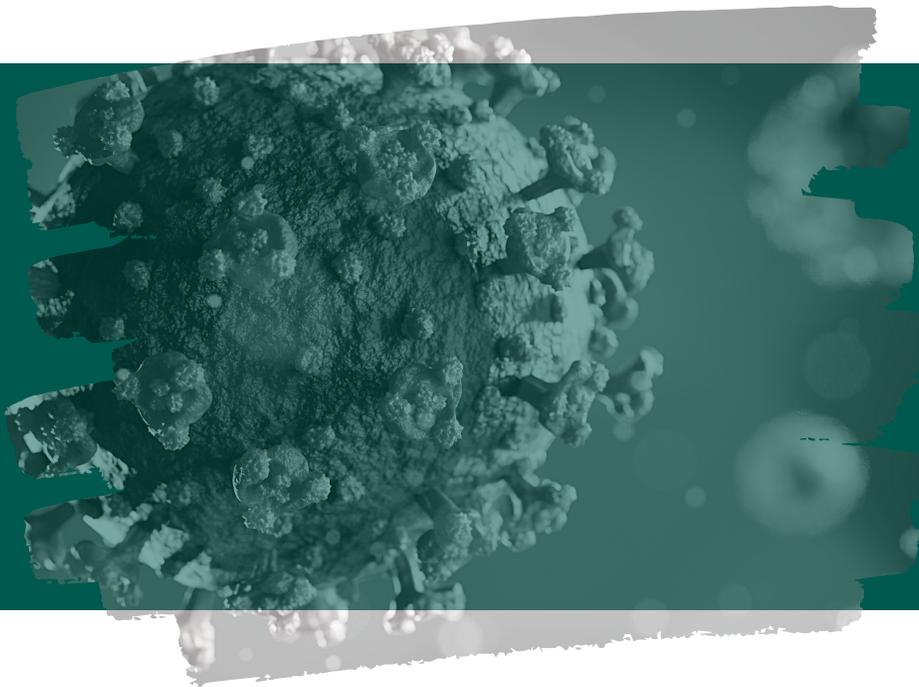




State Legislative Oversight of Emergency Contracts Related to COVID-19:

Three Case Studies

October 2020



The Levin Center would like to thank the report's primary authors, Elise J. Bean, Director, Washington Office of the Levin Center, and Tyler Langley, J.D. candidate, Wayne State University Law School. While the Levin Center is affiliated with Wayne State University Law School, the views expressed in this report do not present the institutional views, if any, of Wayne State University or the Law School.



TABLE OF CONTENTS

| | Page |
|---|------|
| INTRODUCTION | 3 |
| EXECUTIVE SUMMARY | 4 |
| A. Findings of Fact..... | 4 |
| B. Recommendations | 4 |
| C. Overview of Case Studies | 5 |
| | |
| THREE CASE STUDIES | 11 |
| Case Study 1: Contracts for COVID-Related Testing | 11 |
| Case Study 2: Contracts for Protective Face Masks | 24 |
| Case Study 3: Contracts for Consulting Firms | 32 |

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Levin Center at Wayne Law

INTRODUCTION

The COVID-19 outbreak in the United States began with the first reported case in January 2020.¹ In February, the first death was reported in the state of Washington.² In March, after 26,000 deaths worldwide, the World Health Organization declared COVID-19 a pandemic.³ By the end of April, over 60,000 deaths involving COVID-19 were reported in the United States.⁴ Today, the number of U.S. deaths exceeds 200,000.⁵

State governments within the United States have responded to the pandemic, in part, by declaring a state of emergency and ramping up emergency spending.⁶ Generally, state laws authorize the state's executive branch, when a state of emergency exists, to issue emergency contracts on a no-bid basis.⁷ Since January, the 50 states have collectively spent billions of dollars through emergency, no-bid contracts related to the pandemic.⁸

Media reports indicate that some of the state-issued COVID-related contracts have incurred a range of problems, including unreliable contractors, excessive prices, substandard goods or

¹ CDC. (Jan. 21, 2020). *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*. [Press release]. Retrieved from <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

² CDC. (Feb. 29, 2020). *Washington State Report First COVID-19 Death*. [Press release]. Retrieved from <https://www.cdc.gov/media/releases/2020/s0229-COVID-19-first-death.html>.

³ CDC. (March 31, 2020). *Preliminary Estimate of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019*. [Press release]. Retrieved from <https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm>.

⁴ CDC. (2020). *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*. Retrieved from <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>.

⁵ Johns Hopkins University of Medicine Coronavirus Resource Center, Critical Trends, Cumulative Cases. (2020), <https://coronavirus.jhu.edu/data/cumulative-cases>.

⁶ Perper, Rosie, et al. (March 17, 2020). *Almost all US states have declared states of emergency to fight coronavirus—here's what it means for them*. Retrieved from <https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3>.

⁷ See, e.g., California Emergency Services Act §8570(b)(c)(enabling the governor to “plan for, procure, and pre-position supplies, medicines, materials, and equipment” and “use and employ any of the property, services, and resources of the state as necessary to carry out the purposes” in accordance with its State Emergency Plan).

⁸ Committee for a Responsible Federal Budget. (Aug. 6, 2020). *How Much Have States Spent from the Coronavirus Relief Fund?* Retrieved from <https://www.crfb.org/blogs/how-much-have-states-spent-coronavirus-relief-fund>.

services, delayed deliveries, or a lack of transparency. A key question examined in this report is the extent to which state legislatures have exercised oversight to identify, analyze, and address those contract problems. The case studies show that, unfortunately, most state legislatures currently conduct minimal oversight of state-issued contracts. However, the case studies also demonstrate the potential for state legislatures and individual legislators to exercise effective oversight to improve state contracting practices.

EXECUTIVE SUMMARY

A. Findings of Fact

This report makes the following findings of fact.

- (1) States Are Collectively Spending Billions of Dollars on Emergency COVID-Related Contracts.** States are collectively spending billions of taxpayer dollars on no-bid, emergency contracts issued to private sector corporations to deal with COVID-related problems.
- (2) COVID-Related Contracts Have Raised Multiple Concerns.** Some COVID-related no-bid, emergency contracts issued by states have raised substantial concerns including unreliable contractors, excessive prices, substandard goods or services, delayed deliveries, or a lack of transparency.
- (3) State Legislative Oversight of COVID-Related Contracts Has Been Haphazard and Uneven.** The failure of some state legislatures to make contract oversight an explicit committee responsibility and the frequent lack of established mechanisms to oversee contract bidding procedures, pricing, and performance have made it difficult for many state legislatures to oversee no-bid COVID-related contracts issued on an emergency basis and have resulted in haphazard and uneven oversight efforts.
- (4) State Legislative Contract Oversight Has Occurred Whether the Legislators and Governors Were from the Same or Different Political Parties.** The case studies show that legislative oversight efforts have occurred when the legislators and governor were from the same political party as in Utah and California or from different political parties as in Iowa and Nebraska.
- (5) Short Legislative Sessions Have Hampered Contract Oversight.** Some state legislatures operate for limited periods of time during the year making contract oversight difficult, especially if special legislative sessions can be called only by the governor.

B. Recommendations

This report makes the following recommendations.

- (1) **Elevate Contract Oversight.** State legislatures should treat oversight of contracts involving substantial taxpayer funds as a key responsibility.
- (2) **Establish Contract Oversight Mechanisms.** State legislatures should assign contract oversight responsibility to specific committees and establish mechanisms to facilitate oversight of contract bidding procedures, pricing, and performance, particularly for large, no-bid contracts issued on an emergency basis.
- (3) **Enable Year-Long Oversight.** State legislatures should establish mechanisms to facilitate contract oversight even when the legislature as a whole is out of session.

C. Overview of Case Studies

This report is the product of the Levin Center at Wayne Law, located at Wayne State University Law School in Detroit.⁹ Established in honor of Senator Carl Levin, Michigan's longest serving senator who was also renowned for conducting effective, fact-based, bipartisan oversight investigations in the U.S. Senate, the Levin Center has dedicated itself in part to strengthening oversight efforts by legislatures at the national and state levels. It does so through oversight-related research, training, and other activities.¹⁰

As part of its work, the Levin Center commissioned a 2019 report by the Wayne State University Center for Urban Studies (CUS) which examined the capacity of each of the 50 state legislatures to conduct oversight of its executive branch and the extent to which each legislature actually made use of its oversight tools.¹¹ In each state, the CUS report evaluated seven different dimensions of legislative oversight, one of which was oversight of state contracts. The report concluded that contract oversight was a particular weakness across the country, finding that 88 percent of state legislatures conducted only limited or minimal oversight of state procurement practices, even when state contracts involved substantial taxpayer dollars.¹²

To deepen its understanding of contract oversight by state legislatures, the Levin Center decided to develop three case studies examining legislative oversight of state contracts related to the COVID-19 pandemic. To develop those case studies, the Levin Center reviewed media reports, state legislative hearings and materials, relevant contracts (when available), related documents, and CUS report sections on the state legislatures involved in each case study. The Levin Center also reached out to individual state legislators and their staffs, state legislative committee and subcommittee staff, state executive branch personnel, state auditor offices, health

⁹ While the Levin Center is affiliated with Wayne State University Law School, the views expressed in this report do not present the institutional views, if any, of Wayne State University or the Law School.

¹⁰ *About the Levin Center at Wayne Law*. Retrieved from <https://law.wayne.edu/levin-center/about>.

¹¹ Thompson, L., Sarbaugh-Thompson, M. (2019). *Checks and Balances in Action: Legislative Oversight across the States*. Retrieved from <http://stateoversightmap.org/about-the-report/>.

¹² *Id.* at 52.

care and contract experts, reporters, and others. Those in-depth contacts involved a total of ten different states. The entire research effort took place from June to September 2020.

Each of the three case studies examines a different type of COVID-related contract, the problems that arose in connection with that contract, and the extent of oversight exercised by the relevant state legislature. Each contract category was selected for its relevance to combating COVID-19, its occurrence in states across the country, and the incidence of problems arising in multiple states. Other factors influencing selection of the case studies included the availability of public information and the extent to which the contract issues illuminated state-level contract oversight. The three case studies featured in this report address COVID-19 testing, procurement of protective masks for health care workers and first responders, and the use of consultants to address unemployment insurance systems and other COVID-related issues.

1. Contracts for COVID-19 Testing—Utah, Iowa, Nebraska

The first case study examines state contracts to expand testing for the COVID-19 virus. The state contracts were issued to the same consortium of three companies, led by a newly formed Utah company, Nomi Health, to conduct COVID-19 testing in Utah, Iowa, and Nebraska. Each state contract was worth millions of dollars and was issued without a competitive bidding process on an emergency basis. Utah, Iowa, and Nebraska paid \$4 million, \$26 million, and \$27 million, respectively, to obtain the expanded testing services for their residents. Concerns soon arose, however, over pricing, the accuracy of the tests, and delays in returning test results.

