Progress Report
Program Evaluation Unit
Legislative Finance Committee
October 28, 2021

Obtaining and Maximizing Value in State Procurement

Summary

Since 2016, LFC completed two evaluations on the state's procurement systems, highlighting deficiencies in the state's purchasing practices. The Legislature and executive agencies have acted on some of the evaluation recommendations, like consolidating functions of the State Purchasing Division at the General Services Department. Other important recommendations remain unaddressed, including repealing some widely used purchasing exemptions that circumvent competition and adding guardrails to the use of statewide price agreements.

The pandemic highlighted holes in emergency procurement procedures that, in some cases, allowed for fraudulent purchases and waste of taxpayer dollars. This progress report also indicates the state is still losing value due to management decisions by agency chief procurement officers and at the State Purchasing Division. These decisions include authorizing a growing number of sole source purchases, failing to act on appropriations from the Legislature to track spending, and not actively monitoring for violations of the Procurement Code. Further, in some cases the division is still not ensuring compliance with the conditions of its own statewide price agreements.

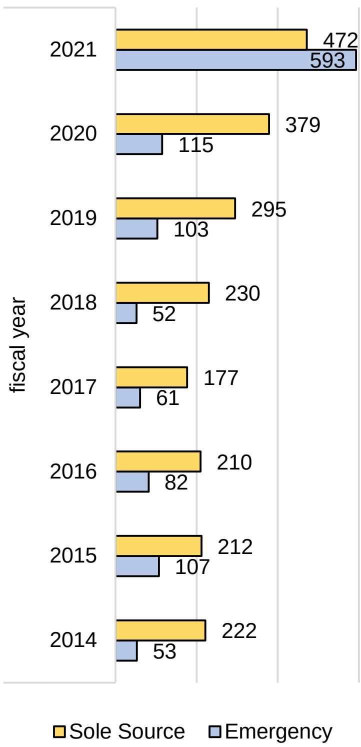
In response to these outstanding issues, LFC staff recommends three new statutory changes and list other outstanding recommendations for the Legislature and General Services Department to consider.

The Evaluations: *LFC's 2016* Obtaining Value in State Procurement and Issues with Non-Competitive Methods *and 2019* Maximizing Value in State Procurement *covered a multitude of issues with state purchasing practices, oversight, and compliance. Only two key recommendations of the reports have been implemented and funding for one—an IT system to State Purchasing—has been appropriated but not utilized by the division.*

Progress Reports foster accountability by assessing the implementation status of previous program evaluation reports, recommendations and need for further changes.

NEW MEXICO LEGISLATIVE FINANCE COMMITTEE

Chart 1. Number of Sole Source and Emergency Procurements



Source: New Mexico Sunshine Portal

Table 1. Value of Sole Source and Emergency Procurements
(in millions)

	FY14	FY21	Change
Emergency	$22.1	$142.1	543%
Sole Source	$78.4	$172.8	120%
TOTAL	**$100.5**	**$314.9**	**213%**

Source: State Purchasing Division

Growing Use of Noncompetitive Procurement Costs the State Millions

In an ideal world, all the goods and services that New Mexico government entities buy with taxpayer dollars would be competitively sourced, with vendors competing to offer the best discounts to secure the state as a customer. The state would facilitate this situation by employing a central group of professionals responsible for ensuring the state gets the best deals. They would do this by not only negotiating contracts, but also keeping track of larger spending patterns of government agencies to identify how the state could be buying smarter. This type of active monitoring would naturally combat the waste, fraud, and abuse of taxpayer dollars that can inadvertently or purposefully occur without such oversight and guidance.

However, as highlighted by LFC over two evaluations in the past five years, state law, management decisions at the State Purchasing Division of the General Services Department, and noncompliance by state agencies have often led to the state overspending for purchases ranging from everyday acquisitions of laptops and cars to noncompetitively sourced contracts worth hundreds of millions of dollars.

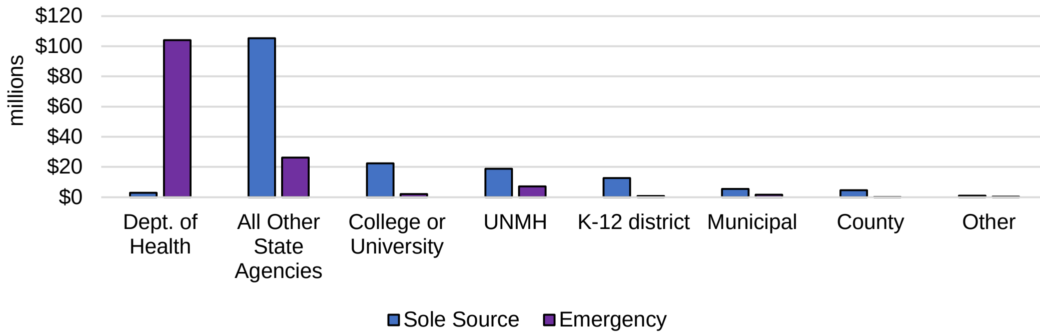
The two most well-known methods of noncompetitive procurement highlighted in LFC's 2016 evaluation are sole source and emergency procurements. In 2016, LFC showed these methods were overused, resulting in excess costs to state agencies. Despite that warning, the use of emergency and sole source procurement methods has only grown since that time, increasing the urgency for both the executive and Legislature to address these types of noncompetitive spending.

