSS agencies have no systematic review of contracts to identify existing contracts that do not meet the contracting standards.

**Comments relative to Finding 13:** The agencies disagree with our recommendation that they should request DAS exemptions from the competitive-bidding process if they received a federal exemption from that process. The agencies assert that Executive Order 00-04 does not apply to contracts that are covered by federal law. The order states that:

“**For those contracts not currently covered by state or federal law**, each agency shall follow the process prescribed by the *Procedure for the Procurement of Contractual Services* manual of the Department of Administrative Services – Material Division or an alternate process approved by the Director of Administrative Services.” (Emphasis added.)

We agree that this sentence appears to exempt from the order contracts governed by federal law. However, during the course of the evaluation, Mr. Gerald Pankonin, an HHSS attorney who specializes in contracts, told us that he didn’t believe that contracts that were also under federal requirements were necessarily exempted from the order’s requirements. In addition, Mr. Medinger told us that DAS recommends that agencies submit federal exemptions to DAS. We also found that the HHSS agencies do submit such requests to DAS some of the time. Consequently, we held the agencies to the standard that they should do so all the time. We acknowledge, however, that the order may not require this.

Whether or not the order requires agencies to request a DAS exemption in these cases, we believe agencies should provide some evidence to DAS that the federal government has exempted a contract from the competitive-bidding process. We favor requiring agencies to obtain a DAS exemption so DAS would have some authority to question the agency if they believe there’s a problem with the federal exemption. However, if agencies are not required to request a DAS exemption, they should at least be required to file the documentation of the federal exemption with DAS.

At a minimum, we believe that the order should be clarified to explicitly state which types of contracts are not subject to its requirements.

### ***Issues not Related to Findings and Recommendations***

#### *Calculation of Personal-Services Expenditures*

In their response the agencies requested information about the methodologies the unit used to arrive at the personal-services expenditure figures contained in Section II. We have provided this information (which we also did during the evaluation) and believe we have answered all the agencies’ questions about these figures.

#### *Executive Order 00-04 Requirement that Agencies Provide DAS with a Contract Request for Proposals*

The agencies state that they understand this requirement to apply only if DAS is conducting the competitive-bidding process. Following receipt of this interpretation in the agencies’

response, we contacted Mr. Medinger who confirmed that agencies are not required to file their RFPs with DAS. We will modify the report to reflect this new information.

### *HHSS Internal System for Tracking Contracts*

The agencies' response takes issue with our recommendation that the agencies should expand their internal efforts to track contracts and payments made under contracts. They state that the Finance and Support agency (F&S) has a contract database that contains "most" contracts and that the agencies will continue to use this database. In addition, they state that they cannot afford to create a "shadow" system that would duplicate the new Nebraska Information System (NIS). Finally, they state that they rely on their program administrators to monitor contract payments and limits.

We are familiar with the Finance and Support agency database. We are also aware that it has serious limitations, which the agency itself brought to our attention during the evaluation. First, staff members are not required to file contracts with the Finance and Support agency, so the database is known to be incomplete. (Since there is no master list of all HHSS contracts, there is no way for us to confirm or disprove the agencies' assertion that the database contains "most" of its contracts.) Second, the database does not contain fields relating individual contracts to the program areas with which they are affiliated or the total contract value.

In terms of the agencies' reliance on their program administrators, we note that, in order to select contracts for our evaluation, we had to ask these administrators to construct lists of the personal-services contracts under their purview. Neither had such a list on hand. In addition, neither had compiled information on contract payments or limits. As noted in our report, both the financial and contract-terms monitoring is left almost exclusively to individual program staff members. In addition, the agencies provide no formal guidance to these staff members about how to conduct such monitoring or what kind of documentation to maintain.

For these reasons, we believe it is unreasonable to expect the agencies to adequately address the issues we've raised if they continue to rely on their existing database and solely on program staff members. It is the failings in these existing systems that led to our recommendations that these functions be centralized.

We are fully aware that the NIS is being touted as a system that can be used for managing contract information, and we did not recommend that the agencies create a "shadow" system that duplicates it. What we recommended was that each program administrator develop a simple list of the contracts under his or her purview and compile basic information about the payments made under these contracts. If each program administrator had such a list, an agency director would be able to review these lists and have a good overview of the contracts in his or her agency. We recognize that such a list might not be a perfect answer, but it would be much better than what is currently available, which is nothing.