State legislative oversight of the testing contracts varied across the three states. In Utah, after criticisms that the “TestUtah” contract advocated use of a discredited drug, hydroxychloroquine, to treat the virus, the Republican governor rescinded an \$800,000 proposal to purchase that drug. Additional concerns were raised about the accuracy of the test results and the competence of the laboratory used to process them, but the state chose to extend the TestUtah contract anyway, again on a no-bid emergency basis. In response, the elected Utah State Auditor, a Republican, and a few state legislators raised questions about the testing contract as well as the state’s overall emergency spending of more than \$100 million. Those concerns led to the legislature enacting in a special session a new law requiring the governor to inform the legislature of any emergency contract that exceeds \$2 million. The State Auditor also published a report that reviewed a number of emergency contracts, including pricing and other problems with the TestUtah procurement. In addition, in response to state-wide concerns about spending, Utah’s Division of Purchasing launched a new website providing increased public information about its COVID-related contracts.

In Iowa, two Democratic state legislators sent a letter to the state House Government Oversight Committee raising concerns about the \$26 million TestIowa contract, including its award without competitive bidding, its high cost, inadequate test numbers, and denial of tests to certain Iowans. The letter requested a legislative committee inquiry into the contract, but no action was taken. Instead, the Republican committee chair sponsored a resolution commending the Republican governor for her “swift and decisive action and thoughtful leadership” in responding to the pandemic.¹³ A month later, in response to ongoing complaints about slow test

¹³ HR113, 88th Gen. Assemb., Reg. Sess. (Iowa 2020).

results, the elected Democratic Iowa State Auditor issued a report that criticized the multi-step reporting chain used by TestIowa to forward test results and found that the process violated state law. That report, however, was not forwarded officially to any legislative committee and, to date, no evidence has surfaced regarding a legislative review of the contract.

In Nebraska, four Democratic senators sent a letter to the state’s Republican governor citing problems with the TestNebraska contract and urging its termination. The letter cited such problems as use of an inexperienced contractor selected on a no-bid emergency basis, inadequate test numbers, delayed test results, and the failure to direct taxpayer dollars to in-state laboratories with pre-existing testing infrastructure and expertise. The governor, however, dismissed the complaints. In response, one legislator asked the elected State Auditor to conduct an audit of the contract. In addition, in late September, a hearing before the Senate Appropriations Committee examined, in part, the TestNebraska contract deficiencies.

In this case study, three states issued multi-million-dollar contracts to the same consortium of companies to expand their COVID-related testing. Complaints followed, targeting the no-bid status and high cost of the contracts, the use of a contractor with no experience in conducting infectious disease testing, the accuracy of the tests, and delays in providing test results. Although the three state legislatures had no tradition or track record of contract oversight, at least some legislators in each state raised concerns, one state enacted new contract oversight legislation, two state auditors issued oversight reports and a third was asked to initiate a review, one state launched a new website with more contract information, and one legislative committee addressed alleged contract deficiencies at a hearing. Those oversight efforts included same-party and cross-party activities, demonstrating the potential for legislative oversight to hold a state’s executive branch accountable for its procurement decisions.

2. Contracts for Protective Face Masks—California, Missouri, West Virginia

The second case study examines state contracts to procure personal protection equipment, specifically face masks for health care providers and first responders. The contracts were issued by the states of California, Missouri, and West Virginia. Identified problems included unreliable vendors, delivery delays, substandard masks, and a lack of transparency.

In California, the Democratic governor issued a \$1 billion contract to a Chinese vehicle manufacturer, BYD, to procure 300 million N95 masks for the state. According to one media report, this no-bid emergency contract “was kept hidden from state legislators and the media” by the governor’s office.¹⁴ The Democratic chair of the legislature’s Joint Legislative Budget Committee sent a letter to the state Department of Finance asking the state for detailed information about the contract requirements, mask delivery timelines, and how the masks would be allocated. Later, when the governor decided to extend the contract to purchase another 420 million masks from BYD, again on a no-bid emergency basis, he made the contract terms public so that everyone could review them and noted the state’s success in securing a lower contract

¹⁴ Grimes, K. (May 28, 2020). Gov. Newsom’s BYD Mask Deal Profitable for Insider Dealmakers. *California Globe*. Retrieved from <https://californiaglobe.com/section-2/exclusive-gov-newsoms-byd-mask-deal-profitable-for-insider-dealmakers/>.

price per mask. In addition, the governor committed to opening future contracts to competitive bids. His actions addressed key concerns expressed by legislators about the mask procurement.

In Missouri, the state ordered 3.9 million masks from a company with local ties at a cost of \$16.5 million. When the masks were delivered to first responders, however, the state determined that 48,000 failed to meet state standards and recalled them. The company initially refused to refund any money, but after the Republican governor got involved, the company did so. In response, the Democratic State Auditor initiated an inquiry into the bidding and funding process, the state's quality control procedures, and the condition of the remaining masks delivered to the state. It is not clear, however, if the Auditor intends to produce an official report on the contract or to provide contract information to the state legislature. To date, only a single legislator has expressed public concerns about the contract, and there is no public evidence of a legislative-backed investigation.

In West Virginia, the state issued a \$567,000 contract to a local company to procure 100,000 masks for first responders. When the masks were delivered, first responders and local officials raised immediate concerns, because some of the masks used ear loops rather than headbands and so were less effective in protecting against the virus. When contacted, the CDC and an emergency response expert advised first responders against using the masks, but a West Virginia official issued a 10-page memorandum declaring that the masks were "not counterfeit" and should be used. A media investigation found that the official advising use of the masks had relied, in part, on a company under separate indictment in another state. Despite the very visible controversy over the mask procurement, complaints by first responders, and some expressions of concern by individual legislators, neither the Legislative Auditor's office nor any legislative committee has initiated an inquiry into the contract. That lack of action may be due, in part, to the legislature's being out of session and its inability to call a special session without the governor's consent. In addition, the West Virginia state legislature does not formally task any of its committees with monitoring state contracts.

This case study shows some of the urgent issues states faced during their attempts to secure needed personal protective equipment, including high prices, unfamiliar vendors, unreliable deliveries, substandard goods, and anxious health care workers and first responders. In West Virginia and Missouri, state legislatures appear to have made little or no effort to exercise oversight of state procurement activities, while in California, legislators were quick to express concerns to a governor of the same political party. The California state legislators' oversight efforts also appear to have contributed to greater contract transparency, lower contract prices, and a new commitment from the governor to make greater use of competitive bidding.

3. Contracts for Consulting Firms—Illinois, Ohio, California, Washington, Florida

The third case study examines state contracts issued to high-priced consulting firms to assist with state responses to the pandemic. The states involved in the case study are Illinois, Ohio, California, Washington, and Florida. The two consulting firms are Deloitte Consulting LLC and McKinsey & Company. Deloitte was hired by three of the states to bolster their unemployment insurance services, while McKinsey was hired by two states to provide data services and advice.

In Illinois, the state hired Deloitte under a no-bid contract for over \$12.7 million to address problems affecting the state's unemployment claims system. Lawmakers first took issue with the contract when personal data such as social security numbers were exposed to outside scrutiny due to a "glitch" in the new system. Six Republican legislators filed a formal resolution calling for the Auditor General, appointed by the Democratic governor, to conduct a full audit of the security breach and no-bid nature of the contract. The resolution also urged the bipartisan, bicameral Legislative Audit Commission to review the findings of any audit and to act if necessary. To date, however, the resolution has not been brought before the state House for a vote, and no public evidence has emerged of actions taken by the Auditor General, Legislative Audit Commission, or any legislative committee to review the Deloitte contract.

In Ohio, a \$10 million no-bid contract with Deloitte also put more than 120,000 people at risk of having their personal data exposed. Ohio's Inspector General is partly responsible for oversight of state contracts, but no public evidence indicates the IG has undertaken any review of the Deloitte contract. Another body within the state's Office of Budget and Management, called the Controlling Board, is also responsible for oversight of state contracts. The Controlling Board has seven members: the head of the Office of Budget and Management and six legislators from both state houses, including members from both the majority and minority parties. That hybrid executive-legislative body, with its bipartisan, bicameral legislative members, is required to meet every two weeks to conduct business. Minutes from board meetings in 2020 indicate that the board was aware of both the Deloitte contract and the data breach, but are unclear on the extent to which the board conducted a specific inquiry into the facts.

In California, Deloitte was awarded a \$16 million no-bid contract to help expand the state's unemployment call center. This contract was awarded despite past problems with a Deloitte contract to improve California's unemployment claims system which, in 2010, triggered oversight from lawmakers and the State Auditor. When issues arose in connection with the new contract, including massive delays in the call center responding to unemployment benefit claims, lawmakers used their committee positions to hold a hearing in which they confronted a key state official with the problems. In addition, over 60 Democratic state legislators sent a letter to the state's Democratic governor noting Deloitte's poor contract performance in the past and calling for "vendor reform and accountability."¹⁵

In Washington, the state signed three separate contracts with McKinsey totaling nearly \$5 million to help utilize certain data tools, defend against unemployment insurance fraud, and speed up contact tracing to combat spread of the virus. A Republican state senator raised concerns about the contracts, noting the large price tags and no-bid process in which they were awarded. Because the state's 60-day legislative session had already ended in March 2020, the same senator called for a special session to address concerns about the Democratic governor's autonomous spending and other unilateral actions during the pandemic, cautioning his colleagues against the legislative branch's ceding so much spending power to the executive branch. To date,

¹⁵ Letter from David Chiu et.al. to Governor Gavin Newsom. (Aug. 5, 2020). Retrieved from <https://a65.asmdc.org/sites/a65.asmdc.org/files/pdf/Legislative%20EDD%20Letter%20to%20Governor%20Newsom.pdf>.

however, no legislative review of the contracts has taken place, and it appears unlikely a special session will be called since it can only be convened by the governor.

In Florida, the state's largest county, Miami-Dade, entered into a \$500,000 contract with McKinsey to help the county collect COVID-related data and use that data to develop a plan to reopen schools, businesses, and facilities. County officials raised concerns about the contract's high cost and the value of the services being provided. A deputy mayor wrote in an internal email, for example, that it "apparently takes 5 people with staff support [from McKinsey] to do what I've been doing myself."¹⁶ Another noted that the \$142,000 per week cost of the contract exceeded the combined annual salaries of the two state employees who had been helping perform the same data collection and analysis. In addition, according to reports, McKinsey resisted county officials seeking to limit the contract period to four weeks, claiming instead that an unspecified end date would "provide flexibility." Still another issue involved McKinsey's inclusion of a strict confidentiality clause in the contract. When the county finally released its reopening plan, it was widely criticized as overly complex and confusing. Despite media reports and an investigative expose that featured the McKinsey contract, no evidence has surfaced that any legislative committee has taken any action to examine the McKinsey procurement.