The pandemic corresponded with more sole source and emergency procurements than ever before. The use of sole source and emergency procurements has been steadily growing since FY17. Understanding a full solicitation for bid is sometimes impractical, the state's Procurement Code and regulations provide avenues by which state government and local public bodies can purchase items in a noncompetitive manner. These include

- Allowing direct purchases when the total purchase price for a good or nonprofessional service is relatively small, ($20 thousand or less),
- Allowing agencies to circumvent the competitive process if they assert there is only one vendor that could provide the goods or services (sole source), and
- Allowing agencies to avoid the competitive process in times of emergency.

Since FY14, the number of sole source and emergency procurements logged on the State Purchasing Division's website has grown from 275 to 1,065. The combined value of these procurements has also grown from $100.5 million to $314.9 million. Driven by the pandemic, the number of emergency procurements logged by New Mexico state and local governments, public school, and higher education entities was over five times higher in FY21 than in FY20. The combined value of these emergency and sole source procurements in FY21 was $142.1 million and $172.8 million, respectively. Due to their noncompetitive and (in the case of emergency procurements) rushed nature, the state may lose value from these sole source and emergency procurements.

Chart 2. Amount of FY21 Sole Source and Emergency Procurements



Note: "Other" includes local water and housing authorities and other quasi-governmental entities.

Source: New Mexico Sunshine Portal

State Purchasing noted to LFC staff that the division has no statutory authority over emergency procurements made by state agencies. The Department of Finance and Administration's Financial Control Division does, however, have the authority to deny state agency emergency procurements through their Model Accounting Practices or MAPs. As such, the State Controller does sign emergency determination forms.

For sole source procurements, State Purchasing noted that it does review proposed sole source purchases but has no authority to deny them except for proposed sole source professional services agreements with executive agencies when they lack form or legal sufficiency. However, DFA's MAPs stipulate that State Purchasing can "decide whether to accept the [sole source] request or require additional justification from the state agency." As such, there is a discrepancy between the two entities on if State Purchasing can or cannot deny agency sole source determinations.

Much of the emergency spending during the pandemic was under a $200 million blanket emergency procurement authorized by the Governor. The vast majority of emergency procurements ($104 million) in FY21 were by the Department of Health (DOH) which, until the end of FY21, was working under a blanket emergency determination declared by the Governor as part of the original Covid-19 public health order issued in March 2020. The blanket emergency determination was for all purchases by the Department of Health up to a total of $200 million. The Department of Finance and Administration (DFA) discontinued allowing DOH to use the emergency authorization on June 30, 2021. However, ongoing payments under contracts and purchase orders authorized before July 30 under the blanket emergency declaration will continue. These ongoing purchases include an estimated $25 million for testing, contact tracing, and personal protective equipment (PPE.) They also include a $364.7 thousand contract to Momentum Santa Fe, the consulting company of former Deputy Secretary of Tourism Audrey Herrera-Castillo, to manage $7.6 million in contracts to community organizations to promote Covid vaccines through June 30, 2024. Any new emergency procurements from the Department of Health moving ahead will need to include their own stand-alone justifications for approval.

Recommendations for Securing Emergency Procurements from the LFC and State Auditors' June 2020 Risk Advisory:

- Utilize statewide price agreements and the expertise of State Purchasing Division staff
- Apply the utmost scrutiny to large purchases
- Prevent price gouging by shopping around and negotiating with vendors
- Investigate unknown vendors
- Avoid prepayment
- Abide by transparency laws
- Reconcile purchases and report counterfeit, damaged, or otherwise unsatisfactory goods to the State Purchasing Division and State Auditor
- Plan for ongoing procurement needs.

Examples of fraudulent or mishandled PPE purchases identified in the Department's 2020 financial audit:

- The department did not provide the basic, statutorily required information for any of the sampled emergency or sole source PPE purchases within three business days for posting on the State Purchasing website.
- Five of 32 invoices sampled were paid before a purchase order was created, amounting to approximately $6.5 million.
- Of five PPE orders at the department's emergency operations center warehouse,
  - Four didn't have enough documentation for the auditors to tell if the shipments received were of the correct quantity or what was actually ordered.
  - Four did not have signed delivery documents to confirm if the items were actually received
  - One shipment did not correspond to the actual amount of PPE ordered
  - The auditors could not locate any record of delivery for one shipment.

Source: Department of Health's FY20 Financial Audit

A "tremendous amount of volume and activity during the initial and middle stages of the pandemic lead to management oversight and lack of internal policy and procedures to properly procure, certify the goods being received, and met the specifications of the goods purchased during the pandemic."

Source: Department of Health's FY20 Financial Audit

Despite multiple warnings, hurried emergency PPE purchases led to instances of fraudulent and mishandled purchases. Early in the pandemic, the rush to purchase masks, sanitizer and other PPE opened new doors for fraudsters to make sales to the government. Rushed emergency procurements elevated the state's risk of purchasing unknown items from unvetted vendors in ways that circumvent normal purchasing procedures. By April 2020, the FBI had released official warnings to government and health care industry buyers of PPE fraud. DFA and the General Services Department released a memo on May 15 to state agencies, restating the requirements for emergency purchases to help prevent fraud, waste, and abuse of this mechanism. In June 2020, LFC also released a joint risk advisory with the Office of the State Auditor with recommendations for New Mexico governmental entities to reduce the risk associated with emergency procurements. Nevertheless, by summer 2020, the Department of Health had already pre-paid for millions of dollars of PPE, some of which were never delivered or accounted for.
The 2020 Department of Health audit had specific findings around these PPE purchases, some of which were fraudulent, and others in which the department broke procurement rules. According to the audit, a "tremendous amount of volume and activity during the initial and middle stages of the pandemic lead to management oversight and lack of internal policy and procedures to properly procure, certify the goods being received, and met the specifications of the goods purchased during the pandemic." Some examples of these fraudulent or mishandled PPE purchases are listed in the gray box to the right.

