



KADE R. MINCHEY, CIA, CFE
AUDITOR GENERAL

President Stuart J. Adams, Co-Chair • Speaker Brad R. Wilson, Co-Chair
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September 15, 2020
Report No: ILR 2020-H

Subject: A Limited Review of State Emergency Contracting Practices

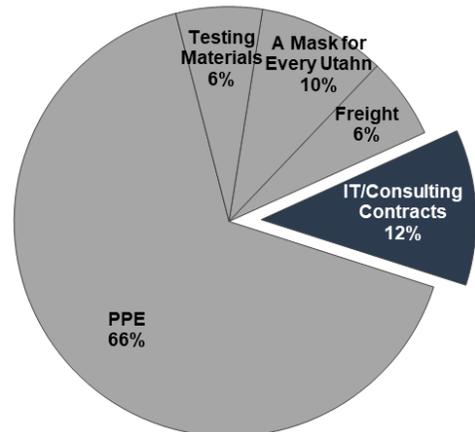
We conducted a limited review of some emergency contracts that resulted from the COVID-19 pandemic. This limited review was not designed as a thorough investigation of questions and concerns surrounding particular emergency contracts. Nor did we seek a full legal review of emergency contracts. We did spend several weeks reviewing contracts and speaking with experts in procurement and related fields and we found no evidence that the purchases or contracts we reviewed were out of alignment with *Utah Code*. However, we observed some weaknesses in how state entities managed emergency contracts with two specific contracts that will be addressed in this report.

Utah Code 63G-6a-803 anticipates the need for periodic emergency purchases to “mitigate a circumstance that is likely to have a negative impact on public health, safety, welfare, or property.” Anticipating the impacts of COVID-19 on public health, Governor Herbert’s State of Emergency declaration on March 6, 2020 led the Director of the Division of Purchasing to allow for statutory emergency procurement provisions. As a result, state agencies have spent approximately \$97 million as of July 10, 2020 on personal protective equipment (PPE) and other supplies and services outside of the normal procurement process, as shown in Figure 1.

Figure 1. State Entities’ Emergency Spending Related to COVID-19 Amounted to Over \$97 Million From March to July (Left Side). While most purchases in grey (right side) appear to have been conducted in alignment with the intent of statute, we are concerned about the manner by which some IT/Consulting Contracts were executed.

Purchasing Category	Dollars Spent
PPE	\$64,298,288
IT/Consulting Contracts	\$11,406,423
A Mask for Every Utahn	\$9,350,000
Testing Materials	\$6,319,652
Freight	\$5,943,135
Total	\$97,317,498

Source: Utah Division of Purchasing Data



We were asked to review emergency contracts that transpired due to the COVID-19 pandemic. In doing so, we acknowledge the uncertain environment and need for flexibility and speed to obtain some supplies and services. Strategically, a Unified Command Structure was set up to coordinate between public and private stakeholders. The structure was created to ensure communication between parties; however, we were told by those involved that strong communication for emergency contracting did not occur in the early stages of the pandemic.

In this report we address weaknesses we observed in how state agencies communicated and collaborated in the execution of the emergency procurement process. We believe there is an opportunity to learn from the process shortcomings that occurred to sharpen procedures and protocols for future emergencies. We therefore recommend the Legislature consider if improvements or clarifications should be made to state statute to clarify how emergency procurements are conducted in the future. We also recommend that the Governor's Office of Management and Budget (GOMB) work with relevant state agencies to improve clearer lines of communication and delegation within the Unified Command Structure.