This case study focuses on high-priced consultant contracts issued on a no-bid, emergency basis to address a variety of COVID-related problems. Each contract involved substantial taxpayer funds, produced questionable results, and were the subject of negative comments by a few legislators, yet in Illinois, Ohio, Washington, and Florida, the state legislatures appear to have taken no action to review the procurements. In contrast, in California, the legislature held a hearing that questioned a key state official, and over 60 legislators sent a joint letter to their governor, who belongs to the same political party, raising concerns about and demanding action on a problematic consultant contract. While the governor did not immediately respond publicly, that level of oversight seems difficult to ignore. The contrasting responses to the Deloitte and McKinsey consulting contracts demonstrate, again, the great variance in state-level oversight by legislatures.

¹⁶ Email from Jennifer Moon to Andrea Dua. *Quick follow up*. (April 24, 2020). Retrieved from https://beta.documentcloud.org/documents/20193103-moon_5-people-email.

THREE CASE STUDIES

The following case studies examine three categories of COVID-related emergency contracts with examples taken from ten states. They feature state legislatures that provided active and productive contract oversight as well as legislatures that demonstrated minimal or no oversight. They include oversight efforts in which the legislators and governor were from the same political party and others in which they came from opposing parties. The examples also showcase a variety of contract oversight mechanisms, including legislators who used correspondence, media statements, legislative hearings, or legislation to address contract problems; worked with elected or appointed state auditors to obtain contract reviews; pressed state officials to provide more contract information on public websites; and contributed to some unusual state bodies with, for example, a mix of executive and legislative members or a mix of legislators drawn from both parties and state houses to form a bipartisan, bicameral group. The examples also demonstrate the limitations of part-time legislatures that lack the unilateral power to call a special session, even during a pandemic.

Together, these case studies document the huge variation in oversight activities by state legislatures, the potential for legislative oversight to safeguard and improve state-level contracting, and the need for state legislatures to strengthen their contract oversight mechanisms to ensure taxpayer dollars are well spent.

Case Study 1: Contracts for COVID-Related Testing

This case study examines state contracts related to testing for COVID-19. The testing contracts were separately issued by the states of Utah, Iowa, and Nebraska to the same consortium of three Utah-based companies. Concerns included the no-bid, emergency status of the contract awards, the accuracy of the tests, and delays in returning test results. In response to complaints, in each case, state legislators exercised some degree of contract oversight.

Background

The need for testing to help combat COVID-19 was clear to health officials from the beginning of the outbreak in the United States. According to Dr. Eduardo Sanchez, American Heart Association Chief Medical Officer for Prevention, early testing leads to “quick identification of cases, quick treatment for those people and immediate isolation to prevent spread.”¹⁷ Dr. Sanchez also pointed out that early testing facilitates “contact tracing” to identify anyone who may have come into contact with an infected person and help limit further exposure.

Despite the great need for testing the United States immediately encountered problems with obtaining a sufficient number of tests that produced quick, reliable results. In early response plans, experts called for at least 500,000 tests a day (with some plans calling for numbers in the millions), but in the last week of April 2020, the United States was averaging only 220,000 tests

¹⁷ Sanchez, Eduardo. (April 2, 2020). COVID-19 science: Why testing is so important. *American Heart Association*. Retrieved from <https://www.heart.org/en/news/2020/04/02/covid-19-science-why-testing-is-so-important>.

a day.¹⁸ Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, said in April that the United States needed to “significantly ramp up not only the number of tests, but the capacity to perform them.”¹⁹ The issues the country faced resulted in part from the large global demand for test components including viral transport media, extraction kits, reagents, and test swabs.²⁰ Another problem was limited U.S. lab capability to turn around test results in a timely manner.

In March 2020, in an attempt to bolster the number of test kits available, the Food and Drug Administration (FDA) began to issue Emergency Use Authorizations (EUAs) allowing commercial test companies to produce and sell COVID-19 tests without going through the normal FDA approval procedures.²¹ Co-Diagnostics, Inc., a molecular diagnostics company, was one of the entities that received an EUA to begin selling its tests in the United States.²² In a televised interview, Co-Diagnostics CEO, Dwight Egan, said that the EUA gave its tests “great accessibility” and allowed the company to “open up and break the log jam.”²³

The Utah Consortium’s Testing Initiative

In response to the demand for quick, reliable tests, three Utah-based tech companies from the “Silicon Slope” region of the state partnered together to form a testing initiative which they called “TestUtah” and later “TestIowa” and “TestNebraska” for each state in which they conducted testing operations. The initiative was spearheaded by the newest of the three Utah companies, Nomi Health Inc., and its CEO Mark Newman. Initially scheduled to launch Nomi Health in 2021, Mr. Newman sped up its formation to 2020, after concluding that the pandemic offered an opportunity for his new company and its partners to provide needed testing solutions. In a March 2020 email later made public by a local newspaper, Mr. Newman expressed his interest in helping with the pandemic response and stated that Nomi Health would focus on “cutting out all middlemen when it comes to buying, paying for and getting healthcare for employees and families.”²⁴ He also identified the COVID-19 testing problem as the perfect example of the type of health care problem his company wanted to tackle.

¹⁸ Lopez, German. (May 1, 2020). Why America’s coronavirus testing barely improved in April. *Vox*. Retrieved from <https://www.vox.com/2020/5/1/21242589/coronavirus-testing-swab-reagent-supply-shortage>.

¹⁹ Park, Alice. (April 23, 2020). Dr. Anthony Fauci ‘Not Overly Confident’ With U.S. COVID-19 Testing Capabilities. *Time Magazine*. Retrieved from <https://time.com/5826161/anthony-fauci-covid-19-testing-capabilities/>.

²⁰ Baird, Robert. (March 24, 2020). Why Widespread Coronavirus Testing Isn’t Coming Anytime Soon. *The New Yorker*. Retrieved from <https://www.newyorker.com/news/news-desk/why-widespread-coronavirus-testing-isnt-coming-anytime-soon>.

²¹ Food and Drug Administration. (March 30, 2020). Coronavirus (COVID-19) Update: Daily Roundup March 20, 2020. [Press release]. Retrieved from <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-daily-roundup-march-30-2020>.

²² Co-Diagnostics, Inc. (April 6, 2020). Co-Diagnostics, Inc Receives FDA Emergency Use Authorization for COVID-19 Test. [News Release]. Retrieved from <http://codiagnostics.com/co-diagnostics-receives-fda-eua-for-covid19-test/>.

²³ Egan, Dwight. (April 6, 2020). Interviewed by Ashley Webster for *Fox Business*, Television. Retrieved from <https://video.foxbusiness.com/v/6147445118001/#sp=show-clips>.

²⁴ Email from Nomi Health CEO Mark Newman (March 14, 2020). Obtained via FOIA by the *Salt Lake City Tribune*. Retrieved from https://www.scribd.com/document/459570383/Newman-Email#fullscreen&from_embed.

On March 18, 2020, at a virtual town hall sponsored by Silicon Slopes, a nonprofit dedicated to promoting the tech industry in Utah, Mr. Newman announced a plan to provide thousands of tests for Utah residents “bought up front for the good of the community.”²⁵ He explained that the tests would be purchased from Co-Diagnostics, which had an EUA from the FDA to sell tests in the United States. Mr. Newman said that Utah was also in critical need of basic supplies like swabs, test kits, test capture, and population health analytics to combat the virus. Finally, he announced that the initial plan was to provide the testing free of charge to the community. The funding was to come from Silicon Slopes which announced it was seeking \$5 million in donations to fund the effort.

Weeks later when the program was set to launch, the promise to provide free testing morphed into one in which the three companies instead promised not to profit from the venture. According to one media report, concerns about funding had been raised almost immediately after the town hall. Instead of promising free testing, Clint Betts, executive director of the Silicon Slopes nonprofit, promised “no tech company is going to make any money off of this.”²⁶

Mr. Betts also asked Mr. Newman to clarify his earlier statement. On a Zoom call Mr. Newman said, “Let’s be clear. There are costs in facilitating all of this: tents, generators, heat, electricity, people, cones, security, public safety, tests, swabs, test kits, extraction kits, you name it.” He did not repeat his earlier offer of free testing. He later said that there would be “no profiteering” and that if the companies had wanted to make money, they would have gone to New York.²⁷

According to a Utah newspaper, by April 2, 2020, TestUtah’s launch date, Nomi Health and the state of Utah had signed a no-bid contract on an emergency basis in which the state committed to paying the company more than \$4 million for testing services to run from March 31-May 30.²⁸

To run the TestUtah program, Nomi Health partnered with two other Utah tech companies, Qualtrics and Domo, Inc., neither of which had any prior health care experience. Qualtrics is a survey software company,²⁹ and Domo is a software company that specializes in business intelligence tools and data visualization.³⁰ Pooling their software expertise, the three companies jointly constructed the TestUtah testing program and website. The website was

²⁵ Silicon Slopes. (March 18, 2020). *Silicon Slopes Town Hall 3/18: COVID19* [Video] YouTube. Retrieved from <https://www.youtube.com/watch?v=JWunYARwOZg>.

²⁶ Baird, Robert. (June 13, 2020). How Utah’s Tech Industry Tried to Disrupt Coronavirus Testing. *The New Yorker*. Retrieved from <https://www.newyorker.com/tech/annals-of-technology/how-utahs-tech-industry-tried-to-disrupt-coronavirus-testing>.

²⁷ *Id.*

²⁸ Carlisle, Nate. (April 22, 2020). Silicon Slope companies ink big dollar contracts for coronavirus testing in Utah, Iowa. Nebraska is next. *Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/2020/04/22/silicon-slopes-companies/>; Utah Division of Purchasing and General Services. *COVID-19 Expenditures*. Retrieved from <https://purchasing.utah.gov/covid-19/>.

²⁹ Qualtrics website. Retrieved from <https://www.qualtrics.com/>.

³⁰ Domo, Inc. website. Retrieved from <https://www.domo.com/>.

designed to provide an online process to assess a person’s need for a COVID test, schedule any needed test, and initiate contact tracing if appropriate.

On the TestUtah website, the process was described as “three simple steps.”³¹ The first step was the “assessment,” which used an online assessment tool to “determine your current risk and provide the Utah State Health Department and government leaders insight into our collective health.” The second step was to schedule a “test” for those who needed it. The website warned that not everyone could be tested, and that testing would be prioritized for “those who currently have symptoms, have interacted with someone who has already tested positive, or have recently visited places where COVID-19 is more widespread.” Tests were prioritized using the answers filled out in the online assessment. The last step, “track,” asked questions to those who had tested positive for the virus to determine who they’d been in contact with. The TestIowa and TestNebraska websites used the same three-step approach.³²

The three companies purchased testing kits from Co-Diagnostics and used a Utah-based lab to process the test results. They also set up physical testing sites.