Agencies continue to rely on emergency procurements as a result of mismanagement rather than to respond to actual emergencies. State law details that the only purpose for making an emergency procurement when a service, construction or item is needed immediately to:

1) control a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; or
2) plan or prepare for the response to a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event.

However, LFC's 2016 procurement evaluation found multiple instances of emergency procurements instead being employed as a result of poor planning (such as forgetting to start a new RFP process before the end of an existing contract), a lack of maintenance, or other management mistakes. These misused emergency procurements are still being allowed to continue, some creating escalating costs to the state.

In one recent example, The General Services Department (GSD) had to issue a three-month emergency contract and then extend that emergency contract for another six months with escalating costs because the department missed timelines for reissuing a competitive RFP for operations of the Stay Well Health Center. On June 25, 2021, GSD sent a request letter to DFA to enter into an emergency contract with Cerner to continue to operate the Stay Well Health Center from July 1, 2021 to September 30, 2021 for $350 thousand ($117 thousand per month.) Cerner's original contract was set to expire June 30, 2021 and GSD had not completed the request for proposal (RFP) process "to obtain a new contract for those services or wind-up operations and close the Center." According to the letter, the Center sees about 400 patients per month, some of which have chronic conditions and use the Center as their primary care provider. GSD states that after either the RFP is complete or if the department decided to shut down the center, "it will be necessary to continue to provide transitional healthcare and administrative services for up to *90 days* after the expirations of the current contract." By September 1, 2021, GSD requested a six-month extension to its June emergency contract and also to increase the contract payout by $16 thousand per month for those six months (bringing the new total monthly compensation to $133 thousand per month.) The increased cost was justified to retain existing staff, add an additional nurse practitioner, and cover the cost of consumables. The increased time was needed because GSD had still not completed the new RFP process. GSD's September request now states that even after the RFP is completed "it will be necessary to continue to provide transitional healthcare and administrative services for up to *180 days* after the expirations of the current emergency contract."

In another example, in September 2021, the Gaming Control Board reported an emergency procurement for $610 thousand for one year to Scientific Games International, Inc. for its gaming central monitoring system. The board justified the emergency procurement because "the Gaming Control Board failed to complete an RFP for the replacement of its statutorily required central monitoring system with sufficient time prior the expiration of the existing contract for maintenance and support." In late 2013, the Gaming Control Board had penned a four-year contract with Scientific Games International, Inc. to develop the central monitoring system and then further extended that contract a year at a time for an additional four years. Since 2014, the Gaming Control Board has paid Scientific Games International, Inc. almost $3 million under that extended contract.

The state's emergency procurement regulations are more permissive of what constitutes an emergency than statute. State law governing emergency procurements states that emergency procurements are only to be used to plan, prepare or control a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event (Section 13-1-127 NMSA 1978.) However, the regulations of the General Services Department's State Purchasing Division are more permissive. State Purchasing Regulations in 1.4.1.59 NMAC states that "an emergency condition is a situation which creates a threat to public health, welfare, safety or property such as may arise by reason of floods, epidemics, riots, equipment failures or similar events. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:

Screen grab of an emergency determination from September 2021. Though the determination is only one month old, the Department of Transportation used an old emergency determination form from 2015 citing the more permissive regulations.

2015 Emergency Form

STATE OF NEW MEXICO
EMERGENCY DETERMINATION FORM

The emergency procurement method (NMSA 1978, Section 13-1-127) may only be used when there exists a threat to public health, welfare, safety or property requiring procurement under emergency conditions. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:

1. the functioning of government;
2. the preservation or protection of property; or
3. the health or safety of any person.

I. Name of Agency: New Mexico Department of Transportation

- *the functioning of government; [emphasis LFC]*
- the preservation or protection of property; or
- the health or safety of any person."

A threat to the functioning of government, while consequential, is not defined in statute as an emergency. Therefore, the State Purchasing regulations create a more permissive avenue for emergency procurement that is not aligned with state law. Until recently, this more permissive use was still listed at the top of State Purchasing's emergency forms. While State Purchasing changed the forms in 2020 to be more aligned with statute, agencies continue to use the old form with the more permissive regulations listed at the top.

New transparency measures have not stemmed the tide of sole source procurements. LFC's 2016 procurement evaluation recommended that the Legislature require all sole source and noncompetitive procurement be posted on a single website for transparency purposes. In 2019, passage of Senate Bill 88 resulted in a requirement that sole source and emergency procurements be posted to State Purchasing's website. Now state agencies, schools, local governments and colleges wishing to make a sole source procurement must

1) Post the prospective procurement to State Purchasing's website for 30 days to allow for any challenges from other vendor, and if unchallenged, and
2) Have sole source professional services agreements approved for form and legal sufficiency by the General Services Department.

State Purchasing then records the closed sole source procurement on its website for transparency and recordkeeping purposes.

As a result of the Senate Bill 88 changes, more information is available to legislators and the public, but use of noncompetitive procurement methods has not decreased. Since FY17, the use of sole source procurements has risen steadily–growing 167 percent over that time to 472 sole source procurements by all state, local, and other governmental entities in New Mexico in FY21.