State Agency Communication Can Improve For Some Emergency Contracting and Monitoring

Greater joint effort among key decision makers can increase the effectiveness of the emergency procurement process. We reviewed, in a limited manner, several emergency contracts and found that many of them were executed without significant concerns. However, a full audit of all contracts would be needed to identify deep-rooted questions. Despite this, we found two contracts that would have benefitted from better communication, collaboration, and direction if all relevant state entities were included in decisions. While the Unified Command Structure was present and included key decision makers, we were told and documents we reviewed confirmed that communication and delegation among these entities could have been stronger. Specifically, the contracts that we believe would have benefitted from improved collaboration and review are the Twenty (Healthy Together App) and Nomi (COVID-19 Testing) contracts. A summary of these two contracts are provided below:

State Contract with Twenty Labs (Twenty. Healthy Together App): Effective March 27, 2020, state entities entered into an agreement with Twenty to provide the Healthy Together app. The app is intended to assist with contact tracing efforts by alerting users if they have been exposed, to run a symptom checker, and to provide residents information about hotspots, among other features. The functionality of the contact tracing element has not been fully operative and was recently revised to use Bluetooth functionality. There has been significant attention surrounding this app. A complete audit review would be needed to understand all questions surrounding this

app and contract. To date the state has paid Twenty \$4.01 million and continues to pay an ongoing \$300,000 monthly maintenance fee.

State Contract with Nomi: Effective March 31, 2020, the state entered into two contracts with Nomi, one for a symptom survey and the other for testing sites intended to improve state testing capacity. To date the state has paid Nomi a total of \$9.62 million between these two initial contracts. We were told that the state recently entered into an additional contract with Nomi; however, we did not review that contract for this report. Again, a full audit would be needed if the Legislature has additional questions on this contract.

Emergency Procurement Code Allows for Flexibility But Encourages Competition

Utah's procurement statute appears to be similar to other states' emergency procurement laws we reviewed. *Utah Code* 63G-6a-803, which outlines state emergency procurement procedures, states the following:

A procurement unit conducting an emergency procurement under Subsection (1) shall:

Ensure that the procurement is made with as much competition as reasonably practicable while: ... avoiding harm, or a risk of harm, to the public health, safety, welfare, or property...and after the emergency has abated, prepare a written document explaining the emergency condition that necessitated the emergency procurement...

Utah Code, therefore, seeks to balance rapid and flexible procurement to avoid public harm with the desire to ensure reasonable and practical competition.¹

We did not observe any violations of statute and noted that the vast majority of purchases appear to be appropriate. The swift onset of the COVID-19 virus created a scarcity of materials leading the state to speedily bid against other states, municipalities, countries, and the private sector for some supplies. To the credit of those working on emergency procurements, they were able to procure much needed supplies in the face of an uncertain pandemic. However, while the state took advantage of the flexibility component

¹ Although state agencies occasionally engage in emergency procurement due to broken pipes or other urgent circumstances, the state has not experienced an emergency of this magnitude for many years. Since May, the Governor has asked state agencies to go back to a standard procurement process and the purchasing director has performed a review of emergency purchases to date. We were told that most new contracts are now competitively procured.

with the Twenty contract, based on interviews we conducted and documentation we reviewed we believe there could have been more room for competition.

Agency Collaboration Could Have Been Stronger on Twenty and Nomi Contracts

Greater collaboration on the Twenty and Nomi contracts between GOMB, the Division of Purchasing (Purchasing), and the Department of Health (DOH) should have happened in the early stages of the pandemic. For example, the Healthy Together app negotiations for contact tracing did not involve Purchasing or DOH until the final formation of the Twenty contract. Although emergency procurement requirements found in *Utah Code* do not require specific entities be involved in contracting, we believe it would have helped secure a better contract and better align state actors to a common vision. As the Unified Command Structure is currently established, it is designed in a way to include other parties in making these important decisions and could have been used more effectively with the Twenty contract. This was also the case on the Nomi contracts which was the impetus for the TestUtah.com testing platform within the state. DOH did not fully engage in initial negotiations for the original Nomi contract when they could have provided subject matter expertise on testing setup and protocols. The Department of Technology Services (DTS) was also not involved in the initial contracting with Nomi.

