



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

June 30, 2015

Major General Patrick Murphy
Division of Military and Naval Affairs
330 Old Niskayuna Road
MNBF Room 412
Latham, NY 12110

Re: 2013-0003-Fuel and Services

Dear Major General Murphy:

Our office is performing an examination¹ of payments the Division of Military and Naval Affairs (DMNA) made in response to Superstorm Sandy (Sandy). The objectives of our examination are to determine whether DMNA conducted appropriate procurements, paid appropriate prices, and received the quality and quantity of goods and services it procured during the Sandy response. The examination is ongoing, and we will keep you informed of our findings as we progress. At this time, we are reporting the results on DMNA's compliance with certain procurement laws, rules, and regulations when purchasing select fuel and services. We will report the results on DMNA's procurement of fuel from another vendor in a future report.

A. Results of Examination

We found that DMNA did not follow, or did not have the documentation to support it followed, State procurement requirements. In particular, DMNA lacked documentation to support the reasonableness of the prices paid and how it selected its vendors. Specifically, we determined DMNA collectively paid eight vendors up to \$66,081 more than necessary for fuel. In addition, we found DMNA lacked documentation to support: (i) the reasonableness of prices paid for the procurement of services from the ten vendors in our examination, (ii) the selection of nine of these ten vendors, and (iii) in some instances, the number of labor hours charged and whether vendors paid the appropriate prevailing wage rates to their employees. While we recognize the extenuating circumstances under which DMNA made these purchases, it is important that DMNA follow State procurement requirements, especially the need for documentation, during future emergencies.

¹We performed our examination in accordance with the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution, as well as Article II, Section 8, and Article VII, Section 111 of the State Finance Law.

We shared a draft report with DMNA officials and considered their comments (Attachment A) in preparing this final report. The comments of the State Comptroller on DMNA's response is included as Attachment B. In their response, DMNA officials stated the agency followed procurement rules and guidelines where feasible. However, they were unable to consistently conduct transactions in accordance with procurement rules during the Sandy emergency. DMNA further stated there were instances where flexibility was needed to mitigate infrastructure damage, or to meet the needs of the New York National Guard as it provided assistance to individuals in storm damaged areas.

While the State's procurement laws, rules and regulations are not optional, they do provide for increased flexibility in the case of emergencies. To facilitate its response to Sandy, the State Comptroller's Bureau of Contracts granted DMNA an exemption from competitive bidding and advertising in the Contract Reporter; however, DMNA was still required to document vendor selection and price reasonableness. We also found DMNA did not follow the prescribed procedures of documenting its reasons for vendor selection and price reasonableness. DMNA should modify its process to ensure compliance with the procurement requirements during an emergency.

B. Background and Methodology

DMNA assists State and local first responders with emergencies such as Sandy. From October 2012 through July 2013, DMNA approved purchase requests totaling \$781,098 for select fuel and \$146,799 in select services related to the Sandy recovery. We considered payment amounts and other risk factors to select and review \$320,579 in fuel purchases from eight vendors and \$117,772 in services from ten vendors.

To conduct our examination, we examined pertinent documentation, and spoke with DMNA representatives, vendors, and industry experts to determine whether DMNA complied with procurement requirements, including: (i) Sections 112 and 163 of the New York State Finance Law, (ii) the New York State Procurement Guidelines, (iii) the New York State Procurement Card Guidelines, (iv) Sections 16.6 and 16.16 of the Codes, Rules, and Regulations of the State of New York (Regulations), (v) Economic Development Law Article 4-C, (vi) New York State Labor Law Article 8, Section 220 3a.a(iv), (vii) United States Service Contract Act, and (viii) Budget Bulletin B-1203.

C. Details of Findings

The objective of State procurement is to facilitate each State agency's mission while protecting the interests of the State and its taxpayers and promoting fairness in contracting with the business

community. To help facilitate this, State procurement laws require agencies to purchase from competitively let centralized contracts before procuring from other vendors. An agency may competitively purchase commodities in lieu of using centralized contracts when the items on the centralized contract do not meet the agency's form, function and utility. However, agencies must evaluate and document both the fairness in vendor selection and reasonableness of price.

Fuel

DMNA received an exemption from advertising its purchase of fuel in the Procurement Opportunities Newsletter due to the emergency caused by Sandy. Nonetheless, DMNA was responsible for substantiating vendor selection and the price reasonableness for fuel, consistent with State procurement requirements. This did not exempt DMNA from purchasing fuel from centralized contract vendors.

We found DMNA did not consistently follow, or did not have the documentation to support it followed, State procurement requirements for fuel procurements during the Sandy response. DMNA could not provide documentation to support it evaluated whether the fuel vendors on Office of General Services (OGS) centralized contracts could have provided fuel or whether prices charged by the non-contract vendors were reasonable.