Defying statute, some emergency and sole source procurements have not been disclosed to State Purchasing or the LFC. Under the Procurement Code (Section 13-1-127 C. NMSA 1978) state agencies, schools, colleges and all other local public bodies subject to the Procurement Code must "promptly" report emergency procurements to the State Purchasing Division so that it can post the procurement to the State Purchasing website. State agencies are further required to do the same reporting to the Department of Information Technology and the LFC within three days (Section 13-1-128 C. NMSA 1978.) State agencies, schools, colleges, and all other local public bodies subject to the Procurement Code are under similar reporting requirements for sole source procurements. Section 13-1-126.1 NMSA 1978 requires those entities to post proposed sole source contracts on the State Purchasing website for at least 30 days before awards and Section 13-1-128 A. NMSA 1978 states all those entities must forward sole source procurement information to the Department of Information Technology and LFC before award of the contract.

Some entities are not reporting their sole source or emergency procurements to any required reporting entity, however. For example, Albuquerque Public Schools lists 81 sole source and emergency procurements worth at least $21.3 million since 2016 on its own procurement website, including a sole source procurement to Robotics Management Learning Systems, the company associated with a former legislator now charged with millions of dollars' worth of alleged procurement fraud. However, only one procurement from 2016 is listed on the State Purchasing website.

When LFC staff inquired about the school district's omission, State Purchasing reported it posts all sole source and emergency procurements and, if any local public body, court, or school fails to submit the required information on a sole source or emergency procurement, State Purchasing staff members would not know about it because they are not involved with those procurements. Further, State Purchasing asserted it does not have the authority to audit whether all entities are complying with requirements to report sole source or emergency requirements. However, Section 13-1-95 NMSA 1978 states State Purchasing has both the "authority and responsibility" to require state agencies to furnish reports concerning use, needs, and stocks on hand of items of tangible personal property and the use and needs for services or construction.

Because of this discrepancy and the inconsistent reporting of sole source and emergency procurements to LFC, the Legislature may want to consider adding further clarification and duties to Section 13-1-95 NMSA 1978, requiring State Purchasing to actively gather information from all governmental entities on their sole source and emergency procurements annually. This process would help State Purchasing identify nonreporting violations and work with the noncompliant agencies to restore required reporting.

The increased approval of sole source procurements may mean State Purchasing and agencies are proceeding with sole source procurements for purchases that should go out for bid.

In one example, the Aging and Long-Tem Services Department requested a sole source determination for a $2 million, one-year contract to Palco Inc. for financial management services for the 10 clients in the federal Veteran Directed Care Program run by the agency. Initial comments from SPD on the sole source determination questioned the uniqueness of Palco and highlighted ALTSD was aware of other vendors but preferred its existing relationship with Palco. However, in the final determination that SPD eventually approved, ALTSD simply deleted any reference to other vendors. Since October 2017, the Aging and Long-Term Services Department has executed nine sole source procurements worth $1.3 million with Palco Inc. for the Veteran Direct Care Program. However, Palco Inc., an Arkansas-based company, is only one of many financial management services in the country (others include ACES$, Consumer Directions Inc., and PPL) and other states procure these financial management services via a traditional request-for-proposal process. As such, Palco is unlikely to be the only, or sole, provider of these services.

The Department of Finance and Administration provided exemptions to its one-year limit on the state's two largest, most recent sole source contracts—both of which have resulted in escalating costs to the state. According to DFA's model accounting practices, sole source contracts are to be for no more than 12 months unless a waiver is granted by the State Controller. However, DFA has provided exemptions to this rule for the state's two largest, most recent sole source contracts. In doing so, it has made it so the majority of sole source procurement dollars are actually authorized under this exemption, while only a smaller portion of the sole source procurements fall under the one-year rule.

In FY21, $72.2 million of the $105 million sole source contracts from all other state agencies was for a July 2020 sole source contract from the Corrections Department to CoreCivic to operate the Northwest Corrections Center in Grants for up to 673 prisoners for four years. In its sole source request, the department stated it would need to rely on the private prison until it is fully staffed and able to manage all inmates in state-owned facilities. The cost per inmate per day stipulated in the 2021 sole source contract was $68.06, up from the department's prior contract with CoreCivic of $60.78 per day—a 12 percent increase in one year. This $72.2 million was in addition to a two-month, $2.7 million emergency procurement the department made with CoreCivic the month before because the sole-source procurement process was delayed for nonspecific Covid-related reasons.

LFC cited the 2015 contract between the department and CoreCivic as an improper use of sole source procurement. The evaluation found the department did not adequately prepare to issue a request for proposals for the prison's operation and instead issued serial noncompetitive sole source contracts, which the Department of Finance and Administration approved.

In another multi-year sole source, in early FY22, the Human Services Department (HSD) had to develop a new, $114 million three-year contract with Conduent State Health Care to continue to operate the state's existing Medicaid management information system after contracting and planning mishaps delayed the build-out of a new system by five years. In the FY22 sole source contract, the state agreed to pay Conduent $39.8 million to operate the Medicaid system, $16.5 million more than they did in FY13—a 71 percent.

Categorical Exemptions from Competitive Purchasing Are Still Overused

Apart from payments between government entities and to reimburse employees, payments made by state agencies that were either exempt or for purchases excluded from the Procurement Code grew to $683.3 million in FY21 from $543.9 million in FY17. In FY21, exempt and excluded purchases were 37 percent of the total $1.8 billion expenditures.

Across three sections of the Procurement Code, New Mexico exempts 40 broad types of purchases and buyers from the Procurement Code. Some exemptions might provide benefits, such as exempting home-rule municipalities with their own purchasing ordinances. Other exemptions, including one exempting purchases for the purpose of creating a network of healthcare providers or jointly operating a common health care service, may be outdated and allow for hundreds of millions of dollars in noncompetitive purchases to occur.