### ***Technical Issues***

We will make the following corrections:  
(Page and item numbers refer to agencies' response.)

Page 1, #2: Revise the footnote to include the direct-purchase authority option.

Page 2, #8: Clarify that NAS payment information cannot be tied to individual contracts.

Page 3, #10: Clarify that smaller-value contracts must be signed by a division administrator or deputy director.

Page 4, #1: Change the word "analysis" to "comparison."

Page 5, #5: Count the TMR contract as having provided public notice, based on new information provided with the agency's response.

Page 5, #7: Reduce from 5 to 4 the number of contractors in the sample who were former HHSS-agency employees, based on new information provided with the agency's response.

## *Addendum A*



RECEIVED

JAN - 8 2003

LEGISLATIVE RESEARCH

January 8, 2003

Cynthia Johnson, Director  
Nebraska Legislative Research Division  
Program Evaluation Unit  
P.O. Box 94945  
State Capitol  
Lincoln, NE 68509-4945

Dear Ms. Johnson:

Thank you for the opportunity to review the final recommendations and revised report on Personal Service Contracts from the Program Evaluation Unit and your comments on our December 2 response. We received your letter on December 24, 2002. We have tried to allow staff involved an opportunity to review all the materials although the holidays and staff absences related to the holidays have made this a challenging assignment.

As a program agency in state government, the primary mission of the Health and Human Service System is to deliver services authorized or required by state or federal law. We accomplish this with both staff and purchased services. HHSS has a variety of different types of provider agreements and contracts that were provided and reviewed in this study. The number of agreements and contracts can change daily as provider agreements are signed or cancelled, or as contracts are initiated, terminated or renewed.

When NIS is functional, we will have a point and click system for tracking contracts. At this time, we have several ways to track these agreements, and we are able to locate them for review, as we did for your staff. Some information is automated but much of the tracking, recording and monitoring is manual. We provided volumes of material including listings, examples, procedures, and copies of contracts for your staff and greatly appreciate their diligent review of this material. In addition, they also reviewed the expenditure information from DAS Accounting and information from DAS Material. We also use these existing systems, expenditure reports, budget and account coding structures and information to monitor our work. We have included some examples with this response.

As a large agency system that serves the entire state population we utilize many small and large computer applications to manage our service delivery. Our priority for investment of HHSS resources has been and continues to be those systems that most directly affect the consumer or citizen. This includes systems to license health professionals, systems to receive and distribute child support, systems to determine and monitor public assistance and Medicaid eligibility, systems to distribute Women, Infant and Children (WIC) nutrition benefits, and systems to record child and adult abuse and neglect.

Early after the merger of the 5 agencies we identified that it would be desirable to have a single location to track, manage and monitor existing agreements and contracts that were not included in the other large systems such as MMIS or NFOCUS. When we learned that the state would be developing a new accounting and payroll system that would include a contract component we determined that we would invest our limited resources into the development and implementation of the new accounting system instead of creating additional interim shadow systems.

The new system, now known as NIS, will be operational this fiscal year. We look forward to the implementation of NIS this year to replace the small systems and the multiple manual listings that have been created over time to handle this work. We have included a draft example of the functionality proposed for the contract component in NIS. We are not point and click now, but we soon will be.

We need to clarify that our comments on Recommendation #2 were not about agreeing or disagreeing with your determination as to whether the five items identified were "sound contract management practices" or whether they were, or should be, included in the Executive Order. Our comments were to dispute the implication of the recommendation that HHSS does not follow 'sound management practice'.

We believe that an Executive Order is a proper and suitable tool for this work and we believe we are substantially in compliance with Executive Order No. 00-04. The new Executive Order No. 02-03 incorporates the implementation of NIS in it's directive. It further clarifies the standards, procedures, and roles in contract development, review, and tracking. This new Executive Order and NIS support our efforts to increase consistency and accountability and implement a System policy for HHSS contracting.

Our comments and additional materials are attached to this letter. If you have questions about our response or the materials, please contact Mary Boschult, 471-9197.

Respectfully,

A handwritten signature in black ink, appearing to read "Steve Curtiss". The signature is fluid and cursive, with a large initial "S" and "C".