OGS holds centralized contracts with multiple fuel vendors for use by State agencies. Vendor fuel prices vary based on a variety of factors. OGS posts fuel prices on a weekly basis to notify State agencies of the price fluctuations. To determine whether DMNA paid a reasonable price for fuel purchased in response to Sandy, we compared the prices DMNA paid to the prices it could have paid at the time of purchase had DMNA purchased fuel from the centralized contract vendors.

We found DMNA paid, on average, between \$.03 and \$1.19 more per gallon for 75,188 gallons of fuel than offered by vendors on State centralized contracts. These prices were up to 36 percent higher than prices on the centralized contracts. As demonstrated in the following chart, DMNA may have paid up to \$66,081 more than necessary for 75,188 gallons of fuel from eight vendors, including one centralized contract vendor that charged DMNA a rate higher than allowed by contract.

Vendor	Gallons Purchased	Amounts DMNA Paid	Prices Available on Centralized Contracts at Time of Purchase	Difference
Approved Oil (Boro)	50,309	\$225,632	\$171,486	\$54,146
OK Petroleum	3,897	16,952	13,057	3,895
Frank Brothers Fuel Corp.	2,500	11,123	8,160	2,962
Petro Commercial Sales	3,995	15,334	13,431	1,902
Bottini Fuels	1,608	6,950	5,325	1,625
NOCO Energy Products*	2,200	8,272	7,153	1,119
Polsinello Fuels, Inc	9,379	31,637	31,393	244
Kingston Oil Supply Co.	1,300	4,680	4,492	188
Total				\$66,081

* This centralized contract vendor charged prices higher than the contract allowed.

If the centralized contracts did not meet DMNA's form, function, and utility (e.g., inadequate supply), DMNA was permitted to purchase from other vendors; however, these purchases should have been at reasonable prices. In comparing the per-gallon fuel prices among the noncontract vendors, we found the prices varied from the centralized contract price by as little as \$0.03 at Polsinello Fuels.

We acknowledge the unfavorable market conditions in which DMNA required fuel to support mission-critical operations; however, DMNA was responsible for maintaining records that substantiated vendor selection and the price reasonableness for fuel, consistent with State procurement requirements.

In addition, according to Appendix B of the Procurement Guidelines, purchases made by the State are exempt from State and local taxes and, with certain exceptions, federal excise taxes. Included in the \$66,081 DMNA paid for fuel, three vendors charged a total of \$3,766 for taxes DMNA was exempt from paying.

Services

In response to the Sandy disaster, DMNA purchased services, such as transportation, repair, and environmental services. We found DMNA did not follow, or did not have the documentation to support it followed, State procurement requirements. Specifically, of the ten procurements we examined we found:

- DMNA did not maintain documentation to justify the prices it paid for the ten procurements. We therefore searched OGS contracts, researched prices online, and contacted industry experts and other vendors to determine whether DMNA paid an appropriate price for each of the procurements. We have reasonable assurance DMNA paid appropriate prices for

five procurements totaling \$34,418. However, we were unable to determine the reasonableness of prices for the remaining five procurements totaling \$83,354 based on the documentation maintained by DMNA and its vendors.

- DMNA did not maintain sufficient evidence to support vendor selection for nine procurements totaling \$100,208. In response to our request for documentation to support vendor selection, DMNA provided memos describing the procurements. However, the memos were dated subsequent to our request, and generally did not include information that would allow us to determine whether DMNA had obtained and evaluated offers from vendors other than the selected vendors. Therefore, DMNA is unable to support its promoted fairness in contracting with the business community.

We performed additional tests on three of the ten procurements totaling \$71,054, of which approximately \$36,678 pertained to labor, to determine whether (i) DMNA maintained records to substantiate the number of labor hours billed by the vendors, and (ii) the vendors paid their employees the appropriate prevailing wage rates for work performed at DMNA Armories, as required by State and Federal laws. We found:

- DMNA could not provide records to substantiate the number of labor hours billed for a total of \$36,678 by the three vendors for services performed at the Farmingdale, Latham, and Bronx Armories.
- DMNA could not substantiate that two vendors paid their employees the appropriate prevailing wage rates, as required by State and Federal laws, for labor totaling \$28,428 performed at two DMNA Armories. When we contacted the vendors for the records, one vendor was allegedly unable to locate the wage documentation and the other failed to respond to our repeated inquiries. We obtained evidence to support one other vendor paid appropriate prevailing wage rates related to labor charges of \$8,250.