Using that healthcare-related exemption (Section 13-1-98.1B NMSA 1978), the Human Services Department (HSD) has spent $33.7 million with its Medicaid actuary, Mercer, since FY17 without State Purchasing oversight. The same statutory exemption has allowed multiple state agencies to join a $492.9 million noncompetitive contract with Falling Colors to serve as an administrator for the Behavioral Health Collaborative and several other functions. HSD also claims, technically, its $5 billion procurement for Centennial Care 2.0 (Medicaid) managed care organizations (MCOs) under the same statute is exempt from competitive procurement, though the agency followed a traditional competitive process when the contracts for the MCOs last went out to bid.

State agencies have spent $303.5 million on services from Falling Colors and might spend up to $492.9 million by the end of FY22.

In August 2017, the state's Behavioral Health Collaborative (HSD, CYFD, ALTSD, and BHSD) inked a contract with Falling Colors to serve as the collaborative's "administrative services organization," or ASO. In essence, Falling Colors was contracted to enter into separate agreements with third-party providers and vendors to deliver and oversee the state's behavioral health services and develop and maintain some state agency IT systems related to the collaborative's work. State agencies involved in the collaborative determined the contract was exempt from the Procurement Code under Section 13-1-98.1B NMSA, which provides the Procurement Code does not apply when purchasing services to create a network of healthcare providers or jointly operating a common healthcare service if the state purchasing agent or a central purchasing office makes a determination the arrangement will or is likely to reduce healthcare costs, improve quality of care, or improve access to care.

Falling Color's original contract from August 2017 was for $160.7 million for 36 months. Falling Colors would keep $15.5 million as indirect costs. The rest was for direct services or pass-throughs to service providers. Since that time, the contract has been amended 27 times to grow the total cost of the contract to $492.9 million, stretch the end date to June 30, 2022, and expand the scope of work to include work from the Department of Health (federal CARES Act programming and the Open Beds program) and Early Childhood Education and Care Department (Medicaid home visiting pilot for new families). Under the latest amendment, Falling Colors is now authorized to receive up to $135.9 million in indirect costs over the five years of the contract. In other words, through multiple amendments, the total cost of the contract has grown over 200 percent, and Falling Color's share of those contract costs has grown almost 800 percent.

In addition to Falling Color's large contract, the state also has a general price agreement with the company for IT professional services. Most recently, the Public Education Department used this price agreement to pay Falling Colors $27,109 to create the department's tracking dashboard for federal elementary and secondary emergency relief funds.

State agencies have also relied on the exemption for advertising in Section 13-1-98 NMSA to make millions of dollars of noncompetitive purchases. Contracts under this exemption in FY21 have included $3.6 million from the Department of Finance and Administration to Real Time Solutions so that Real

Time Solutions could make and place advertisements for the federal emergency rental assistance program. The Department of Finance and Administration created a similar exempt, noncompetitive, $3.2 million contract with the firm MediaDesk NM to make and place advertisements promoting the 2020 census. In both cases, the department provided the exemption for itself via a memo from the department's general counsel to the state controller without any outside oversight. The exemption memos for both states the contracts are exempt because the entity the Department of Finance and Administration was contracting with would use most of the contract amount to purchase media ads.

Setting caps on all exempt purchases and eliminating certain broad exemptions are unaddressed recommendations from the LFC's 2016 procurement report. Due to the recent immense scope of some exempt expenditures and noting HSD already forgoes the procurement exemption for its Medicaid MCO contracts, the Legislature might want to consider repealing the exemptions under Section 13-1-98.1 (for healthcare-related purchases.) For all other exemptions, the Legislature may still want to consider amending the Procurement Code to set price limits (e.g., $10 thousand) for exempt purchases.

Despite Significant IT Investments, State Purchasing is Still Not Tracking Spending

Even though the State Purchasing Division is legally responsible for the preparation of statistical data concerning the acquisition and usage of all services, construction and items of tangible personal property by state agencies (Section 13-1-95 NMSA) the division is not performing that duty. State Purchasing is also not fulfilling its statutory obligation listed in the same Section 13-1-95 to collect information concerning procurement matters, quality, and quality control of commonly used services, construction and items of tangible personal property. As a result, a finding of the 2019 LFC procurement evaluation still stands: State Purchasing is not using actual spending data to inform its or other state agencies' contract negotiations. This is true even for State Purchasing's own statewide price agreements which enable multi-millions of spending.

State Purchasing is just starting to act on a FY20, $1.9 million IT project to track price agreement use, delaying other key procurement system upgrades. The LFC's 2019 procurement evaluation found State Purchasing lacked the business analytics capabilities and technology to collect, analyze, and use spending and vendor performance data. As a result, the evaluation recommended the Legislature approve State Purchasing's funding request to configure the strategic sourcing and eProcurement modules for SHARE, the state finance and human resources system. In the 2020 session, the Legislature appropriated the full, $1.9 million request for the initial steps to implement the strategic sourcing module so all vendor management, requests for proposal, invitations to bid, and other sourcing event information could be housed within SHARE. However, two years later, State Purchasing is just now beginning to seek out a project manager to implement the module. State Purchasing staff said the pandemic delayed action. Because IT appropriations are authorized for three years (through FY22 in this case), State Purchasing will need to request an extension of the $1.9 million appropriation this year to continue on with the project.

