

# RISK REVIEW: Spending & Emergency Procurement

## Department of Health PPE Expenditures

### Emergency Use of State General Fund

### Purchases from Corrections Industries Division



## BACKGROUND

The coronavirus disease (COVID-19) was identified in late 2019 and spread worldwide throughout 2020, with the first cases confirmed in the United States in late January 2020.<sup>1</sup> As COVID-19 progressed and evolved Governor Michelle Lujan Grisham issued Executive Order 2020-004 (“Order”) on March 11, 2020 declaring a state public health emergency in response to the COVID-19 pandemic.

Following the declaration of the public health emergency several measures intended to slow the spread of the disease were taken by agencies statewide. As a result, complaints concerning allegations of waste, fraud, and abuse were submitted to the Office of the State Auditor (OSA) through its Fraud Hotline.<sup>2</sup> All complaints submitted to the OSA undergo thorough review often resulting in an examination by the OSA’s Special Investigations Division (SID). In many instances a single examination may incorporate numerous complaints or reports of waste, fraud, and abuse. The examination referenced in this report is an example of that practice.

The examination highlights three matters of significant concern:

- the ambiguity in the statutory authority of the Governor during an emergency, specifically as it relates to procurement and the emergency expenditure of State General Fund reserves (“General Fund”);
- the purchase of potentially fraudulent and/or substandard personal protective equipment (PPE) by the Department of Health (DOH); and
- the questionable application of the emergency procurement process and alleged price gouging by the Corrections Industries Division (CID) of the Corrections Department.

This document, prepared by the Government Accountability Office (GAO), serves as an advisory on some of the risks identified following the issuance of the Order due to the pandemic.

## EXECUTIVE SUMMARY

### *Introduction*

Regardless of the capacity in which they serve, public servants – from officials (elected or appointed) to employees (classified or exempt, permanent or temporary) – have a duty and a heightened responsibility to act as good and ethical leaders in governance and in particular with the expenditure of limited government resources. This is of utmost importance during a public emergency when extra levels of care must be taken out of concern for public safety. While certain executive powers may be invoked during a state of emergency to allow for a swift response to the emergency it is vital that transparency and accountability are at the forefront of every action and decision.

1: World Health Organization Timeline COVID-19: [Listings of WHO's response to COVID-19](#)

2: OSA Hotline references the mode for submitting complaints either by calling 1-866-OSA-FRAUD or visiting the online portal at [EthicsPoint - State of New Mexico Office of the State Auditor](#), [www.osafraud.org](http://www.osafraud.org)

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## EXECUTIVE SUMMARY (Con't)

In an effort to mitigate the risk of waste and/or abuse or even potential fraud related to the expenditure of public funds due to the public health emergency, the OSA emphasizes the need for review of proper policies, procedures, internal controls, statutory authority, and limitations. It is critical that the rules that govern action by public servants, including but not limited to internal controls, policies and procedures, statutes, and regulations be followed and should never be overridden, especially by management, those charged with governance, or any individual in a position of authority. Officials and management should always lead efforts to support proper behavior and adherence to the rules that govern action. When this does not occur, finite, limited resources and the public trust are at risk.

### *Objective/Scope/Methodology*

**Objective:** To provide information about potential risks identified from the open and ongoing SID examination.

**Scope:** To capture, review, analyze, and evaluate the allegations related to the authority of the Executive to expend emergency General Fund reserves, emergency procurements made by DOH in response to the Governor's declaration of a public health emergency for the COVID-19 pandemic, to include inventory controls over procured PPE, for appropriate execution, and the procurement of cloth masks by CID for resale to other state agencies at a significant markup was appropriate.

**Methodology:** The SID performed procedures to gain an understanding of the rules and regulations that govern the items identified in the scope. The review includes an understanding of the pertinent policies and statutes in existence that govern procurement, as well as consideration of proper internal controls and accounting.

## ANALYSIS

### *General Fund*

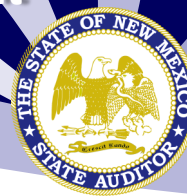
The provisional appropriations, while intended to enable a rapid response, could be interpreted as exceeding the Governor's authority concerning expenditure/use of the General Fund, depending on how "each eligible and qualified applicant" is interpreted. There are seemingly conflicting interpretations of the applicable authority governing emergency expenditures between the Executive and the Legislature. Specifically, what funds may be accessed for emergency disaster relief funding, what is an "eligible and qualified applicant" with regard to the \$750,000 for each eligible and qualified applicant pursuant to NMSA 1978, Section 12-11-24, and what reporting is required concerning emergency and disaster expenditure and disbursement to the Legislature?

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## ANALYSIS (Con't)

### *General Fund*

The OSA noted ambiguity in the statutory requirements governing executive authority to expend General Fund. It would not be appropriate for the OSA to make legal interpretations and therefore is unable to deliver legal assessment on the statutes, including NMSA 1978, Sections 6-4-2.1 (B) and 12-11-24. Additionally, existing statutes that lack clarity or that may be subject to varying interpretation may benefit from revision to clarify process and intent.