Another area of poor collaboration we found is with the ongoing use and monitoring of these contracts. It was reported to us that one state entity continued to work with one vendor, soliciting additional work and reprioritizing some of the original terms of the agreement without the knowledge of other state agencies. Questions persisted during the audit on which state entity is providing contract oversight of the contact tracing app. The monitoring of one contract for example is under one agency while the payment to the vendor is managed by another agency. This contributes to confusion and decentralizes the efficacy of monitoring a contract for compliance. Agencies should communicate on contract revisions and assign a single entity to oversee and monitor the contract.

Lessons Learned From Twenty Labs and NOMI Contracting

In recent months we observed that state entities have started to come together to discuss the further use of the contact tracing app and how to continue to improve upon it moving forward. We are encouraged by this collaboration and believe it should be a future model, where possible, when emergency procurement is needed. In reviewing documents and through discussions with state employees whose collaboration on these contracts would have been beneficial, there were lessons learned that could help with the execution of contracts in future emergencies. These lessons are outlined in Figure 2.

Figure 2. Lessons Learned From Emergency Contracting During the COVID-19 Pandemic. Improved communication and collaboration were a consistent theme.

<ul style="list-style-type: none"> • Ensure better communication and delegation within the Unified Command Structure • Include in contract negotiations those actors that may oversee the contract • Notify other relevant agencies of the desire to procure contracts • Include state purchasing expertise as much as possible • Utah Code for emergency procurement does not contemplate the different situations of what constitutes an “emergency” • Certain emergency procurements may not need to be fulfilled in such a short timeframe, allowing for greater competition • Ensure concerns raised by legal counsel are carefully considered 	<ul style="list-style-type: none"> • The Legislature could be included as an added decision maker, which inclusion occurred recently on the Twenty contract • Current statute may be outdated in that technology has allowed for improved competition in a short amount of time for procurement even during an emergency • Continue collaborating with local level leaders to get needed supplies into the state • If there is a private and public partnership, be clear on requirements for each party • To prepare for future emergencies, pre-drafted solicitations that are reviewed on a regular basis and predetermined stakeholders should be included in negotiations
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Source: Discussions with Various State Agencies

We recommend the Legislature consider these lessons learned to determine whether more guidance is needed to direct how the executive branch uses emergency procurements in the future. Lessons learned in Figure 2 of this report could be used to continue to improve upon the process of procuring necessary goods and services during times of emergency.

Recommendations

1. We recommend the Governor’s Office of Management and Budget continually work with relevant state agencies to improve clearer lines of communication and delegation within the Unified Command Structure.
2. We recommend the Legislature consider revisiting *Utah Code* 63G-6a-803 to determine if:
 - a) emergency procurement statute should be clarified; and
 - b) decision makers authorized to approve emergency contracts are clearly outlined and communication channels for emergency contracts are clearly articulated.

For questions contact the supervisor of this audit Jesse Martinson at 801-652-3566 or at jmartinson@le.utah.gov.

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Agency Response

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State of Utah

GARY R HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Utah Department of Health
Executive Director's Office

Richard G. Saunders
Executive Director

Joseph K. Miner, M.D., M.S.P.H., F.A.C.P.M.
Deputy Director

Heather R. Borski, M.P.H., M.C.H.E.S.
Deputy Director

September 3, 2020

Kade R. Minchey, CIA, CFE
Auditor General
Officer of the Legislative Auditor General
315 House Building
PO Box 145315
Salt Lake City, UT 84114-5315

Dear Kade:

Thank you for the opportunity to respond to "A Limited Review of State Emergency Contracting Practices" (ILR 2020-H). We appreciate the perspective shared and the lessons learned.

We concur with your recommendations. The department is committed to the efficient and effective use of taxpayer funds and values the insight this report provides on areas that can improved.

Sincerely,

Richard G. Saunders
Interim Executive Director

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State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Department of Administrative Services
Division of Purchasing

TANI PACK DOWNING
Executive Director

CHRISTOPHER HUGHES
Division Director

September 7, 2020

Kade R. Minchey, CIA, CFE
Auditor General
Office of the Legislative Auditor General
315 House Building
Salt Lake City, Utah 84114-5315

Re: Emergency Procurements During the COVID-19 Pandemic

Dear Minchey,

Thank you for the opportunity to review and respond to your office's review of the emergency procurements made by the State of Utah during the COVID-19 pandemic. We appreciate the effort and professionalism during this review.

