

State Government Purchasing: A Biennial Review of State Procurement

Purpose of the Review: As required by state law, PEER conducted its fourth biennial review of state procurement. This review provided an overview of Mississippi's procurement environment and emergency procurement process, specifically during the COVID-19 pandemic. In addition, PEER addressed legislators' concerns regarding the Mississippi Department of Education's (MDE) emergency declaration regarding the procurement of technology products and professional services, and subsequent requests to suspend the one-year restriction on contract(s) awarded from an emergency declaration.

Background

MISS. CODE ANN. Section 5-3-72 (1972) requires PEER to evaluate on a biennial basis the procurement process used by all state agencies, including, but not limited to, the contract review, reporting, record keeping, and bid requirements in state law. Upon completion of its review, PEER is required to submit a report to the Legislature with its recommendations for improving the procurement process.

The Governor's Emergency Declaration of the COVID-19 Emergency in March 2020

On March 14, 2020, in response to the pandemic, Governor Tate Reeves issued a proclamation declaring a state of emergency in Mississippi. This proclamation allowed state agencies to temporarily suspend or modify rules, regulations, or orders if compliance with such provisions would prevent, hinder, or delay action necessary to cope with COVID-19.

Procurement Oversight Authorities

- Mississippi state law governs the processes for procurement of commodities, services, and technology, and delegates oversight responsibility to the Department of Finance and Administration (DFA) and the Department of Information Technology Services (ITS).
- DFA and ITS have worked together to create procurement rules and regulations to provide consistency across state government.
- The procurement process is complex, and the average length of time for a state agency to procure varies by agency and by the type and amount of goods and services needed.

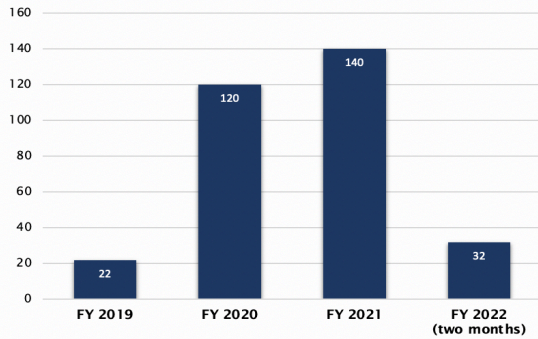
Overview of Emergency Procurement in Mississippi

- An "emergency" is defined as an unexpected circumstance that creates a threat to health, safety, or the preservation of public property.
- The executive director or board of a state agency has the authority to declare that an emergency exists, and an emergency purchase is necessary.
- State agencies are not required to obtain prior approval from an oversight authority to make an emergency purchase if the emergency threatens health, safety, or the preservation of property. Proper documentation is required to be filed with the appropriate oversight authority after the purchase is made.
- Emergency purchases determined to be in the "best interest of the state" do require prior approval from an oversight authority.
- State law does not require DFA and ITS to conduct an analysis to determine the validity of an emergency declaration.
- Procurement rules and regulations prohibit emergency contracts exceeding one year in duration.

MDE's Emergency Declaration and Request to ITS to Temporarily Suspend Rules and Regulations

- In September 2021, MDE declared that an emergency existed for the department in the procurement of technology products and services. MDE stated that the emergency existed because the delay in undertaking a competitive procurement would threaten health, safety, or the preservation of property.
- On September 16, 2021, under the authority of the Governor's Proclamation on March 14, 2020, the ITS Board approved MDE's request to temporarily suspend the ITS regulation restricting emergency contracts to one-year for six technology products totaling \$89 million.

Emergency Procurement Contracts from FY 2019 to FY 2022



SOURCE: PEER analysis of emergency procurement contract data reported in MAGIC and available on the Transparency Mississippi website from July 1, 2018, to September 15, 2021.

- There were 314 emergency procurement contracts, totaling approximately \$469.6 million from July 1, 2018, to September 16, 2021. As shown in the chart above, the majority of emergency contracts were during FY 2020 and FY 2021. According to DFA and ITS, the increase in emergency procurement contracts can be attributed to the COVID-19 pandemic.

- As shown in the chart below, approximately **154 or 49%** of the total emergency procurement contracts reviewed by PEER did not have an emergency declaration letter as required by state law. According to DFA, it is common for state agencies to proceed with an emergency purchase without an emergency declaration letter, even prior to the pandemic.

Emergency Declaration Letter	Number of Emergency Procurement Contracts from FY 2019 to FY 2022	Percentage
Yes	160	51%
No	154	49%

SOURCE: PEER analysis of emergency procurement contract data and documentation reported in MAGIC and available on the Transparency Mississippi website from July 1, 2018, to September 16, 2021.

Report Conclusions

1. State agencies claim emergencies threaten health, safety, or property even when the agency made the emergency procurement to correct a procedural error.
2. MDE's emergency declaration allows the department to use federal COVID-19 relief funds to procure the products and services prior to the award deadline.
3. While MDE's emergency declaration does not appear to threaten health, safety, or property, MDE is within the bounds of the state emergency procurement law.
4. The ITS Board is within its authority to temporarily suspend the one-year restriction because it is an ITS rule and not state law, and the Governor's Proclamation on March 14, 2020, allowing the suspension of rules and regulations.
5. An emergency procurement plan, as recommended by best practices, would help the state navigate procurement during an emergency situation, such as the pandemic.

Report Recommendations

1. The State Auditor should annually conduct a random sample and audit of emergency procurement contracts made without prior approval from DFA or ITS, to determine if emergencies in the sample did threaten health, safety, or property.
2. DFA and ITS should amend their rules and regulations to require procedural errors to be submitted as in the "best interest of the state" emergencies, which require prior approval.
3. DFA, ITS, and Mississippi Emergency Management Agency should build on preexisting inter-agency relationships to prepare an Emergency Procurement Response Plan, focused on ensuring documentation and continued operations.
4. The Legislature should consider amending state law to:
 - limit any IT-related contract awarded in response to an emergency to a term not to exceed one year;
 - include emergency contracts for personal or professional services;
 - prevent any part of the emergency procurement process from being suspended during an emergency; and,
 - require DFA and ITS to evaluate jointly on a biennial basis the procurement process utilized by all state agencies and repeal state law that currently requires PEER to conduct such review.