LFC's 2019 evaluation found several other states developed "eMarketplaces" to automate purchasing of items from price agreements. These eMarketplaces ensure agencies consistently order items for the lowest price possible and that all information about the purchase is correctly recorded in the state's accounting system. These eMarketplaces also allow state purchasing staff to track spending on items within price agreements and how vendors are changing prices for products over time—something State Purchasing claims it cannot do currently.

In 2019, State Purchasing told LFC staff the configuration of the strategic sourcing module in SHARE was the first phase of a larger implementation of eProcurement features in SHARE. At the time, the department planned to request funding for the contract management module in FY22 and then supplier eMarketplaces functionality in FY23. However, with the initial strategic sourcing work pushed back two years, State Purchasing is unlikely to tackle the key eMarketplace work until FY25 or later.

State agency use of price agreements continues to grow. Price agreements are statewide contracts negotiated and managed by State Purchasing that allow agencies, local governments, schools and colleges to purchase frequently-used goods and services at a set ceiling price, a set

Table 2. State Agency Spending from Statewide Price Agreements is up Nearly $70 Million Since FY19
(In thousands)

FY21	$284,880.4
FY20	$275,522.7
FY19	$216,329.5

Source: SHARE

FY21 Examples of Multimillion Dollar Price Agreement Expenditures

- $13 million from the Department of Health to Real Time Solutions for six months of advertising and media work to promote the Covid-19 vaccine authorized under an unrelated, IT services statewide price agreement,
- $7.5 million from the Workforce Solutions Department to Yearout Energy Solutions to remodel and renovate the Tiwa Building in Albuquerque,
- $4 million from the Public Education Department (PED) for the Canvas learning management system purchased through a cloud solutions statewide price agreement with SHI international
- $1.6 million from PED for Emergency Panic Buttons from Lyme Computers System Inc.

discount, or both. Theoretically, State Purchasing is negotiating the terms of the price agreements by leveraging the buying power of the entire state for discounts. But, as stated in the prior section, without spending data, the actual buying power of the state is left to State Purchasing's best guesswork.

LFC focused on the use of price agreements over other contracts in its 2019 evaluation for a few reasons. First, the amount of spending underneath price agreements is considerable. The 2019 procurement evolution found state agencies alone purchased $216 million worth of goods and services from statewide price agreements. Spending under statewide price agreements in FY21 grew to $284 million—several times the size of many state agency budgets.

Second, past work by both LFC and the Office of the State Auditor found that without sufficient guardrails limiting product types and encouraging agencies to purchase in bulk and negotiate further discounts, price agreements can actually dissuade savings because they do not require agencies to shop around for better prices or seek bulk discounts. Instead, with price agreements, agencies are free to purchase millions of dollars' worth of goods and services through direct purchase orders.

Many price agreements also offer a wide range of products without any accompanying advice to agencies to aid them in deciding between "nice-to-have" versus "need-to-have" products. The Office of the State Auditor further flagged that agencies are not required to select the lowest price when a suite of options are on a price agreement, solicit quotes from additional sources, "or in any way research that the agency is receiving the best value when using a price agreement." The 2019 LFC procurement evaluation found this to be true using examples of laptops, cars, and ammunition where agencies were not standardizing purchases, purchasing in bulk, or otherwise seeking additional discounts.

Since that time, in FY20 State Purchasing released a guidance document reaffirming that negotiating a separate contract or obtaining additional quotes before using a price agreement is best practice, but not required.

In the absence of State Purchasing guidance, the Legislature could create guardrails around the use of statewide price agreements. In 2017, the State Purchasing Division issued helpful guidance to agencies using price agreements that said purchases for general services of $60 thousand or less, or professional services $5,000 or less, can be made via direct purchase orders from agencies to the vendor under a statewide price agreement. According to that guidance, purchases for any services over the thresholds must occur under a separate contract between the agency and vendor according to the terms of the price agreement, though the contract does not need to be competitively sourced. However, State Purchasing rescinded that guidance in July 2019. The Legislature may want to consider galvanizing the terms of the 2017 guidance into the Procurement Code. Further, and also in line with the recommendation of the 2019 report, the Legislature should consider requiring agencies to comply with federal regulations requiring purchases of general services between $10 thousand and $60 thousand to occur only after the agency has gathered and documented three quotes.

Forty-three of State Purchasing's statewide price agreements are over 5 years old and, therefore, may reflect out-of-date pricing. As of September

21, 2021, State Purchasing had 265 active statewide price agreements with over 1,200 vendors. About a third (72) of these price agreements were negotiated within the last year, and over half (142) were negotiated within the last two years. However, State Purchasing has been using some price agreements for much longer. Forty-three of State Purchasing's statewide price agreements are over 5 years old and have been kept active via contract extensions.

The oldest price agreement State Purchasing has is to allow agencies and local governments to buy inmate computer kiosks from two vendors, J Pay Inc. and Centric Group LLC. The agreement is a national contract which New Mexico joined via a purchasing consortium called the National Association of State Procurement Officials. That national contract was first negotiated from November 2011 to July 2015 and then extended to July 2022. However, no state agency has used the price agreement since at least 2014, the furthest back purchase records can reliably be pulled from SHARE. Local governments may be using the purchase agreement for their own jails, but State Purchasing has no way of tracking that potential use.

The 2019 LFC procurement evaluation noted State Purchasing is required by statute (Section 13-1-95 E. NMSA 1978) to procure a price agreement for any local government, school, or other subdivision of the state that requests one. However, State Purchasing has noted it cannot track the use of these price agreements outside of the state's SHARE accounting system.