Recommendations

- 1) *Conduct procurements in accordance with all applicable laws, rules, and regulations.*
- 2) *Review fuel charges and recover overcharges as appropriate.*
- 3) *Collect and maintain appropriate documentation to support the selection of vendors and reasonableness of prices paid, including but not limited to: quotes, records supporting hours worked by vendors, centralized contract pricing lists, and records supporting payment of prevailing wage rates.*

- 4) Refer to the Department of Labor the two vendors that did not provide evidence to support they paid prevailing wages to their workers.*

We would appreciate your response to this report by July 30, 2015, indicating any actions planned to address the recommendations in this report. We thank the management and staff of the Division of Military and Naval Affairs for the ongoing courtesies and cooperation extended to our auditors.

Sincerely,

Bernard J. McHugh
Director of State Expenditures

Encl: Attachment A
Attachment B

cc: Robert Martin, Audit Liaison
Theresa Bonneau, Director of Internal Audit



ANDREW M. CUOMO
Governor
Commander-in-Chief

PATRICK A. MURPHY
Major General
The Adjutant General

June 5, 2015

Bernard J. McHugh
Director of State Expenditures
Office of the State Comptroller
110 State Street
Albany, NY, 12236

Dear Mr. McHugh:

Thank you for your Draft Report 2013-0003 – Fuel and Services dated May 5, 2015 relating to the Superstorm Sandy emergency response by the Division of Military and Naval Affairs. The agency has reviewed your report and would like to offer the following comments:

- 1) *Conduct procurements in accordance with all applicable laws, rules, and regulations.*

As stated during the audit interviews, the agency followed procurement rules and guidelines where feasible. However, during the emergency response to Superstorm Sandy, the agency was not able to conduct transactions in accordance with procurement rules at all times. While we recognize the procurement rules are always applicable, an emergency response in certain instances should not be viewed as business as usual. There are circumstances during the course of an operation where the agency requires flexibility to meet critical needs of the mission which was certainly the case during Sandy. Specifically, the purchase of fuel was used for various military vehicles to provide mobility for the National Guard operation for relief in affected areas that were not easily accessible. Additionally, the mobility provided by these military vehicles allowed the agency to assist other public health and safety partners in providing aid to those impacted by the storm. Considering the severity of the damage and destruction, and the high level of need of those affected, the ability to rapidly purchase fuel from multiple vendors was a necessity. Transactions noted in this report were reviewed and investigated with the conclusion that there was no waste, fraud or abuse. Similarly, it is the agency understanding that OSC has also not identified any transactions in this report that were borne of waste, fraud or abuse.

- 2) *Review fuel charges and recover overcharges as appropriate.*

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The agency will continue to review the fuel charges and seek restitution on any taxes that may have been erroneously paid to a vendor.

- 3) *Collect and maintain appropriate documentation to support the selection of vendors and reasonableness of prices paid, including but not limited to: quotes, records supporting hours worked by vendors, centralized contract pricing lists, and records supporting payment of prevailing wage rates.*

The agency did collect and maintain voluminous documentation in reference to the Superstorm Sandy activation and does understand that there must be accountability in relation to vendors and payments. Quotes and price comparisons should be sought, and hours should be accounted for, however, in some exigent circumstances, such as the multi-day lead time provision as referenced in the OGS state contract for bulk fuel which prevented the agency's ability to conform to the procurement standard without impeding the rapid response to the emergency. Due to the dynamic nature of the Sandy mission, there were instances where flexibility was needed and required to quickly mitigate damage to infrastructure or to meet the needs of the New York National Guard as it provided services to assist people in the storm damaged areas.

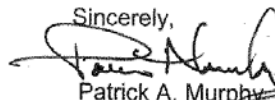
- 4) *Refer to the Department of Labor the two vendors that did not provide evidence to support they paid prevailing wages to their workers.*

The agency will review the vendors in question and, if applicable, will refer them to the Department of Labor in relation to the prevailing wages paid to their employees.

The agency appreciates the comments and recommendations of the State Comptroller and will continue to work toward improving its procurement processes relating to emergency activations. Such improvements may include creating additional documentation to record every anomaly outside of the normal business of state contracting. Additionally, the agency will continue to improve its business practices relating to tracking labor hours when applicable, and ensuring prevailing wage pay documentation is collected and reviewed.

Please extend my thanks to your staff for conducting a thorough review.

Sincerely,


Patrick A. Murphy
Major General, New York Army
National Guard
The Adjutant General

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State Comptroller Comments on Auditee Response

1. There are no provisions in the State Finance Law that allows an agency to comply with procurement rules “when feasible.” State procurement requirements afford agencies the flexibility to procure in cases of emergency without advertising in the New York State Contract Reporter or conducting formal competitive bids; however, agencies must still guard against favoritism and wasteful pricing and must still document reasons for vendor selection and price reasonableness.
2. We disagree. As outlined in the report, the \$66,081 that DMNA paid to vendors for fuel in excess of Office of General Services centralized contract prices is indicative of waste.
3. DMNA should also seek to recover overcharges from the centralized fuel vendor that charged prices in excess of the contract prices.