At the beginning of the year, the world and The United States began responding to a pandemic respiratory disease known as "coronavirus disease 2019" (abbreviated "COVID-19"). This situation posed a serious public health risk. In the interest of aiding the people and local governments in Utah, Governor Herbert issued a State of Emergency Declaration on March 6, 2020. Subsequently, the Division of Purchasing issued an Emergency Procurement Declaration that allowed Utah agencies to purchase equipment and supplies that would help slow the spread of COVID-19 in the State of Utah without going through a standard procurement process.

As the State of Utah followed the emergency procurement processes outlined in the Utah Procurement Code and Administrative Rules, the Division of Purchasing continued to follow the purpose of the Utah Procurement Code identified in Utah Code Section 63G-6a-102, by being open and transparent with each of the purchase made by the State of Utah. As a result, the Division of Purchasing was one of the first states to publicly post its emergency COVID-19 purchases on a website and provided quick responses to GRAMA responses.

The Division of Purchasing's response to this review continues with its commitment to being open and transparent with purchases made by the State of Utah with taxpayer funds.

Recommendation:

To prepare for future emergencies, pre-drafted solicitations that are reviewed on a regular basis and predetermined stakeholders should be included in negotiations.

Division Response:

The Division of Purchasing with insight from key stakeholders will begin discussions on "possible" future emergency purchases. While the Division of Purchasing understands that emergencies, like COVID-19, are unpredictable and can present unforeseen challenges it is committed to established pre-drafted solicitations with key stakeholders in the event that such solicitations are necessary. This will allow the State of Utah to immediately respond to emergencies.

Contact: Christopher Hughes, Director of Purchasing, christopherhughes@utah.gov

Implementation Date: December 1, 2021.

Recommendation:

Utah Code for emergency procurement does not contemplate the different situations of what constitutes an "emergency"

Division Response:

The Division of Purchasing, since the beginning of COVID-19, has been reviewing how other states handled procurements related to COVID-19. This review includes reviewing other states' emergency procurements statutes, rules, and policies. The Division of Purchasing is committed to make the Utah Procurement Code efficient and effective in for all procurements, emergency and non-emergency.

Contact: Christopher Hughes, Director of Purchasing, christopherhughes@utah.gov

Implementation: Ongoing

Recommendation:

Current statute may be outdated in that technology has allowed for improved competition in a short amount of time for procurement even during an emergency

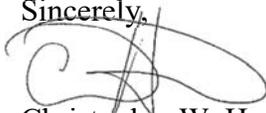
Division Response:

In the 2020 General Legislative Session, the Division of Purchasing worked with the Utah Procurement Policy Board, Senator Buxton, and Representative Peterson to pass Senate Bill 90. Senate Bill 90 modernized the Utah Procurement Code by allowing for more efficient procurements for the State of Utah.

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Contact: Christopher Hughes, Director of Purchasing, christopherhughes@utah.gov

Sincerely,

A handwritten signature in black ink, appearing to be 'C. Hughes', written over the word 'Sincerely,'.

Christopher W. Hughes, Division Director
Division of Purchasing & General Services
Utah Department of Administrative Services

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State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Department of Public Safety

JESS L. ANDERSON
Commissioner

September 5, 2020

Kade R. Minchey, CIA, CFE
Auditor General
Officer of the Legislative Auditor General
315 House Building
PO Box 145315
Salt Lake City, UT 84114-5315

Dear Kade,

This is in response to your audit titled "A Limited Review of State Emergency Contracting Practices" (ILR 2020-H). We appreciate your perspective and value your feedback and insight.

Our department is committed to following emergency procurement processes and acting swiftly, all while protecting tax payer funds.

Sincerely,

A handwritten signature in black ink that reads "Jess L. Anderson".

Jess L. Anderson
Commissioner