Steve Curtiss, Director  
Health and Human Services Finance & Support

A handwritten signature in black ink, appearing to read "Ron Ross". The signature is cursive and somewhat stylized, with a large initial "R" and "R".

Ron Ross, Director,  
Health and Human Services



**HHSS Additional Comments and information on the December 24, 2002  
Legislative Research Draft Report and Recommendations on  
Personal Services Contracts**

1. Budget status and expenditure reports are produced monthly and distributed to division and program managers in HHSS. Monitoring of the expenditures is one of the ways the contract and payments to contractors and providers are tracked.

Following is an example of how HHSS tracks contracts.

Example 1: The Subprogram Budget Status Report (see attachment)

- A. The contract is referenced by in which the agency it resides:
  1. Regulation and Licensure      Agency 20
  2. Services                              Agency 25
  3. Finance and Support              Agency 26
- B. The contract is referenced by Division.  
A list of Division numbers was provided in the study.
- C. The contract is referenced by Program.  
A list of Program numbers was provided in the study.
- D. The contract is referenced by Subprogram.  
A list of subprogram numbers was provided and each has a similar budget status sheet.
- E. Account codes  
A list can be found in the DAS Accounting Manual.

Example 2: Payment Sheet (see attachment)

All Subprograms have Account Code Descriptions. DAS defines these accounts in their manual, "The DAS Accounting Manual."

Account codes allow us to know what we pay the provider for doing. These document numbers reference the document that authorized the payment.

2. We believe we are substantially in compliance with the Executive Order and have attached the federal correspondence, regulations that explain the federal requirements for the two contracts (Iowa Foundation/Sunderbruch). These contracts are within the category of "otherwise covered by state or federal law" and were fully processed through those federal agency regulations and processes. As noted in the Unit Director comments (p.5) it is recommended, but not required, that agencies submit federal exemptions to DAS Material. We do not agree with the recommendation that DAS review federal exemptions.



Federal Medicaid law provides an enhanced federal financial participation (FFP) of 75% for Peer Review Organization (PRO) functions to the States participating in the Medicaid program if the State contracts with a **designated** peer review organization (PRO). The **designation** is made by the Health Care Financing Authority (HCFA), now the Centers for Medicaid and Medicare Services (CMS), through a contract award to do peer review for Medicare. If the State contracts with the same PRO as Medicare, the federal share is 75%. If the State does not contract with the same PRO, the federal share is only 50%.

Attached are copies of the Code of Federal Regulations sections that set forth these requirements. 42 CFR §433.15(6)(i) shows the 75% enhanced FFP for a PRO under contract with HCFA. Attached are copies of the Social Security Act that defines a PRO and requires the Secretary of the Health and Human Services Department (HHS) of which HCFA is a part, to contract with a PRO for each geographic region of the country.

Attached is a letter from HCFA to then-Director Jeff Elliott acknowledging that the contract with the Iowa Foundation for Medical Care (Sunderbruch) (IFMC) met all the requirements for the enhanced 75% FFP - ergo, that IFMC was the designated PRO for Nebraska's geographic region.

3. The cost analysis of the staffing versus purchase of child support services for Douglas County was located by the program staff and is included as an attachment. The analysis was done in 2000 as one of many proposals for consideration in the development of the 95% budget modifications in the 02-03 biennial budget request. We considered doing the child support services in Douglas County internally versus through an outside contract. The existing contract with Policy Studies Incorporated (PSI) was due to expire in March 2001.

We decided to issue an RFP and compared this new proposed amount against doing the work internally. Based on the resources necessary to meet the federal requirements of CHARTS and the State Disbursement unit, and avoid the large penalties possible, we made the decision that a new contract was the best choice. The proposal accepted from Young Williams was less than the contract amount with PSI. The 4/1/02-3/31/03 contract amount has further been reduced by the 4% across the board budget reduction.

4. The new state accounting system, NIS, will include a component for contracts. A draft of the proposed functionality and fields for this section is attached. This component will include all contracts for commodities and personal services. It will provide the place for "the point and click" queries of how many, what kind, what for, how long and how much paid or yet to pay on the obligation. We look forward to this new tool in our management of our contracts and agreements.