To give State Purchasing more discretion over which price agreements are most beneficial, the 2019 evaluation recommended the Legislature consider changing the statute so State Purchasing "may" procure these price agreements on behalf of localities, rather than being mandated to do so under any circumstances.

State Purchasing Could Do More to Enforce the Procurement Code

Table 3. Twenty-Eight Agencies do not have a Current CPO Listed on the State Purchasing Website

Thirteenth Judicial District Attorney
Intertribal Ceremonial Office
Developmental Disabilities Planning Council
Supreme Court Law Library
Compilation Commission
Court of Appeals
Supreme Court Building Commission
First Judicial District Attorney
Third Judicial District Attorney
Fourth Judicial District Attorney
Fifth Judicial District Attorney
Seventh Judicial District Attorney
Eighth Judicial District Attorney
Tenth Judicial District Attorney
Administrative Office of the District Attorneys
Eleventh Judicial District Attorney, Division II
State Investment Council
Retiree Health Care Authority
Governor
Lieutenant Governor
Public Employees Retirement Association
State Commission of Public Records
Public Employee Labor Relations Board
Tourism Department
Board of Veterinary Medicine
Cumbres and Toltec Scenic Railroad Commission
Veterans' Services Department
Parole Board

Source: State Purchasing Website, October 2021

In its quarterly performance reporting to the LFC, State Purchasing notes one of the services it provides is to administer and enforce the New Mexico Procurement Code. However, throughout LFC's past procurement evaluations, State Purchasing has many times noted its lack of statutory authority to compel state agencies and other governmental entities to comply with the Procurement Code. The result has been noncompliance with few repercussions.

State Procurement does communicate with state agencies and local public bodies regularly through "Policy Memos," however, and could be offering more guidance to state agencies in getting the best value for purchases, avoiding noncompetitive methods of procurement, and reminding them of their reporting and compliance requirements under price agreements and the Procurement Code.

In the absence of that guidance and oversight, agencies are likely skirting the requirements of the Procurement Code—some of which are outlined below.

Twenty-eight agencies have no active chief procurement officer listed on State Purchasing's website. A chief procurement officer (CPO) is a trained and certified person in a state agency or local body responsible for the control of procurement. The Procurement Code says only CPOs can make purchases orders or initiate exempt or small purchases. However, 25 agencies have no CPO listed on the State Purchasing website and another three had CPOs listed who are no longer employees of the state according to the October State Personnel Office listing. A lack of CPOs at an agency is a long-standing issue first noted in the LFC's 2016 procurement evaluation when 65 agencies and local bodies operated with CPOs who had not completed certification.

State Purchasing reported to LFC that it doesn't not currently have statutory authority to require agencies and governmental entities to have a CPO, only to keep a list of CPOs on their website. Because many of the agencies without CPOs listed are small agencies with few employees, the 2016 LFC procurement evaluation recommended that State Purchasing work with the State Personnel Office to set up a structure where agency CPOs could potentially be employed by State Purchasing and assigned to specific agencies. This could eliminate the need to have an employee assigned as a CPO at every small agency.

State agencies issued 42 contracts in FY21 at or near the small purchase limit. With a few exceptions,[1] state law (13-1-125 NMSA 1978) allows for agencies to make small purchases of $60 thousand or less without going through the formal process of gathering competitive sealed bids or proposals. State agencies issue a significant number of contracts at or near that $60 thousand threshold. In FY21, of the 2,206 new contracts reviewed by State Purchasing's contract review board, 39 were for $60 thousand exactly, three were for $59,999, and another 16 were for amounts between $59 thousand and $60 thousand.

[1] The small purchase allowances do not apply to the services of landscape architects or surveyors for state public works projects or local public works projects

In five cases, state agencies amended small purchase contracts above the $60 thousand limit, skirting the Procurement Code. In FY21, state agencies increased the amounts of 236 contracts through amendments. The total value of those contracts was originally $1.2 million, but through amendments those 236 contracts had grown by another $1.5 million – a 126 percent increase. In five cases, these amendments pushed contracts originally considered small purchases over the $60 thousand limit, allowing agencies to skirt the Procurement Code and purchase items or services over $60 thousand without soliciting competitive bids.

Table 5. FY21 Small Purchase Contracts Amended above the Small Purchase Threshold

Agency	Vendor	Original Amount	Amendment Amount	Total Amount
CYFD	MEADE, JULIE ANN	$60,000	$76,819	$136,819
Com. For the Blind	WINSTEAD PC	$5,256	$57,819	$63,075
DFA	CENTER FOR CIVIC POLICY	$49,000	$15,380	$64,380
GSD	BOHANNAN HUSTON INC.	$45,613	$14,781	$60,394
Comish. For Public Lands	GENEVIEVE CONLEY CONSULTING	$50,593	$10,160	$60,753

Source: GSD Contracts Review Bureau monthly reports

The General Services Department (GSD) may be artificially splitting construction projects to avoid putting the projects out for bid. The statewide price agreement for construction (00-00000-20-00110**)** is responsible for some of the highest amounts of spending of all price agreements—accounting for $29.5 million in encumbrances in FY21 alone. The most recent price agreement, which GSD first developed for one year from July 1, 2020 to June 30, 2021, was subsequently extended through an amendment to June 30, 2022.