Utah

Concerns about the TestUtah online assessment tool arose almost immediately after the website was launched. One prominent concern was why the online assessment asked users if they were allergic to hydroxychloroquine, a drug that was raising questions in the medical community.³³ Hydroxychloroquine later lost its emergency use authorization from the FDA as a COVID-19 treatment when the FDC determined that it “showed no benefit for decreasing the likelihood of death or speeding recovery.”³⁴

According to news reports, the online assessment asked about hydroxychloroquine, because Nomi Health had initially recommended that those who tested positive for COVID-19 consider treatment with that medication.³⁵ This recommendation was also in the state-issued contract which stated: “ Optional: If individuals in the pool test positive and are in high-risk category consider medication treatment (e.g. Hydroxychloroquine or Chloroquine) administered by the Health Department.”³⁶ In response to the TestUtah approach, on March 31, 2020, the Utah Division of Purchasing and General Services ordered 20,000 medication packs of chloroquine, zinc, and hydroxychloroquine for \$800,000 from a company called Meds in Motion. Around the

³¹ TestUtah Website. Retrieved from <https://www.testutah.com/en>.

³² TestIowa Website. Retrieved from <https://www.testiowa.com/en>; TestNebraska Website. Retrieved from <https://www.testnebraska.com/en>.

³³ Baird, *supra* note 26.

³⁴ Food and Drug Administration. (June 15, 2020, updated July 1, 2020). *FDA cautions against use of hydroxychloroquine or chloroquine for COVID-19 outside of the hospital setting or a clinical trial due to risk of heart rhythm problems*. [Press release]. Retrieved from <https://www.fda.gov/drugs/drug-safety-and-availability/fda-cautions-against-use-hydroxychloroquine-or-chloroquine-covid-19-outside-hospital-setting-or>.

³⁵ State of Nebraska service contract with Nomi Health Inc. (April 21, 2020). Retrieved from <https://statecontracts.nebraska.gov/Search/ViewDocument?D=YwlqfjIJWhNLrVKwpufSnA%3D%3D>.

³⁶ *Id.*

same time, the Utah Health Department was in a separate negotiation for additional doses.³⁷ The news media later disclosed that the Nomi Health CEO, Mark Newman, also served on the board of Meds in Motion, the supplier selling hydroxychloroquine to Utah.³⁸

After concerns were raised about the effectiveness of the drug, Utah Governor Gary Herbert ordered an investigation and determined that a state stockpile of hydroxychloroquine was “no longer prudent.”³⁹ The state requested and received a refund from Meds in Motion for the \$800,000.⁴⁰ In response to questions, Mr. Newman stated that the assessment question and contract provision had been based on available information at the time, and were changed upon receipt of new information about the drug’s ineffectiveness as a treatment for COVID-19.⁴¹

A second set of concerns with the TestUtah initiative involved questions about the accuracy of the test results. The questions centered on negative results provided to persons suspected of being infected with COVID-19. Members of Utah’s coronavirus task force told one media outlet that TestUtah was “getting levels of positivity that were significantly lower” than other labs, noting that TestUtah had only a 2% positivity rate while other state labs had rates as high as 5%.⁴² The company responded that the discrepancy in rates was due to population differences, and while several laboratory directors agreed that could play a role, when investigators controlled for asymptomatic patients, TestUtah still had an inexplicably lower positivity rate.⁴³

To resolve the concerns, the state asked TestUtah to send specimens to ARUP Laboratories, a national nonprofit and academic reference laboratory associated with the University of Utah.⁴⁴ ARUP said that it was unable to test roughly 10% of the samples provided by TestUtah due to contamination problems. When asked about the contaminated samples, Co-Diagnostics was quoted as saying there was “leaking or something from the tubes,” and Nomi Health explained that it happened when people failed to screw the lids on tight.⁴⁵ Utah Department of Health Director Jeff Burton said that ARUP did not plan to release the TestUtah results.⁴⁶

³⁷ Rodgers, Bethany. (April 23, 2020). Utah has already ordered \$800K of malaria drugs, could spend millions more on unproven COVID-19 treatment. *Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/politics/2020/04/23/utah-has-already-ordered/>.

³⁸ Alberty, E. and Carlisle, N. (April 25, 2020). This executive links TestUtah.com and the pharmacy selling the state malaria drugs to treat coronavirus. *Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/2020/04/24/utah-adds/>.

³⁹ McKellar, Katie. (April 29, 2020). Utah issued refund for \$800,000 in anti-malarial meds. *Desert News*. Retrieved from <https://www.deseret.com/utah/2020/4/29/21242089/utah-coronavirus-covid-19-malaria-drugs-refund-state-purchase-meds-in-motion>.

⁴⁰ *Id.*

⁴¹ Alberty, *supra* note 38.

⁴² Baird, *supra* note 26.

⁴³ *Id.*

⁴⁴ *Id.* See also <https://www.aruplab.com/about>.

⁴⁵ Baird, *supra* note 26.

⁴⁶ Alberty, Erin. (May 29, 2020) Utah scraps its investigation of TestUtah’s coronavirus accuracy and will try again. *Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/2020/05/28/utah-scraps-its-own/>.

A third set of concerns involved the competence of the laboratory used by TestUtah to process its samples. Located at Timpanogos Regional Hospital in Orem, Utah, the lab had earlier been found to be out of compliance with federal regulations. The U.S. Centers for Medicare and Medicaid Services (CMS) issued a report detailing a number of deficiencies and concluding that the “laboratory is not in compliance with all applicable CLIA Conditions.” CLIA refers to the Clinical Laboratory Improvement Amendments that govern medical labs nationwide.⁴⁷ A local newspaper used a FOIA request to obtain a related CMS letter describing some of the lab deficiencies. They included problems with general laboratory systems, preanalytical systems, analytics systems, post-analytic systems, and qualifications or performance of the lab director and the general supervisor.⁴⁸ While CMS did not find that the deficiencies produced “immediate jeopardy” (a designation reserved to labs that threaten serious harm to patients), it did require the lab to correct the problems.

When asked for a reaction, Utah Public Health Department director Jeff Burton was quoted by the media as downplaying the problems, saying this was “not out of the ordinary.”⁴⁹ He also said, “If CLIA [sic] had reason to believe any TestUtah results should be invalidated, or that individuals should be re-tested, we would expect that information to be relayed to those individuals from the lab.”⁵⁰ In contrast, however, Robyn Atkinson-Dunn, director of the Utah Public Health Laboratory, a respected facility within the state, had visited the lab in April before the CMS investigation and witnessed a number of troubling practices.⁵¹

Despite these issues, on May 31, 2020, Utah extended the TestUtah contract for another 45 days, again on an emergency, no-bid basis.⁵² Around the same time, the Utah Department of Health directed Dr. Atkinson-Dunn to route some of the state’s backlogged tests to TestUtah. Due to TestUtah’s reliance on a laboratory which she knew to be out of compliance with CLIA standards, however, she declined to send the tests as directed.⁵³ A few days after her refusal, Dr. Atkinson-Dunn was demoted from director of the Utah Public Health Laboratory and offered a new position as a “multi-drug resistant organism specialist,” a position for which she said she lacked expertise.⁵⁴ When asked about the demotion, she responded: “I dedicated eight-and-a-half years to that job [T]hat lab had built a reputation across the nation and across the state. And I get removed because I refused to do something that is unethical. That’s how the state works right now. They do unethical things.”

In May 2020, in response to the TestUtah concerns as well as other spending issues related to COVID-19, some state legislators and the elected Utah State Auditor began to raise

⁴⁷ Alberty, Erin. (June 4, 2020). TestUtah’s lab for COVID-19 testing not in compliance with federal requirements, regulators find. *Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/2020/06/04/testutahs-lab-covid/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Baird, *supra* note 26.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Alberty, E. and Rodgers, B. (June 8, 2020). Former public health lab director says she was demoted after voicing concern about TestUtah. *Salt Lake Tribune*. Retrieved from <https://www.sltrib.com/news/2020/06/08/former-public-health-lab/>.

concerns about the state's emergency spending, estimated at \$108 million and counting.⁵⁵ According to the Center for Urban Studies report on state-level legislative oversight, one barrier to legislative oversight of state contracts is the short legislative sessions in Utah.⁵⁶ Another problem is that, according to information provided by the state to CUS, the Utah legislature does not assign explicit authority to any committee to oversee state contracts with vendors.⁵⁷

Nevertheless, several Utah state legislators expressed concern about the state's COVID-related emergency contracts. Utah Democratic Rep. Andrew Stoddard, for example, in a media interview about Utah's COVID-related spending, said that "time will tell if these were wise purchases. I understand they had to do them quickly, but I would like to see more transparency."⁵⁸ He stated that he had already filed a bill for the next legislative session to rein in some of the state's emergency spending powers, in particular to "limit what types of purchases could be made with the no-bid contracts."⁵⁹ Concerns were also expressed by Republican Rep. Brad Daw, co-chair of the Utah House Health and Human Services Committee. In a media interview, Rep. Daw said his committee would be looking into the emergency purchase of the hydroxychloroquine: "It looks like there were some issues, we need to have a public hearing and let all sides present their arguments."⁶⁰ At the time of this writing in October, however, the Health and Human Services Committee website indicates that the committee has not met since March 9, 2020.⁶¹ In addition, Mr. Daw is scheduled to leave office at the end of 2020.⁶²

Also in 2020, the Utah legislature took advantage of its ability to convene special legislative sessions, an authority it gained under a 2018 amendment to the state constitution which, for the first time, enabled the legislature to call a session without the consent of the governor.⁶³ From March to September, the Utah legislature used that authority to call four special sessions.⁶⁴ In the special session that started on June 18, 2020, the legislature strengthened its contract oversight authority by enacting the "Emergency Management Act

⁵⁵ Winslow, B. (May 12, 2020). Utah has spent \$108 million and counting using emergency powers to respond to COVID-19. *Fox 13*. Retrieved from <https://www.fox13now.com/news/coronavirus/local-coronavirus-news/utah-has-spent-108-million-and-counting-to-respond-to-covid-19>.

⁵⁶ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 890-899.

⁵⁷ *Id.*

⁵⁸ Winslow, B. (May 12, 2020). Utah has spent \$108 million and counting using emergency powers to respond to COVID-19. *Fox 13*. Retrieved from <https://www.fox13now.com/news/coronavirus/local-coronavirus-news/utah-has-spent-108-million-and-counting-to-respond-to-covid-19>.

⁵⁹ *Id.*

⁶⁰ Winslow, Ben. *Audits, hearings planned over Utah's emergency spending power for COVID-19*. (May 4, 2020). *Fox 13 Salt Lake City*. Retrieved from <https://www.fox13now.com/news/coronavirus/local-coronavirus-news/audits-hearings-planned-over-utahs-emergency-spending-power-for-covid-19>.

⁶¹ Utah State Legislature. 2020 House Health and Human Services Committee. Retrieved from <https://le.utah.gov/asp/interim/Commit.asp?Year=2020&Com=HSTHHS>.

⁶² Donaldson, Sahalie. (April 21, 2020). Utah County Republicans oust longtime legislator during digital convention. *Deseret News*. Retrieved from <https://www.deseret.com/utah/2020/4/21/21228173/county-republicans-oust-longtime-legislator-during-digital-convention>.