*The attachments that follow this section in the printed report are available as printed copies from the Legislative Research Division, Room 1201, State Capitol.*

## *Addendum B*



STATE *of* NEBRASKA  
EXECUTIVE OFFICE  
LINCOLN

**EXECUTIVE ORDER**

**No. 00-04**

**Selection of Contractual Services**

- 1.0 **Establishment.** The Governor of the State of Nebraska, through Executive Order 00-04, hereby orders that State agencies shall immediately utilize an open competitive process for selecting recipients for contracted services.
- 2.0 **Purpose.** The purpose of this order is to establish a standardized, open and fair process for selection of contractual services and to create an accurate reporting of expended funds for such services. This process shall promote a standardized method of selection in State contracts for services, assuring a fair assessment of qualifications and capabilities for project completion. There will also be an accountable, efficient reporting method of all expenditures for these services.
- 3.0 **Charge.** Each agency director shall be responsible for utilizing a process for selecting contractual services. For those contracts not currently covered by state or federal law, each agency shall follow the process prescribed by the *Procedure for the Procurement of Contractual Services* manual of the Department of Administrative Services - Materiel Division or an alternate process approved by the Director of Administrative Services.
  - 3.1 All services in excess of \$25,000 for a contract period shall be subject to the order.

- 3.2 Agency directors will be responsible for maintaining an accurate accounting of the process used for selection of all contracts, which shall include:
- (a) A clear scope of work;
  - (b) Cost comparisons to ensure reasonable fees;
  - (c) A defined work product expected;
  - (d) Coding to the appropriate line of coding. This will enable DAS Accounting to provide a report upon demand of all service expenditures.
- 3.3 Agency directors shall assure that each contract in excess of \$25,000 shall follow the DAS Materiel *Procedures for the Procurement of Contractual Services* manual or a process approved by the DAS Director.
- 3.4 Agency directors shall be responsible for adequate public notice of an impending project.
- 3.5 Agency directors shall be responsible for ensuring preparation of a request for contractual services to be filed with the DAS Materiel Division for dissemination or website access to vendors interested in competing for services.
- 3.6 DAS Materiel Division shall provide a procedural manual for procurement of contractual services to all agencies.
- 3.7 DAS Materiel Division shall be available to all agencies for assistance in providing vendor lists for specific services, for consultation, and for guidance in the process for the procurement of contractual services.
- 3.8 DAS Materiel Division shall provide procedures to grant limited exemptions for "sole source," "specialized sources," "emergency," and other unique requirements, subject to review by the DAS Director.
- 3.9 DAS Accounting shall be able to provide a report to the Director of Administrative Services on all service contract expenditures, upon demand.
- 3.10 The Department of Administrative Services shall work with agency personnel to continually assess the process to ensure it is open, fair, standardized, and expedites delivery of a work product.

#### 4.0 Powers.

- 4.1 The DAS Materiel Division will update and modify the *Procurement* manual to address change in scope defined by purchasing standards, state law and economic necessity.
- 4.2 The DAS Materiel Division may issue reports, recommendations and communications as necessary.


5.0 Governance.

5.1 Each agency director shall have the responsibility and be held accountable for adherence to this procedure.


5.2 The Department of Administrative Services and its divisions shall be responsible for a timely response to agency requests, monitoring procedure compliance and reporting same to the Governor.

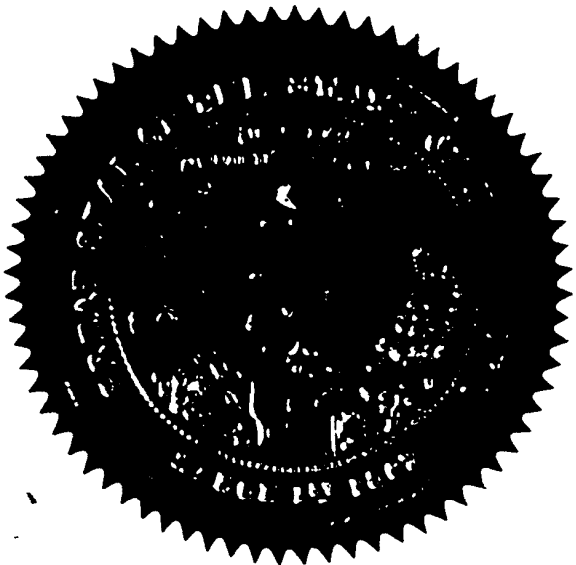
6.0 Sunset. This Executive Order becomes effective on December 21, 2000, and remains effective until rescinded. This Executive Order supercedes Executive Order 95-4.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nebraska to be affixed this 21<sup>st</sup> day of December, in the year of our Lord Two Thousand.