The Executive cites NMSA 1978, Section 12-11-24 to support their interpretation there exists no limit to the amount of public money that can be expended in response to the public health emergency or any emergency scenarios and expenditures were within applicable statutory authority. The Executive acknowledged that the relevant statute generally limits disbursements to \$750,000<sup>3</sup> in emergency expenditures from the General Fund for each eligible and qualified applicant, but it does not limit the number of eligible and qualified applicants.

### *Department of Health*

The OSA's review regarding the purchase of potentially fraudulent PPE by the DOH noted inefficiencies in the DOH emergency procurement process. The pandemic caused a global crisis, PPE was in short supply worldwide making it difficult for states to secure enough for medical staff and the public. This led to various procurement challenges, such as states having to bid against the federal government for PPE. Understanding and aware of the circumstances affecting New Mexico, and states across the country, due to the pandemic and the need to engage in swift procurement of PPE, the OSA identified problematic practices that may have been mitigated with the implementation of proper internal controls for emergency situations. The OSA notes there were no established internal controls to dictate efficient coordination, acquisition, and distribution for products or services during an emergency thus leading to troubling outcomes concerning the procurement of the emergency PPE. The lack of internal controls and adherence to any internal controls that were in place may have also led to potential procurement violations. Several deficiencies were noted by the OSA, including prepayment for goods and/or services, invoices paid prior to the creation of a purchase order, and lack of controls over inventory.

Due to critical timing and short supply of PPE available, the Executive identified what supplies and equipment were needed and selected distributors that required prepayment and utilized alternative supply chains to purchase the necessary emergency supplies and equipment. The OSA noted that the Executive selected the distributors through solicitations and DOH was directed to place orders with the referred distributors void of a vetting process by DOH. The Executive supported its direction pursuant to NMSA 1978, Section 12-10-4(B)(5).

In accordance with the Procurement Code, agencies executing emergency procurements are to employ a competitive process to the extent possible and to use due diligence in determining basis for procurement and selection of a vendor. While emergency procurements are exempt from the requirements of the State Purchasing Agent they are not exempt from the Procurement Code.

3: NMSA 1978, §12-11-24

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## ANALYSIS (Con't)

### *Department of Health*

The OSA notes an apparent breakdown of internal controls by the DOH that resulted in a failure to maintain adequate control over the purchase, receipt, and distribution process of the emergency PPE. The DOH has since responded that improvements have been employed and continue to be designed to address the inadequacies and prevent future instances of problematic procurement activities. The DOH indicated it continues to address the overall effectiveness and efficiencies concerning the ongoing need to procure PPE and is actively developing and implementing new internal controls.

### *Corrections Industries Division*

Corrections Industries Division claims to provide productive involvement in enterprise and public works of benefit to state agencies and local public bodies by servicing their purchasing demands without the need of a competitive bid. NMSA 1978, Section 13-1-98(A) provides this as a lawful exception to the Procurement Code. The OSA received a concern related to CID's cloth face mask sales to various state agencies during the pandemic. The OSA's review of the practice revealed that CID was accepting cloth face mask orders, ordering the product from third-party suppliers and other correctional industry programs, and invoicing the purchasing state agency at a significant mark-up for the cloth face masks.

While the OSA notes the purchase and resale practices employed by CID may not have been prohibited, the practice represents potential abuse of a system intended to alleviate barriers, and in this case to expedite necessary requests due to the pandemic and the declaration of the state's public health emergency. Recognizing the potentially problematic nature of selling goods at an increased price for government-to-government transactions, it is important to note the responsibility to conduct due diligence in procuring goods lies solely with the purchasing agency.

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## RECOMMENDATIONS AND CONCLUSION

### *Recommendations*

The following list of recommendations are provided to assist management, and those charged with governance, on some of the most critical risk factors identified over the course of this specific examination.

- The Governor's Office create policies and written protocols for emergencies to develop guidelines to procure emergency supplies, equipment, and services upon the onset of a disaster or public emergency.
- The Governor's authority to expend General Fund and the reporting to the Legislature regarding emergency expenditures be considered by the Legislature and the Executive during the 2021 New Mexico Legislative Session, particularly as it relates to ambiguity in statute.<sup>4</sup>
- The DOH continue to improve its emergency procurement process by implementing policies ensuring reputable vendors are used and to minimize the purchasing from vendors using alternative supply chains that may include substandard product.
- The DOH continue to improve its internal controls over medical supply inventory and distributions under its direct control by ensuring that inventory counts are performed regularly, tracking systems are accurate and DOH management receives regular updates from staff.
- The CID should consider adopting policies reflective of good faith and fair dealing that support best practices in government-to-government transactions.

### *Conclusion*

Management, and those charged with governance, are ultimately responsible for establishing, monitoring, communicating, and always enforcing internal controls. Especially, during times of an emergency when failure to do so may heighten the risk of improper expenditure of taxpayer funds, resulting in potential waste, fraud, and/or abuse. Regardless of justification or legal issues, taxpayer funds must be protected and expended sensibly, that responsibility lies with management. Management, and those charged with governance, must provide effective internal controls and oversight while also ensuring policies and procedures are developed to guide the use of, and protect, taxpayer funds.

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4: As of the issuance of this risk alert HB180 and SB295 have been introduced during the 55th Legislature, State of New Mexico, First Session, 2021.