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OVERSIGHT HEARING

Monday, May 11, 2020
1:30 p.m., State Capitol, Assembly Chamber

State Contracting in Emergency

Worldwide demand and limited supply

The scale and severity of the COVID-19 pandemic has quickly created a worldwide demand for various personal protective equipment (PPE) like gloves, masks, and face shields. In early March, the federal Department of Health and Human Services determined that the United States had only about 1% of the needed N95 respirator masks to address a major outbreak. These masks, worn in hospitals, are critical to preventing the spread of the disease and are used to test and treat those who are ill. As the virus has spread, there has not been enough supply to meet the demand, even with stockpiles in reserve. Medical workers have reported a lack of sufficient PPE. Some have worn masks longer than recommended, reused them, or even worked without them.

With the national stockpile depleted, California and other states have taken measures to procure this critical equipment on their own in response to projected hospitalization surges. This patchwork approach has left holes in the supply chain, forcing states to bid against each other, rely on third-party brokers, and condense the process for purchasing and vetting products from what could typically take months to within a few days instead.

Procurement during an emergency

Generally, the State of California acquires goods and services through competitive bidding requirements specified in the Government Code and Public Contract Code. When Governor Newsom proclaimed a State of Emergency related to COVID-19 on March 4, 2020, these requirements were suspended for purchases needed to assist in the State's COVID-19 response.

On March 18, 2020, the Department of General Services issued Emergency Purchasing Guidance for Departments. The guidance notes that typical purchasing requirements, including competitive bidding, are suspended in an emergency and requires departments to document

sufficient justification for emergency purchases in their files. Specifically, the procurement file must include:

- A description of the emergency;
- Explanation of why the situation warranted the emergency purchase and the consequences of making the purchase through normal procurement processes;
- A description of the goods and price; and,
- The names and quotes of suppliers contacted

The guidance allows for significant flexibility while instructing departments to use existing agreements when possible and to justify emergency purchasing when necessary.

During a proclaimed State of Emergency, the Governor is vested with the power to use and commandeer public and private property and personnel to ensure all resources within California are available and dedicated to the emergency. The Governor can direct all State agencies to utilize and employ personnel, equipment, and facilities for any and all activities related to the emergency.

Recent State PPE contracting activity

On April 7, 2020, the Governor's Office of Emergency Services (CalOES), under emergency authority, entered into a nearly \$1 billion purchase agreement with BYD, a Chinese manufacturer, for 200 million surgical and N95 respirator masks per month amid the pandemic. The contract states everything made under the agreement must be newly manufactured and requires BYD's subsidiary, Global Health Product Solutions LLC, to obtain certification from the National Institute for Occupational Safety and Health for the masks by April 30, 2020. That date has since been extended to May 31, 2020. Per the terms of the contract, BYD must return \$247 million to the State for not meeting the original deadline.

Details of the contract were publicly released on May 6, 2020. According to the contract, the State paid \$3.30 per N95 mask and \$.55 per paper surgical mask. The contract goes through June 2020, with an option for one-month extensions.

In a separate agreement reported by CalMatters on May 5, 2020, the State initially wired a payment in late March of almost \$457 million to a Delaware-based company, known as Blue Flame Medical LLC, for an order of 100 million N95 masks. The CalMatters article reported that the company had only been in business for three days at the time. Within hours, the transaction was canceled and the funds were returned to the State Treasurer's Office.

Additionally, on May 9, 2020, the Los Angeles Times reported another instance of the State canceling a PPE contract. According to the article, the State canceled a nearly \$800 million contract for face shields and masks with Alabama-based Bear Mountain Development Company, LLC since the supplies that had been delivered fell short of what was agreed to in the terms of the contract. Originally, the contract was to provide 200 million face shields and 400 million

surgical masks by June 24, 2020. According to CalOES, the State did not pay upfront for this contract and would instead only pay the company for the PPE delivered.

In response to concerns, CalOES has indicated that the vetting process now includes a team of experts in health, logistics and foreign commodities as well as federal emergency management and law enforcement officials.

Federal response to PPE concerns

In response to the potential for fraudulent medical supply sales, the federal Department of Justice has established the COVID-19 Hoarding and Price Gouging Task Force. The task force aims to investigate and, if necessary, bring charges against any person or company that accumulates an unreasonable amount of any COVID-19-related supplies, equipment, and materials, such as respirator masks, medical gloves, coveralls, or ventilators, for their personal use, or for purposes of selling them far above prevailing market prices. The task force works closely with federal, state, and local government partners to investigate and prosecute illegal hoarding and price gouging.

Key questions and areas for discussion

- In light of the demand for PPE and related challenges during the emergency, how can the State conduct a proper vetting process of contractors?
- Have procurement processes and procedures changed recently? If so, how?
- What lessons have been learned from these initial contracts and how will that inform future contracting during this pandemic and in other emergencies?
- What level of transparency is appropriate for contracts entered into during this and other emergencies? If limitations exist, why?
- What oversight currently exists? Is it sufficient?