  
Mike Johanns, Governor  
State of Nebraska

Attest:

  
John A. Gale, Secretary of State  
State of Nebraska





# STATE *of* NEBRASKA

OFFICE OF THE GOVERNOR

LINCOLN

## EXECUTIVE ORDER

No. 02-03

### Selection of Contractual Services

**1.01 Establishment.** The Governor of the State of Nebraska, through Executive Order 02-03, hereby orders that all State agencies, constitutional officers, boards, and commissions (hereafter "agencies") shall immediately utilize an open competitive process for selecting recipients for contractual services. This Executive Order shall apply, under the terms and conditions set forth herein, to contracts entered into by state government for the purchase of services.

**2.01 Purpose.** The purpose of this order is to establish a standardized, open and fair process for selection of contractual services and to create an accurate reporting of expended funds for such services. This process shall promote a standardized method of selection in State contracts for services, assuring a fair assessment of qualifications and capabilities for project completion. There will also be an accountable, efficient reporting method of all expenditures for these services.

**3.01 Definitions.** For the purpose of this Executive Order, the following definitions apply:

**3.1 Contracts for Services:** Means service contracts and personal service contracts.

A. **Personal Service Contract** means any agency contract with an individual, either personally, or doing business as a sole proprietor or in corporate or other entity form, to perform a service or to render an opinion or recommendation. Multi-party contracts with one or more parties who are individuals are included in this definition.

B. **Service Contract** means all agency contracts for services other than personal service contracts.

- 3.2 **Emergency** means necessary to meet an urgent or unexpected requirement where health and public safety or the conservation of public resources is at risk.
- 3.3 **Sole source** means of such a unique nature that the person or firm is clearly and justifiably the only practicable source to provide the service. Determination that the person or firm is justifiably the sole source is based on either the uniqueness of the service or sole availability at the location required.

#### 4.01 Charge.

- 4.1 All agencies shall process and document all contracts through the Nebraska Information System ["NIS"], the statewide accounting system. The Director of the Department of Administrative Services shall specify the format and type of information for agencies to provide.
- A. Beginning April 1, 2003, agencies shall enter data on new contracts and amendments to existing contracts on the NIS as they occur.
- B. By no later than August 31, 2003, all agencies shall have completed entry of information onto the NIS about all contracts made prior to April 1, 2003 that are still in effect.
- 4.2 All agencies, except those exempted in Section 5.01, must comply with the review and competitive solicitation processes provided in this section for service and personal service contracts. No agency, subject to this section, shall expend funds for contracts for services unless the agency has complied with this Order.
- A. Agency directors shall assure that each service contract and personal service contract in excess of \$25,000 is competitively bid at the agency level in the manner prescribed by the DAS Materiel *Procedures for the Procurement of Contractual Services* manual or a process approved by the DAS Director or designee.
- B. Agency directors shall assure that each service contract and personal service contract in excess of \$50,000 is pre-reviewed by DAS Materiel Division and competitively bid at the agency level in the manner prescribed by the DAS Materiel *Procedures for the Procurement of Contractual Service* manual or a process approved by the DAS Director or designee.
- C. For each personal service contract in excess of \$50,000, agency directors shall, in addition to the requirements of Section 4.2(B), use the pre-process prescribed by the *People Resource Management Guide* provided by the Department of Administrative Services Personnel



Division or an alternative process approved by the Director of the Department of Administrative Services.