Figure 1. Google Earth view of nearly identical north and south campus buildings of the Penitentiary of New Mexico

The price agreement stipulates caps of $4 million per project including gross receipts tax and $12.5 million per contractor over the life of the price agreement, though the price agreement does not delineate what constitutes a single "project." However, in one example, GSD may have artificially split a project to remain under that cap. In late March 2021, GSD issued two purchase orders totaling $4.4 million to All-Rite Construction, Inc. (dba RITECON) to reroof buildings at the Penitentiary of New Mexico campus in Santa Fe. The purchase orders were for the nearly identical north and south campus buildings. Though GSD might argue the reroofing at the two campuses represents two separate projects, the fact the purchase orders were issued on the same day, and that many of the analogous buildings on each campus were scoped for the same price raises the possibility GSD artificially split this work into two separate "projects" to avoid having to put the work out for bid.

A stipulation of the price agreement is that the agency or local public body using the price agreement must report all work issued under the price agreement to both State Purchasing and LFC so the cap thresholds can be monitored.

Table 4. Purchase orders to All-Rite Construction issued on 03/24/21 for roof replacement at Penitentiary of New Mexico under single statewide price agreement total more than $4 million cap

PO Number	Description	Amount
35373	Roof replacement at Unit 1-South Facility	$509,037
	Roof replacement at Unit 2-South Facility	$509,037
	Roof replacement at Unit 3-South Facility	$509,037
	Roof replacement at Admin Bldg-South Facility	$893,915
35375	Roof replacement at Unit 1 North Facility	$509,037
	Roof replacement at Unit 2 North Facility	$509,037
	Roof replacement at Unit 3 North Facility	$509,037
	Roof replacement at Admin Bldg North Facility	$403,283
	TOTAL	**$4,351,418**

Source: SHARE

Note. The amounts listed above include GRT at 7.125 percent

New Recommendations

The Legislature should consider adding duties to Section 13-1-95 NMSA 1978, requiring State Purchasing to actively and annuallygather information from all governmental entities on sole source and emergency procurements.

The Legislature should consider repealing the exemption under Section 13-1-98.1 (for healthcare-related purchases.)

The Legislature should consider adding duties to Section 13-1-95 NMSA 1978, requiring State Purchasing to flag violations of purchases or procurements made by entities without a chief procurement officer.

Finding

New Mexico procurement has a decentralized system with confusing processes and differing practices.

Recommendation	Status			Comments
	No Action	Progressing	Complete	
The Legislature should consider moving the state purchasing division from GSD to DFA or another strategy for consolidation.				Senate Bill 88 in the 2019 session consolidated the contracts review board functions with State Purchasing. However, most of the procurement decisions are still made by individual CPOs employed by agencies and local public bodies. As a final step toward consolidation, the General Services Department should work with the State Personnel Office to set up a structure where agency CPOs are employed by GSD and assigned to a specific agency to achieve centralized control and decentralized execution.
The State Purchasing Division should require its purchasing specialists to conduct business analyses of all spending. Specifically, before November 2020, the State Purchasing Division should undertake an effort to analyze spending on current price agreements and create an action plan for consolidating the number of price agreements into fewer, more frequently used agreements with fewer vendors. State Purchasing should report on the outcomes of the exercise to the Legislative Finance Committee at the General Services Department's 2020 budget hearing.				State Purchasing is just beginning to use a $1.9 million IT appropriation from FY20 to track state spending. SPD is currently vetting the project manager and will hire programmers to implement the IT system.
The State Purchasing Division should find a way to share certain information across agencies, such as contracted hourly rates by vendor and vendor type in a way that would help agencies strategically negotiate rates and deliverables.				

Finding

Agencies use noncompetitive methods, sometimes violating statute, possibly resulting in higher costs.

Recommendation	Status			Comments
	No Action	Progressing	Complete	
The Legislature should consider repealing sections of statute granting broad authority for exemptions to state agencies and programs within state agencies due				

to the current situation of billions of dollars being used to buy goods and services outside provisions of the Procurement Code.				
The Legislature should consider setting price limits (e.g., $10,000 for advertising) to contracts eligible for exemptions from the Procurement Code.				
The Legislature should consider putting limitations into place around the amount a contract can be amended for and the number of times a contract can be amended. For example, a contract should not be amended for more than the original value of the contract. This should be done in conjunction with advisement from GSD and DFA around best practices for amending contracts. This could be more relevant to limits on sole source amendments than to RFPs.				
All state agencies should comply with statute requiring LFC be notified of all sole source and emergency procurement.				
The Legislature should consider giving statutory authority to GSD's State Purchasing Agent to have sole source determination responsibility and exemption determination responsibility for state agencies requesting such purchases.				
The Legislature should consider amending the Procurement Code in Section 13-1-129 NMSA 1978 such that: • Purchases against a price agreement for general services over $60 thousand or professional services over $5,000 must occur under a separate contract with a defined scope of work between the agency and vendor according to the terms of the price agreement. • Purchases of goods or general services between $10 thousand and $60 thousand may only occur after the agency has gathered and documented three quotes. These quotes must be documented in a searchable form in the purchase order logged into the SHARE statewide financial information system.				

Finding

Procurement reform has had success but there is still room for improvement in contract management and best practices.

Recommendation	Status			Comments
	No Action	Progressing	Complete	
GSD should provide additional guidelines for price agreements asking agencies to put good faith efforts into trying to find better prices for large purchases.				
The Legislature should consider requiring all sole source and noncompetitive procurement be posted on a single website. Additionally, post the following on the central website: • winning and losing procurement bids; • procurement regulations; • annual reports; • procurement manuals; and • sole source and emergency procurement justification				Senate Bill 88 in the 2019 session required State Purchasing or an agency CPO to post notice of a sole source and emergency procurements on the State Purchasing website. However, information on winning and losing procurement bids is still not publicly available.