⁶³ In 2018, Utah voters amended the state constitution to allow the state legislature, through a two-thirds vote, to call a special session of up to ten days to deal with matters such as a fiscal crisis, war, natural disaster, or other emergency. Utah Constitutional Amendment C, approved Nov. 6, 2018. See *Ballotpedia*. Retrieved from [https://ballotpedia.org/Utah_Constitutional_Amendment_C_Changes_Related_to_Special_Legislative_Sessions_and_State_Revenue_Measure_\(2018\)](https://ballotpedia.org/Utah_Constitutional_Amendment_C_Changes_Related_to_Special_Legislative_Sessions_and_State_Revenue_Measure_(2018)).

⁶⁴ Utah State Legislature. Sessions. Retrieved from <https://le.utah.gov/sessions/sessions.jsp>.

Procurement Process Amendment.”⁶⁵ That amendment requires “the Governor, during an epidemic or pandemic disease emergency, to provide notice to the Legislature within 24 hours of an expenditure or procurement that: is greater than \$2 million; uses federal funds received by the state ... and is made using statutory emergency procurement processes.”⁶⁶ Since, in Utah, Republicans control both the legislative and executive branches, this legislation is an example of a stronger interbranch oversight measure put into place by a joint effort of members of the same party.

In addition, in late September, the elected State Auditor, Republican John Dougall, a longtime, respected state official who was once a Utah legislator, released a report reviewing several emergency Utah procurements, including the hydroxychloroquine purchase and the TestUtah contract.⁶⁷ According to the review, the Auditor could not determine who approved the hydroxychloroquine purchase or why, because “[w]ithout written documentation of authorization (or explicit verbal authorization), it is impossible to determine exactly how this occurred.”⁶⁸ As for the TestUtah contract, the review focused on inflated testing costs, noting that the “projected per-test costs were reasonable, however actual per-test costs were unreasonable.”⁶⁹ The review explained that, while other established testing services listed a price at \$125 or less per test, TestUtah had ended up charging the state over \$235 per test under the initial contract.⁷⁰

Finally, in still another response to state-wide concerns about emergency spending, Utah’s Division of Purchasing launched a website that increased transparency and accountability for contract decisions by providing more information on state spending during the pandemic.⁷¹

These facts show that, despite having failed to assign explicit contract oversight authority to any committee and lacking a history of active contract oversight, the Utah legislature managed to enact legislation requiring greater emergency contract transparency, secure a state auditor’s report on the TestUtah contract, and spur creation of a new agency website with more contract information. The Utah legislature took those actions while overseeing procurement activities by a governor from the same political party.

⁶⁵ Utah State Legislature. (June 25, 2020). *Legislation Passed in the Fifth Special Session*, at 2. Retrieved from https://le.utah.gov/~2020S5/Summary_PassedLegislation.pdf.

⁶⁶ *Id.*

⁶⁷ Office of the Utah State Auditor. (Sept. 30, 2020). *Limited Review of State Emergency Procurements and Emergency Response*. Report No. GOV-20-SP. Retrieved from <https://reporting.auditor.utah.gov/servlet/servlet.FileDownload?file=0151K0000041R3qQAE>.

⁶⁸ *Id.* at 15. The report continued: “We are concerned that this purchase occurred without anyone’s explicit authorization. We also note the State lacks an effective system that allows the State Division of Purchasing to ensure purchases are properly authorized.” *Id.*

⁶⁹ *Id.* at 17 (capitalization and bolding omitted).

⁷⁰ *Id.* at 18. The report noted that Iowa later procured a new contract “at a lower cost.” *Id.*

⁷¹ Utah Division of Purchasing and General Services. *COVID-19 Expenditures*. Retrieved from <https://purchasing.utah.gov/covid-19/>.

Iowa

On or around April 21, 2020, Nomi Health and its partners launched a second testing initiative by signing a no-bid \$26 million testing services contract with the state of Iowa.⁷² The “TestIowa” contract required Nomi Health to provide over 540,000 tests across the state as well as run the TestIowa website. Media reports indicate that the program was recommended to Iowa Governor Kim Reynolds by Iowa native Ashton Kutcher who was working with the governor on COVID-19 safety advertisements.⁷³ According to the press, Mr. Kutcher is friendly with Qualtrics CEO Ryan Smith, and the press quoted Mr. Kutcher as saying that the governor “jumped at the chance and moved fast to implement” the TestIowa program. Iowa Sen. Joe Bolkcom, a Democrat, later criticized the contract decision for not first consulting the state’s health experts saying, “Mr. Kutcher seems like a great guy but not sure what public health expertise he brings for advising our pandemic response.”⁷⁴

In May 2020, two representatives from the Iowa House also raised concerns about the TestIowa initiative. In a letter sent to the chair of the House Government Oversight Committee, Democratic Rep. Ruth Gaines and Rep. Chris Hall wrote: “It’s clear that Test Iowa failed to meet the goals outlined by Governor Reynolds. Iowa taxpayers are on the hook for \$26 million and they deserve to know whether their money is being spent wisely.” The letter then identified a long list of problems including “[c]ontract awarded without a competitive bid process,” “testing numbers are well short,” and “[v]ulnerable Iowans being denied tests.”⁷⁵ The letter concluded with a call for action by the Government Oversight Committee (where Rep. Gaines is the ranking minority member) to “do its job,” by taking testimony from people involved in the contract negotiation, including state officials and TestIowa representatives.⁷⁶ If the committee didn’t act, the letter indicated that House Democrats “will seek to review the contract and its implementation during the appropriations process.”⁷⁷

At the time of this writing in October 2020, the Iowa legislative session has ended, and the legislature is not scheduled to convene again until January 2021.⁷⁸ During the 2020 session, the Government Oversight Committee did not hold a hearing or appear to take any action on the

⁷² State of Iowa Department of Administrative Services. Contract with Nomi Health for TestIowa. (undated and unsigned). Retrieved from <https://who13.com/wp-content/uploads/sites/19/2020/04/TestIowa-Contract-Nomi-Health-State-of-Iowa-DAS-4-14-20-Nomi-Clean.pdf>. See also Kaufmann, Clark. (April 23, 2020) (noting that no other vendors were considered for Iowa’s \$26 million COVID-19 testing contract). *Iowa Capital Dispatch*. Retrieved from https://www.ottumwacourier.com/news/coronavirus/no-other-vendors-considered-for-iowas-26-million-covid-19-testing-contract/article_e6c70b3e-8569-11ea-bede-d7eda1ba5d86.html.

⁷³ Foley, Ryan. (April 23, 2020). Iowa governor: Tip from Ashton Kutcher led to testing deal. Associated Press. Retrieved from <https://apnews.com/ef5038c7d6e9e08601d469d1a72bba6b>.

⁷⁴ *Id.*

⁷⁵ Letter from Rep. Ruth Gains and Rep. Chris Hall to Rep. Mary Ann Hanusa. (Undated but likely in May 2020). Retrieved from <https://twitter.com/CaroRCummings/status/1266075956994805766>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Henderson, O. (June 15, 2020). ‘Unprecedented’ Ending to 2020 Iowa Legislative Session. Iowa Public Radio. Retrieved from <https://www.iowapublicradio.org/state-government-news/2020-06-15/unprecedented-ending-to-2020-iowa-legislative-session>.

TestIowa contract.⁷⁹ Instead, in June 2020, the committee chair, Republican Mary Ann Hanusa, sponsored a House Resolution that thanked Republican “Governor Kim Reynolds for her swift and decisive action and thoughtful leadership to protect the health and safety of Iowans during the COVID-19 pandemic.”⁸⁰

In the meantime, state and county employees repeatedly complained about TestIowa’s long delays in providing test results and how those delays were negatively affecting the state’s efforts to combat the virus. In response, Iowa State Auditor Rob Sand, an elected Democrat, initiated a review of TestIowa’s procedure for reporting test results.⁸¹ According to a report issued by his office in July 2020, the delays were attributable to a lengthy four-step process employed by IowaTest.⁸² The report indicated that, once test results were produced, they went first from the State Hygienic Laboratory to Qualtrics, then to Domo, then to the state’s chief information officer, and only then to the Iowa Department of Public Health (IDPH) where they were finally communicated to the test subject.

The Auditor’s report was unable to identify any legitimate reason why the test results were routed through multiple parties instead of being reported directly from the lab to IDPH. The report also found that the process violated an Iowa law that “requires laboratories dealing with a reportable infectious disease to immediately report the case to the IDPH.”⁸³ In addition, the report determined that TestIowa’s multi-step reporting procedure exposed the state to unnecessary risks. The findings explained that the reporting “chain is an area where integrity, reliability, and timely transmission of information is put at unnecessary risk of error, equipment failure, maladministration, outright falsification, or any other cause.”⁸⁴ The report further concluded that TestIowa’s reliance on private companies to transmit test results, when those companies have interests aside from Iowa’s welfare, opened up the state to liability.⁸⁵

The Auditor’s report was not only made public, but also filed with the Johnson and Polk County Sheriff’s Offices and Attorneys’ Offices, the Iowa Division of Criminal Investigation, and the Iowa Attorney General. In response, the Iowa Attorney General defended the TestIowa arrangements, finding nothing illegal with TestIowa’s reporting practices, and noting that direct reporting of test results by the lab technicians would require burdensome data entry efforts.⁸⁶ Auditor Sand’s office replied: “If it is true that changing the TestIowa reporting system to be

⁷⁹ Iowa Legislature. Committees & Schedules, Meetings, Committee Meetings, Government Oversight Committee. Minutes. (March 3 and March 11, 2020). Retrieved from <https://www.legis.iowa.gov/committees/meetings/meetingsListComm?groupID=589&ga=88>.

⁸⁰ HR113, 88th Gen. Assemb., Reg. Sess. (Iowa 2020).

⁸¹ Office of Auditor of State. (July 14, 2020). *Report on COVID-19 Test Reporting Involving the Iowa Department of Public Health and State Hygienic Laboratory*. Retrieved from <https://www.auditor.iowa.gov/reports/file/62305/embed>.

⁸² *Id.*

⁸³ *Id.* See Iowa Code §139A.

⁸⁴ Office of Auditor of State, *supra* at 81.

⁸⁵ *Id.*

⁸⁶ Murphy, Erin. (July 14, 2020). TestIowa audit claims coronavirus testing reporting process illegal, risky. *The Gazette*. Retrieved from <https://www.thegazette.com/subject/news/health/coronavirus-test-iowa-reporting-process-audit-illegal-risky-20200714>.

legal would require hand entry of data by public lab technicians, then taxpayers probably should not have paid \$26 million for that system.”⁸⁷

The Center for Urban Studies report on state-level oversight indicates that, in Iowa, evidence suggests that there is a level of “cooperation” between the elected State Auditor and the legislature, although CUS was unable to identify “any example of the legislature making use of the auditor of state’s reports for monitoring state contracts.”⁸⁸ The CUS report also suggested that “the absence of a legislative auditor limits legislators’ capacity to monitor state agencies.”⁸⁹

This case study was similarly unable to determine whether the Iowa State Auditor’s report on TestIowa was relayed to the state legislature or any state legislative committee. The contract criticisms by Iowa Sen. Joe Bolkcom, Rep. Ruth Gaines, and Rep. Chris Hall, cited earlier, indicate that at least some legislators were aware of the controversy and the millions of dollars at stake, but no evidence has yet surfaced of a legislative committee initiating a review or taking action with respect to the no-bid \$26 million contract, the delays in reporting test results, or TestIowa’s possible violation of state law.