- D. Agency contracts for services subject to Sections 4.2 (A) through (C) shall meet the following requirements:
- (1) All proposed sole source service contracts shall be pre-reviewed by the Department of Administrative Services, except in emergency situations. In case of an emergency, contract approval by the Agency Director or his or her designee is required. A copy of the contract and agency justification of the emergency must be provided to the Director of the Department of Administrative Services within three (3) business days.
  - (2) Agency directors will be responsible for maintaining an accurate accounting of the process used for selection of all contracts, which shall include, but not be limited to:
    - i. A clear scope of work;
    - ii. Cost comparisons to ensure reasonable fees; and
    - iii. A defined work product.
  - (3) Agency directors will be responsible for ensuring contract compliance, which shall include, but not be limited to:
    - i. Services required under the contract are being performed;
    - ii. No payments shall be made until deliverables are received;
    - iii. Coding contracts appropriately into the NIS system.
  - (4) Agencies may not enter into contracts for services with an unspecified duration or an unlimited duration.
  - (5) Agencies may not structure contracts to avoid any of the requirements of this Order.
  - (6) Agency directors are responsible for adequate public notice of an impending project in accordance with the *Procedures for the Procurement of Contractual Services* manual.
  - (7) Agency directors are responsible for ensuring preparation of a request for contracts for services to be filed with the DAS Materiel Division for dissemination or website access to vendors interested in competing for services.
- 4.3 The DAS Materiel Division shall provide procedures to grant limited exceptions for sole source and emergency situations and for other unique circumstances, subject to review by the Director of DAS.

- 4.4 The DAS Materiel Division shall be available to all agencies for assistance in providing vendor lists for specific services, for consultation, and for guidance in the process for the procurement of contractual services.
- 4.5 The Department of Administrative Services shall work with agency personnel to continually assess the process to ensure that it is open, fair, and standardized, and that it expedites delivery of needed services.

**5.01 Agencies and Contracts for Services Exempt from Section 4.2 of this Order.**

**5.1 Agencies**

- A. The University of Nebraska (also exempt from Section 4.1);
- B. The Nebraska State Colleges; and
- C. The Legislature, Courts, and Constitutional officers

**5.2 Contracts for Services**

- A. Architectural and engineering services for capital construction projects;
- B. Contracts for services required by federal law, regulation, or policy, or by state statute, to be bid using a particular process or to be entered into with an identified contractor;
- C. Professional legal services and services of expert witnesses, hearing officers, or administrative law judges retained by state agencies for administrative or court proceedings;
- D. Any state or federal financial assistance passed through by an agency to a local political subdivision;
- E. Medical provider or practitioner agreements for participation in the Medicaid program or child welfare program administered by HHSS;
- F. Agreements for services to be performed for one state agency by another state or local government agency or contracts made by a state agency with a local government agency for the direct provision of services to the public;

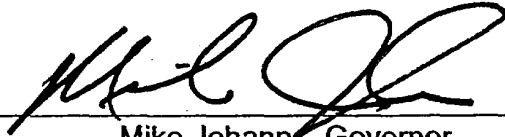
- G. Department of Insurance contracts for financial or actuarial examination, for rehabilitation, conservation, reorganization or liquidation of licensees, and for contracts for professional services related to residual pools or excess funds under the agency's control;
- H. Department of Roads contracts for all road and bridge projects.

**6.01 Governance.**

- 6.1 Each agency director shall have the responsibility and be held accountable for adherence to this procedure.
- 6.2 The Department of Administrative Services and its divisions shall be responsible for a timely response to agency requests, monitoring procedure compliance, and reporting to the Governor as requested.

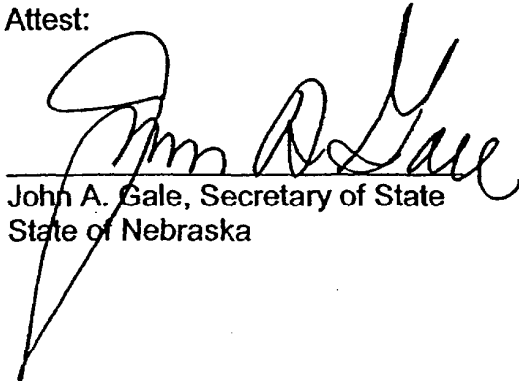
**7.01 Sunset.** This Executive Order becomes effective on December 20, 2002, and remains effective until rescinded. This Executive Order supercedes Executive Order 00-04, which is hereby repealed.

**IN WITNESS WHEREOF**, I have hereunto set my hand and caused the Great Seal of the State of Nebraska to be affixed this 20th day of December, in the year of our Lord Two Thousand and Two.



Mike Johanns, Governor  
State of Nebraska

Attest:



John A. Gale, Secretary of State  
State of Nebraska

