

\$200M in emergency purchases skirt rules

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SANTA FE, N.M. — The state is bypassing normal purchasing procedures in response to the COVID-19 pandemic to pay for no-bid, sole-source purchases of masks, broadband services, coronavirus testing and even attorneys to defend Gov. Michelle Lujan Grisham's public health orders that have closed businesses.

The emergency procurement process isn't unusual, and it's also used by local governments.

But when the state Department of Health filed notice of an emergency procurement for \$200 million, it rattled cages in Santa Fe.

Emergency requests, under state law, are required to name the amount of each purchase or contract, the name and address of the vendor, the nature of goods or services purchased and the nature of the emergency.

The DOH, in its emergency procurement filing with the Department of Finance and Administration, does none of that.

"We posted the emergency declaration, earmarking the \$200 million to demonstrate there is sufficient budget available over the course of the pandemic," spokesman David Morgan said. He said individual expenditures will be detailed and posted on the state Sunshine Portal when the department has time and sufficient "people power."

The emergency spending money comes from the more than \$1 billion the state received from the federal CARES Act as part of the financial packages approved by Congress in response to the COVID-19 pandemic.

But the lack of transparency and involvement of the Legislature in the way the Lujan Grisham administration is spending the money has drawn the ire of Republicans and the Democratic-controlled Legislative Finance Committee.

"We're supposed to have a say on how the state spends this money. It is better to do it on the front end," said Rep. Patricia Lundstrom, D-Gallup and LFC co-chair. "I don't think it takes that much more time to let the Legislature know where the money is going."

'Public health first'

Typically, the emergency procurement laws are used for one-time purchases by state agencies for items such as emergency repairs of sewer lines and broken backup generators. Detailed accounting of how the money is spent is required.

That hasn't happened with the current spending.

The pandemic is the justification listed for the \$200 million emergency procurement posted by the Department of Health and approved by DFA.

According to the department's emergency application, "The goods and services being procured under this emergency determination will vary widely. Some of the goods and services that may be included under this emergency are:

"Personal protective equipment and supplies, medical providers, temporary labor, janitorial services and supplies, decontamination equipment and services, portable equipment, medical supplies, food, rent of facilities necessary to quarantine, IT services for tracking and reporting, and other goods and services necessary to manage, mitigate and contain this deadly virus."

"Make no mistake," Morgan said. "The Department of Health is committed to following procurement laws. However, given the priorities of all the items needed, we needed to prioritize purchasing in order to put public health first."

The emergency procurement will also pay for testing, tracing, telemedicine and treatment.



David Abbey

No question the pandemic is costing money. The American Health Care Association and National Center for Assisted Living, a trade organization, estimates that testing New Mexico nursing home residents and staff each week costs almost \$2 million.

That estimate doesn't include residents and staff at assisted living or other long-term care facilities.

Other procurements

The Department of Health isn't alone in posting emergency procurements.

Cities, including Farmington and Roswell, have made emergency procurements for masks and personal protective gear for first responders.

School districts have rented tents and purchased other materials to provide meals to students being taught at home.

State agencies use the procedure for getting broken sewer lines fixed at state buildings such as the State Veterans Home in Truth or Consequences.

Those emergency procurements are more typical of emergency purchases.

The General Services Department used a separate emergency procurement to hire the Albuquerque law firm of Freedman Boyd Hollander Goldberg Urias and Ward to represent the state against legal challenges to the public health emergency orders issued by Lujan Grisham.

The initial contract is for \$40,000, but it is for the duration of the cases the firm is asked to handle.

The request says the governor's staff lawyers are overwhelmed dealing with a large number of legal issues created by the pandemic and don't have the time to "respond to the high volume of complaints the Governor has received pertaining to the lawful executive orders."

Spending on technology

The Department of Information Technology issued an emergency procurement for broadband connectivity to rural parts of Sierra County at a cost of more than \$2 million.

Sierra County has one case of COVID-19 out of more than 500 tests, according to the state Department of Health.

The posted application says Sacred Wind Communications of Albuquerque received the contract.

However, the documentation for emergency procurement refers to a \$300,000 contract with Carahsoft Technology for subscription services to use a two-way texting system to monitor disease symptoms in at-risk individuals.

Fiscal planning

Legislative Finance Committee Director David Abbey has raised a number of issues on how the CARES Act money is being spent and how it could affect the state's looming budget crunch caused by the pandemic and crashing oil prices.

He said in a letter to Department of Finance Secretary Olivia Padilla-Jackson that to avoid "draconian reductions" in the state's next fiscal year, which begins July 1, the "Legislature and the executive need to ensure that initiatives to fight the pandemic reflect good fiscal planning and budget practices."

Abbey, whose department has to approve emergency procurements, said that he was concerned that there was no overall plan for spending the money from the CARES Act and that the Legislature was being excluded from any decision-making process on how the money is being spent.

Instead of using emergency procurements, Abbey said, the correct course was for the administration to file Budget Adjustment Requests with the LFC for legislative oversight.

The LFC chairman, Sen. John Arthur Smith, D-Deming, was conciliatory toward the administration in a telephone interview but was still concerned that the federal money was being spent without consultation with legislators.

“I wouldn’t want to be in the executive’s shoes,” Smith said. “We, the governor and the Legislature are in territory none of us has been before.”

Smith said the Legislature needs to know what the executive agencies are doing with the federal money so they can make better decisions on the state’s budget during June’s special session.

State Auditor Brian Colón said emergency procurements “can be necessary and adjustments to procedure may be required, but not at the risk of waste, fraud or abuse.”

He said his office would be “testing” the purchases made under emergency procurements, which means auditing the purchases made by departments under the emergency declarations.

Past problems

Emergency and sole-source procurements that get around the state public bidding laws have concerned legislators and state auditors in the past.

In 2016, both went after the administration of then-Gov. Susana Martinez for the use of emergency and sole-source purchases, and an LFC report found that state agencies were often paying too much by using sole-source or emergency purchases.

They recommended consolidated contract reviews under the Department of Finance and Administration.

Then-State Auditor Tim Keller’s office reached similar conclusions when an extensive audit found that state agencies used the emergency exemptions in the state Procurement Code to purchase more than \$105 million in goods and services.

The auditors found emergency justifications “that were not permitted by law, including a desire for convenience.”

Both reports noted that the problem was somewhat reduced by requiring agencies to post on the state’s public Sunshine Portal each request for emergency or sole-source purchasing for 30 days.

In 2019, the Legislature consolidated the oversight for emergency and sole-source purchasing under the DFA and narrowed the provisions for making such purchases.

The Lujan Grisham administration has set up some internal controls for tracking the CARES Act money flowing out of various state departments, and the DFA has set up accounts to track COVID-19 spending by each department that should provide a paper or electronic trail for purchases and contracts.

But it isn’t transparent to the public on the state’s Sunshine Portal.

Morgan said the Health Department will fix that by posting individual transactions in the near future.

“Given the volume of transactions per day it was, and still is, challenging to keep all individual transactions posted on the State Purchasing Division portal and subsequently the (public) Sunshine Portal,” he said.

Morgan said it would take “people power” to get the transactions posted.