Nebraska

On April 21, 2020, around the same time that it launched its Iowa effort, Nomi Health entered into a third contract with the state of Nebraska totaling nearly \$27 million.⁹⁰ Like the Iowa and Utah contracts, the contract was awarded by the state on a no-bid, emergency basis. It required Nomi Health and its partners to run the TestNebraska website, conduct at least 3,000 tests per day, and return test results within 48 hours. As in Iowa and Utah, soon after the contract was awarded, complaints began to roll in related to the services provided by TestNebraska.

Three weeks after the contract was awarded, on May 11, 2020, four Nebraska senators, led by Democratic Senator Machaela Cavanaugh, sent a letter to Republican Governor Pete Ricketts urging him to terminate the TestNebraska contract on multiple grounds.⁹¹ First, the four Democratic senators claimed that TestNebraska had “failed to deliver the contractually required number of daily tests and failed to meet the contractually required 48-hour turnaround time for test results.” Second, the senators noted that Nomi Health executives, by their own admission, had no experience in public health, and “Nebraskans do not have the luxury to wait for Nomi leadership to learn on the job.”

The letter also asserted that the University of Nebraska Medical Center in partnership with county public health departments should be leading testing in the state, because they “already have the infrastructure and expertise to do this critical work.” The letter urged that the millions of dollars going to the Utah companies be invested instead in Nebraska county public

⁸⁷ *Id.*

⁸⁸ Thompson, *supra* note 11 at 351-369.

⁸⁹ *Id.* at 351.

⁹⁰ State of Nebraska. Contract awarded to Nomi Health. (April 21, 2020). Retrieved from <https://statecontracts.nebraska.gov/Search/ViewDocument?D=YwlqfjIJWhNLrVKwpufSnA%3D%3D>.

⁹¹ Letter from Machaela Cavanaugh et.al. to Governor Ricketts. (May 11, 2020). Retrieved from https://www.scribd.com/document/461345839/Test-Nebraska-Letter-to-Governor-Ricketts#fullscreen&from_embed.

health labs that need the financial support. In addition, the letter questioned the advocacy of Nomi leadership, meaning CEO Newman, related to hydroxychloroquine and the references related to that drug in the online assessment tool. The letter stated: “The financial relationship between Nomi leadership and the maker of the drug casts further doubts about the stewardship of Nebraska taxpayer dollars and sensitive health data on the part of Nomi leadership.”

Governor Ricketts essentially dismissed the concerns raised in the letter. Among other comments, he said, “You’re not going to find a lot of companies that have tons of experience in testing in a pandemic experience, since this is the first one we’ve had in 100 years, so on the face of it, the senators’ statement is ludicrous.”⁹²

TestNebraska continued to conduct testing operations within the state. According to one media report, as of July 2020, it had tested over 100,000 residents and performed the most testing state-wide of any company or laboratory.⁹³ On July 20, 2020, one of the letter signatories from May, Sen. Megan Hunt, asked the state Auditor of Public Accounts, Republican Charlie Janssen, to conduct “a financial audit and investigation of the operation of Test Nebraska in order to ensure that the state funds are being properly and judiciously spent.”⁹⁴ She identified multiple ongoing problems with the TestNebraska contract. Senator Cavanaugh also introduced a resolution in late July to direct the Senate Appropriations Committee to conduct a study of the TestNebraska contract.⁹⁵ In late September, a Senate Appropriations Committee hearing examined, in part, the alleged contract deficiencies.⁹⁶

Nebraska is unique in having a unicameral legislature that is officially nonpartisan. According to the Center for Urban Studies report on state-level oversight, Nebraska legislators do not normally exercise oversight of state contracts, which is instead seen as an obligation of the executive branch’s Department of Administrative Services. The legislature itself meets on only a part-time basis, making contract oversight difficult. Nevertheless, four Nebraska legislators promptly reviewed, expressed concerns about, and recommended termination of the TestNebraska no-bid \$26 million contract.⁹⁷ One of those legislators continued to press for contract oversight, calling for a review by the state Auditor and a study by the Senate Appropriations Committee. To date, however, no evidence has emerged that any review or committee study is underway.

⁹² Spiewak, Jim. (May 14, 2020). Nebraska lawmakers want to terminate \$27 million contract with Test Utah companies. *KUTV*. Retrieved from <https://kutv.com/news/coronavirus/nebraska-lawmakers-want-to-terminate-27-million-contract-with-test-utah-companies>.

⁹³ NTVABC. (July 24, 2020). *Test Nebraska reaches milestone of testing 100,000 Nebraska residents*. Retrieved from <https://nebraska.tv/news/local/test-nebraska-reaches-milestone-of-testing-100000-nebraska-residents>.

⁹⁴ Nebraska Sen. Megan Hunt press release (July 20, 2020). Retrieved from <http://news.legislature.ne.gov/dist08/>.

⁹⁵ Nebraska Legislative Resolution 394 (July 27, 2020) (stating in part: “The study should include investigation into the contract which formed the basis of the partnership, the procurement process used for purposes of the program, the exclusion of certain state resources by the program, and the lack of access to the program for vulnerable populations, including low-income, minority, medically fragile, and disability populations.”) Retrieved from <https://nebraskalegislature.gov/FloorDocs/106/PDF/Journal/r2journal.pdf#page=1165>.

⁹⁶ Nebraska Appropriations Committee Hearing Transcript (Sept. 28, 2020). Retrieved from <https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Appropriations/2020-09-28.pdf>.

⁹⁷ Thompson, *supra* note 11 at 581-595.

Conclusion

In this case study, three different states issued multi-million-dollar testing contracts on a no-bid, emergency basis with a consortium of Utah companies that had no experience in conducting infectious disease testing. In all three states, complaints targeted the no-bid status of the contracts, the contractor's lack of health care expertise, the large dollar amounts, the accuracy of the tests, and delays in providing test results. Although the three state legislatures had no tradition or track record of contract oversight, at least some legislators in each state raised concerns, demonstrating the potential for legislative oversight to identify problems and serve as a check on state procurement practices. In one state, Utah, the legislators raising concerns were of the same political party as the governor and were able to effect several important reforms. In the two other states, the legislators raising concerns were members of a different political party than the governor. The ability of those cross-party oversight efforts to produce meaningful contract oversight and procurement reforms is still unfolding.

Case Study 2: Contracts for Protective Face Masks

This case study examines state procurement of personal protective equipment in the form of face masks for health workers and first responders during the COVID-19 pandemic. Contracts issued by the states of California, Missouri, and West Virginia raised a variety of concerns about high-priced no-bid contracts, unfamiliar vendors, and substandard masks. They also demonstrated varying degrees of legislative oversight in the affected states.

Background

At the beginning of the COVID-19 pandemic in the United States, many states found themselves scrambling to secure personal protective equipment (PPE). Rising demand for the products caused disruption in the global supply, putting pressure on states to locate and purchase needed supplies.⁹⁸ States engaged in a variety of efforts to secure PPE for their health workers and first responders, often ignoring normal procurement procedures calling for competitive bids, the vetting of vendors, and inspection of purchased goods.

Illustrating the types of efforts made and additional expenses incurred is the action taken by Illinois which arranged at least two secret flights to China to secure masks.⁹⁹ Worried that the federal government would secure available PPE for the federal stockpile and leave the states with insufficient supplies, Illinois Governor Pritzker ordered two flights, each costing over \$888,000, from FedEx Trade Networks Transport to provide an “aircraft charter flight to Shanghai, China for COVID-19 response...prepayment required.”¹⁰⁰ Those flights increased the state’s PPE costs by an unanticipated \$1.7 million. In a further odd development, the Illinois State Comptroller’s office apparently prepared multiple \$3.5 million checks for PPE purchases and delivered them to parties waiting at fast food and truck stop parking lots.¹⁰¹ Susana Mendoza, the state comptroller acknowledged that it sounded like a “sketchy drug deal,” but asserted that her office needed to act as it did in order to save lives. Clearly, states were under pressure.

Illinois was not alone in its extreme efforts to obtain PPE. In an attempt to secure PPE quickly, many states agreed to large upfront payments and relied on unfamiliar and unvetted vendors to fulfill massive orders. Unfortunately, many of the vendors that contracted with the

⁹⁸ World Health Organization. (March 3, 2020). *Shortage of personal protective equipment endangering health workers worldwide*. [News Release]. Retrieved from <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide>.

⁹⁹ Main, F. (April 4, 2020). Pritzker arranging secret flights from China to bring millions of masks and gloves to Illinois. *Chicago Sun Times*. Retrieved from <https://chicago.suntimes.com/coronavirus/2020/4/14/21221459/pritzker-secret-flights-china-illinois-ppe-trump-coronavirus>.

¹⁰⁰ Illinois State Comptroller. (2020). *COVID-19 Response and Resources*. Retrieved from <https://illinoiscomptroller.gov/covid19-information/>. This Illinois website lists COVID-19 expenditures by the state and shows two invoices of \$888,275 to FEDEX TRADE NTWK TRANS INC.

¹⁰¹ De Mar, C. (April 7, 2020). Illinois Comptroller’s Office Finds Itself Paying \$3.5 Million for PPE in McDonald’s Parking Lot During Coronavirus Crisis. *CBS Chicago*. Retrieved from <https://chicago.cbslocal.com/2020/04/07/illinois-comptrollers-office-finds-itself-paying-3-5-million-for-ppe-in-mcdonalds-parking-lot-during-coronavirus-crisis/>.

states were unable to fill the promised orders, and some fulfilled the orders – wittingly or unwittingly – with substandard or counterfeit products. Several examples follow.

California

In April 2020, California placed an order for 300 million N95 masks with a Chinese company called Build Your Dream (BYD), which normally manufactured vehicles but promised to deliver the needed masks in exchange for \$1 billion.¹⁰² The contract required the N95 masks to be certified by the National Institute for Occupational Safety and Health (NIOSH) by April 30, a deadline which BYD failed to meet. The state gave the company an extension to May 31, which it failed to meet again. A third extension to June 12 was granted, and BYD was finally able to acquire the NIOSH certification and the green light to ship the masks—over two months after California paid \$500 million up front for the products.¹⁰³

California issued the BYD contract for masks after an earlier \$454 million deal with a company called Blue Flame had fallen through. According to one media account, the Blue Flame contract, promising delivery of 100 million masks, was cancelled in March 2020, just six hours after the state had initiated the \$454 million wire transfer. The bank handling the transfer flagged the transaction for additional review and informed the state that the account they were wiring money to was only one day old, and the company itself only three.¹⁰⁴ California decided to look elsewhere.

After making the pivot to BYD, the California state government apparently did not initially disclose the new contract to the public. One media account complained that the contract had been “kept hidden from state legislators and the media.”¹⁰⁵ Democratic Sen. Holly Mitchell, chair of the California Joint Legislative Budget Committee, in a letter sent to the Director of California’s Department of Finance, asked the state to provide detailed information about the contract requirements, mask delivery timelines, and how the masks would be allocated.¹⁰⁶ In response, the Office of Emergency Services made the contract details public, and the legislature

¹⁰² Bollag, S. (May 13, 2020). Federal regulators contradict California Gov. Newsome, say BYD masks denied certification. *Sacramento Bee*. Retrieved from <https://www.sacbee.com/news/politics-government/capitol-alert/article242707981.html>.

¹⁰³ Symon, E. (June 9, 2020). \$1 Billion BYD Mask Deal Approved By Feds, To Be Shipped Soon. *California Globe*. Retrieved from <https://californiaglobe.com/section-2/1-billion-byd-mask-deal-approved-by-feds-to-be-shipped-soon/>.

¹⁰⁴ Grimes, *supra* note 14.

¹⁰⁵ *Id.*

¹⁰⁶ Letter from California Joint Legislative Budget Committee Chair Holly J. Mitchell to Keely Martin Bosler, Director, California Department of Finance (April 9, 2020). Retrieved from https://jtlegbudget.legislature.ca.gov/sites/jtlegbudget.legislature.ca.gov/files/FINAL%20-%20JLBC%20to%20DOF%20-%20Section%2036%20Letter%20-%20COVID-19%20-%20PPE%20-%202004-9-2020.Sec_.pdf. A California law, SB 89, gives the governor’s administration access to allocated funds subject to a 72-hour review period by the JLBC, which can be waived. The administration asked for the 72-hour period to be waived with respect to the BYD contract, prompting the JLBC letter requesting greater contract transparency to obtain a waiver of the normal JLBC review period. Legislative Analyst’s Office. *State Funding Actions Related to COVID-19*. Retrieved from <https://lao.ca.gov/Publications/Report/4223>.

was able to evaluate the cost, timing, and usefulness of the \$1 billion purchase.¹⁰⁷ The masks were ultimately delivered in June.¹⁰⁸

Despite a rocky start from an inexperienced vendor in PPE, the BYD contract seems to have turned out to be a success for the state, enabling Democratic Governor Gavin Newsom to announce that his administration sent out “an unprecedented number of masks” across the state.¹⁰⁹ In July 2020, Governor Newsom announced that the state would be extending its contract with BYD to purchase an additional 120 million N95 masks and 300 million paper surgical masks at a cost of over \$300 million.¹¹⁰

Unlike its handling of the initial contract, the state made the terms of this procurement extension public quickly after the purchase order was signed.¹¹¹ Lawmaker calls for transparency and competitive bidding may have also contributed to pressure on the state to secure a lower contract price, as the N95 mask cost dropped from \$3.30 to \$2.13 per mask and the price of the surgical paper masks went from 55 cents to 20 cents.¹¹² Governor Newsom also promised that the state would “take advantage of scaled-up manufacturing of masks and other PPE by opening future contracts to bids” so the state could “demand more competitive pricing.”¹¹³ The Governor’s actions suggest he was responding to the earlier criticisms by his fellow Democrats in the state legislature.

It is also worth noting that this type of increased contract oversight by the legislature had been explicitly advocated by the California State Auditor Elaine M. Howle, according to the study of state-level oversight by the Center for Urban Studies.¹¹⁴ In 2017, the California State Auditor, a Democrat, published a report that, in part, warned against lax oversight of no-bid contracts and recommended that the state legislature become more involved in contract oversight.¹¹⁵ Auditor Howle, a respected state official who has held that office for over 20 years, wrote that state agencies routinely oversaw their own contracts, and they did “not do so vigorously.”¹¹⁶ This case study suggests that some legislators may have taken the Auditor’s advice to heart and begun using their oversight authority to strengthen the state’s procurement practices.

¹⁰⁷ Grimes, *supra* note 14.

¹⁰⁸ Symon, *supra* note 103.

¹⁰⁹ Ronayne, Kathleen. (July 23, 2020). California to Buy More Masks, But Will They Get to the Workers Who Need Them? *NBC4*. Retrieved from <https://www.nbclosangeles.com/news/coronavirus/n95-masks-coronavirus-california-nurses-doctors-essential-workers-covid-19-gavin-newsom/2401063/>.

¹¹⁰ Nixon, Nicole. (July 22, 2020) California Extends A Controversial Mask Contract – But Gets A Better Deal This Time. *Capradio*. Retrieved from <https://www.capradio.org/articles/2020/07/22/california-extends-a-controversial-mask-contract-but-gets-a-better-deal-this-time/>.

¹¹¹ State of California General Services Procurement Division. (July 20, 2020). *Purchase order from Global Healthcare Product Solutions, LLC a Subsidiary of BYD International Development*. Retrieved from <https://files.covid19.ca.gov/pdf/BYD-Motors-LLC-OES-5.pdf>.

¹¹² Nixon, *supra* note 110.

¹¹³ *Id.*

¹¹⁴ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 159.

¹¹⁵ California State Auditor. (June 2017). *Department of General Services and California Department of Technology*. Retrieved from <https://www.bsa.ca.gov/pdfs/reports/2016-124.pdf>.

¹¹⁶ See Thompson, L., Sarbaugh-Thompson, M., *supra* note 11.

Missouri

While states like California were facing problems acquiring masks at all, other states faced problems with substandard or counterfeit masks. In Missouri, for example, the state ordered 3.9 million masks from a company called National Material Supply Co. LLC for a price of \$16.5 million, and paid a 50% deposit upfront.¹¹⁷ The state received the masks in early April 2020, and distributed a portion of them to first responders across the state. Not long afterward, Missouri recalled those masks.¹¹⁸ Missouri Department of Public Safety director Sandy Karsten explained that the 48,000 KN95 masks sent to first responders “did not meet state standards” and that first responders should return the masks to the department.¹¹⁹

After the recall, NMS initially refused to refund any of the money that the state had paid for the substandard masks.¹²⁰ Missouri Governor Mike Parson stated that the company was “cheating” taxpayers by rejecting any refund.¹²¹ The state was able to settle the dispute, but not until former Missouri governor Jay Nixon, a lawyer at the firm representing NMS, met with state officials. By the end of April, the state’s \$9 million advance payment was fully refunded.¹²²

In response to the issues raised by the substandard masks, Missouri State Auditor Nicole Galloway, an elected Democrat, initiated an inquiry into the mask procurement, stating that there were “obvious concerns for the safety of first responders and the public as a result of the distribution of this faulty personal protective equipment.”¹²³ She requested information from Director Karsten about what funding mechanism was used for the purchase of the masks, what quality control procedures were employed, and whether any additional masks the state sent to first responders were counterfeit.¹²⁴ It is unclear whether Director Karsten provided the requested information. It is also unclear whether an official audit is underway.

¹¹⁷ Keller, R. (April 20, 2020). St. Louis firm identified as vendor that resisted paying refund to Missouri for rejected masks. *St. Louis Dispatch*. Retrieved from https://www.stltoday.com/business/local/st-louis-firm-identified-as-vendor-that-resisted-paying-refund-to-missouri-for-rejected-masks/article_7d6e0861-52f6-5162-be90-758087195a35.html.

¹¹⁸ Sanders, M. (April 13, 2020). State recalls thousands of protective masks for safety concerns. *ABC 17 KMIZ*. Retrieved from <https://abc17news.com/news/coronavirus/2020/04/13/state-recalls-thousands-of-protective-masks-for-safety-concerns/>.

¹¹⁹ *Id.*

¹²⁰ Keller, *supra* note 117.

¹²¹ *Id.*

¹²² Keller, R. (April 20, 2020). St. Louis firm refunds \$9M to Missouri for rejected masks. *Columbia Daily Tribune*. Retrieved from <https://www.columbiatribune.com/news/20200420/st-louis-firm-refunds-9m-to-missouri-for-rejected-masks>.

¹²³ Letter from Missouri State Auditor Nicole Galloway to Director Sandra K. Karsten, Missouri Department of Public Safety (April 15, 2020). Retrieved from <https://auditor.mo.gov/media/pdf/letter-department-public-safety>. See also (April 17, 2020). MO auditor investigating mask recall. *DailyJournal Online*. Retrieved from https://dailyjournalonline.com/news/state-and-regional/govt-and-politics/mo-auditor-investigating-mask-recall/article_370a8ec0-1b93-5dae-a11b-4167e50a6857.html.

¹²⁴ Letter from Missouri State Auditor Nicole Galloway to Director Sandra K. Karsten, Missouri Department of Public Safety (April 15, 2020). Retrieved from <https://auditor.mo.gov/media/pdf/letter-department-public-safety>. At the time of the letter, State Auditor Galloway was the Democratic candidate in the governor’s race, running against the Republican incumbent.

According to the Center for Urban Studies report on state-level oversight, the Missouri legislature has “little formal authority” to monitor state contracts, and “determining with who agencies contract—and how—generally, remains a gubernatorial and executive agency prerogative.”¹²⁵ Further, according to the CUS report, when the Missouri State Auditor’s office conducts oversight, it “does not work in tandem with the legislature or the governor.”¹²⁶

To date, no Missouri legislative committee appears to have examined the \$16 million mask purchase, followed up with the State Auditor, or recommended any changes in the procurement laws. One of the few legislators to express public concern was Rep. Kip Kendrick, a Democrat, who called it “very problematic” that the public had not been informed about the mask procurement and requested an “investigation conducted quickly.”¹²⁷ At this time, however, there is no evidence of a legislative-backed inquiry.

West Virginia

West Virginia is another state that has been plagued by substandard masks, but its issues unfolded in a different way than in Missouri. In March 2020, West Virginia purchased 100,000 masks from a company named Ballard Safety Equipment for about \$567,000.¹²⁸ The contract noted that the masks were manufactured by a Chinese company, Shanghai Dasheng Health Products, a reputable manufacturer that is one of the largest producers of masks in the world. In mid-April 2020, West Virginia received the masks and distributed them to first responders across the state.

The masks received by local government officials were almost immediately met with skepticism. Braxton County officials quickly emailed the CDC asking if the masks that they had received were genuine.¹²⁹ The CDC responded that the masks were not genuine, explaining that Shanghai Dasheng Health (SDH) was an NIOSH approval holder, but that all NIOSH approvals related to masks with headbands, not the ear loops used on the masks distributed in West Virginia. The CDC further explained in its email that it is an OSHA requirement to have a “fit-factor” of 100, while ear loop masks had a fit factor of only 11. In other email correspondence with West Virginia officials, consultant Christina Baxter, who holds a Ph.D. and is CEO of an emergency response firm, wrote: “[T]hese are definitely counterfeit masks, and should not be used for front line emergency operations, especially for anyone dealing directly with a COVID-19 patient.”¹³⁰

¹²⁵ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 558.

¹²⁶ *Id.* at 574.

¹²⁷ Keller, *supra* note 117.

¹²⁸ State of West Virginia. Expense and Revenue Transactions. Check issued to Ballard Safety LLC for \$567,000 (April 30, 2020). Retrieved from <https://westvirginia.opengov.com/transparency#/26219/query=4D57ADEEC28EC4C4A437436BFEE062FE&embed=n>.

¹²⁹ *See, e.g.*, emails between CDC and John Hoffman, Braxton County OES Director. (April 13-14, 2020). Obtained via FOIA by the Charleston Gazette-Mail. Retrieved from <https://www.documentcloud.org/documents/6882086-N95-mask-FOIA.html>.

¹³⁰ Email from Christina Baxter to John Hoffman, Baxton Country OES Director. (April 20, 2020). Obtained via FOIA by the Charleston Gazette-Mail. Retrieved from <https://www.documentcloud.org/documents/6882086-N95-mask-FOIA.html>.

After the masks had been shipped around the state, Jeff Sandy, head of the West Virginia Department of Military Affairs and Public Safety, began inquiring into the mask purchase using contacts at Ballard Safety, a company with West Virginia ties. Despite the CDC and expert warnings, Mr. Sandy issued a 10-page memorandum addressed to “West Virginia First Responders” which declared that the masks were “not counterfeit” and sent it to emergency services directors across the state.¹³¹ In the memorandum, he explained that SDH produced two different models of N95 masks, one with headbands and one with ear loops. Of the 100,000 masks delivered to the state, half had the headbands and half had the ear loops. He assured first responders that the masks with ear loops were genuine SDH products and encouraged them to use the masks even though they did not meet the NIOSH standard. He indicated that he based his assurances in part on information provided by Eastern 7 Enterprises, a company that Ballard Safety Equipment had worked with to secure the masks. He provided those assurances despite SDH’s own website warning potential customers against counterfeit masks.¹³²

The Sandy memorandum did not satisfy the West Virginia State Fireman’s Association. The Association’s president, Jerry Loudin, said in a statement that his members were “deeply concerned” to learn the PPE they had been issued did not meet NIOSH guidelines.¹³³ The statement said, “By trusting the equipment to protect [firefighters], our members may have unknowingly placed themselves in situations that put them at further risk.”¹³⁴

A West Virginia reporter obtained a copy of the Sandy memorandum through a FOIA request to the state and began looking into some of the companies relied on by the state to obtain the masks and advocate their use. The newspaper disclosed that Eastern 7 Enterprises, one of the companies cited in the Sandy memorandum, was currently under indictment in a separate felony case in Houston, charged with stealing four large trucks and seven containers filled with plastic resin.¹³⁵ Despite that disclosure, Mr. Sandy continued to advocate first responder use of the masks with ear loops.

According to the Center for Urban Studies report on state-level oversight, the West Virginia state legislature does not explicitly task any of its committees with monitoring state contracts. In addition, the legislative sessions last only 60 days. In 2020, the session ended on

¹³¹ Memorandum issued by Jeff S. Sandy, Cabinet Secretary, West Virginia Department of Military Affairs and Public Safety, to West Virginia First Responders (April 16, 2020). Obtained via FOIA by West Virginia Metro News. Retrieved from <https://www.documentcloud.org/documents/6882418-McElhinny-FOIA-Responsive-Documents-1of-2-5-5-2020.html>.

¹³² <http://www.dashengmask.com/>.

¹³³ West Virginia State Firemen’s Association. Statement from President Jerry Loudin. (May 6, 2020). Retrieved from <https://www.wvsfa.org/wvsfa-statement-regarding-state-provided-masks/>.

¹³⁴ *Id.*

¹³⁵ Severino, J. (June 20, 2020). Unmasked: At the height of the pandemic, West Virginia equipped first responders with counterfeit respirators. Here’s how it happened. *Charleston Gazette-Mail*. Retrieved at https://www.wvgazette.com/coronavirus/unmasked-at-the-height-of-the-pandemic-west-virginia-equipped-first-responders-with-counterfeit-respirators/article_8af20ad4-8575-58a9-906e-1cff6fd424ae.html.

March 7,¹³⁶ ten days before the first reported COVID-19 case in West Virginia.¹³⁷ According to the CUS report, the West Virginia legislature relies, in part, on a Legislative Auditor's Office but described that office as taking a "fire alarm" approach to oversight which meant that it reviewed only problematic agency actions.¹³⁸ To date, no public evidence indicates that either the state legislature or the Legislative Auditor's Office has initiated an inquiry into the \$567,000 Ballard contract, the distribution of and protection provided by the ear-loop masks, or the conflicting directions given to first responders.

One newspaper has reported, however, that West Virginia House Delegate Buck Jennings, a paramedic, emergency medical technician instructor, and Republican chairman of the state homeland security committee, expressed concern about first responders using masks with ear loops. According to the newspaper, Del. Jennings said:

"Whenever you breathe in, if it comes around your nose or up around your chin, that mask does zero good. As far as protecting you, I don't think it would be nearly as good. ... It just sounds to me like somebody screwed up and they're just trying to make up for it."¹³⁹

Some West Virginia legislators have also called for a special session to deal with spending issues arising from the pandemic. Democratic Del. Amanda Estep-Burton said, for example, it was important "our constituents are heard by the legislative voice, and our governor is not responsible for spending \$1.25 billion dollars, alone."¹⁴⁰ To date, however, Republican Governor Justice has resisted a special session, and one cannot be called without his consent.¹⁴¹

Conclusion

This case study shows some of the urgent issues states faced during their attempts to secure needed PPE, including high-priced goods, unfamiliar vendors, unreliable deliveries, substandard masks, and anxious health care workers and first responders. In West Virginia and Missouri, state legislatures appear to have made little effort to oversee state procurement actions, and complaints by individual legislators seemed to have had little impact even when West Virginia sent substandard masks to first responders. In contrast, California legislators were quick

¹³⁶ West Virginia Legislature, Legislative Calendar. Retrieved from https://www.wvlegislature.gov/nowcalendar_legis3.cfm.

¹³⁷ Beck, E. (March 17, 2020). First COVID-19 case reported in West Virginia. *Register Herald*. Retrieved at https://www.register-herald.com/health/updated-first-covid-19-case-reported-in-west-virginia/article_b3b0bb82-68a4-11ea-8394-1764f8776f45.html.

¹³⁸ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 960.

¹³⁹ McElhinny, B. (May 5, 2020). Justice: W.Va. scrambled to get emergency responders the 50,000 masks now under scrutiny. *Metro News*. Retrieved from <https://wvmetronews.com/2020/05/05/justice-w-va-scrambled-to-get-emergency-responders-the-50000-respirators-now-under-scrutiny/>.

¹⁴⁰ Curtis, Mark. (July 30, 2020). More calls for a special session of the West Virginia Legislature. *CBS13WOWK*. Retrieved from <https://www.wowktv.com/news/west-virginia/more-calls-for-a-special-session-of-the-west-virginia-legislature/>.

¹⁴¹ West Virginia Legislature. 2020 Legislative Calendar. Retrieved from http://www.wvlegislature.gov/Bulletin_Board/calendar/calendar_2020.cfm#:~:text=Thirty%2Dfifth%20Day%20%2D%20February%2011,introduce%20bills%20in%20the%20House.&text=Forty%2Dfirst%20Day%20%2D%20February%2017,introduce%20bills%20in%20the%20Senate.

to express concerns about a problematic mask procurement, even when issued by a governor of the same political party. Their oversight efforts appear to have contributed to greater contract transparency, lower prices, and a renewed commitment to competitive bidding. The contrasting state track records suggest that greater legislative oversight of state procurement holds promise to produce more positive results.

Case Study 3: Contracts for Consulting Firms

This case study examines state contracts issued on an emergency, no-bid basis to two consulting firms, Deloitte Consulting LLC and McKinsey & Company, to provide COVID-related assistance to state and local governments. During the COVID-19 pandemic, states faced many unique and urgent problems, including record unemployment, short-term closures of businesses, schools and facilities, and data management needs to enable informed decision making. To address those problems, some states issued contracts soliciting assistance from high-priced private consulting firms to help develop or execute a variety of strategies. This case study examines concerns related to five emergency state contracts issued to those consultants, including concerns involving no-bid awards, high fees, poor contract performance, and a lack of transparency. This case study also demonstrates, once again, significant variation in the contract oversight exercised by state legislatures.

Deloitte Consulting

In April 2020, unemployment in the United States grew to 14.7%, more than triple the 4.4% level a month earlier.¹⁴² Many of those who'd lost their jobs, including gig workers and independent contractors, were normally ineligible for unemployment benefits. Congress then enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act which, in part, "expand[ed] states' ability to provide unemployment insurance for ... workers who are not ordinarily eligible."¹⁴³ In response, an unprecedented number of Americans filed unemployment insurance claims, often overwhelming state systems.

Illinois

In Illinois, for example, in the last week of March 2020, over 178,000 workers filed for unemployment benefits, a record number.¹⁴⁴ Illinois Governor J.B. Pritzker, a Democrat, noted at the time that the total did not reflect many others who could not file claims due to the state's overloaded unemployment website and call centers.¹⁴⁵ Some Illinois citizens claimed that they had tried for weeks to telephone the state's toll-free hotline for unemployment benefits but received only "busy signals."¹⁴⁶ Similar problems plagued the Illinois website which posted messages saying applications could not be filed before 11:00 a.m. or during the evening hours of 8:00-10:00 p.m. and urging applicants to file on only certain days corresponding to the first letter of their last name.¹⁴⁷

¹⁴² Trading Economics. *United States Unemployment Rate 2020*. Retrieved from <https://tradingeconomics.com/united-states/unemployment-rate#:~:text=Unemployment%20Rate%20in%20the%20United,percent%20in%20May%20of%201953>.

¹⁴³ U.S. Department of Labor. *Unemployment Insurance Relief During COVID-19 Outbreak*. [Section entitled "Background"]. Retrieved from <https://www.dol.gov/coronavirus/unemployment-insurance>.

¹⁴⁴ Mihalopoulos, Dan. (April 2, 2020). For a Second Straight Week, A Record Number of Unemployment Claims Were Filed in Illinois. *WBEZ*. Retrieved from <https://www.wbez.org/stories/for-a-second-straight-week-a-record-number-of-unemployment-claims-were-filed-in-illinois/2a6ccdee-c70b-4637-af22-61600d789223>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Seeking help to resolve the access problems affecting the state’s unemployment claims system, Illinois turned to Deloitte Consulting. On April 24, 2020, the Illinois Department of Employment Security (IDES) entered into an emergency no-bid contract with Deloitte,¹⁴⁸ agreeing to pay the firm about \$9.5 million to build a new system that would enable gig workers and independent contractors, for the first time, to file unemployment claims.¹⁴⁹ Four days later, the same state agency signed a second emergency no-bid contract with Deloitte for more than \$12.7 million.¹⁵⁰ Under that second contract, Deloitte was enlisted to oversee the hiring of telephone agents to take applications for jobless benefits.¹⁵¹ The contract permitted Deloitte, at the call center under its management, to charge the state up to \$55 dollars per hour for each call agent and up to \$315 per hour for each project manager.¹⁵² When asked about those extraordinary fees, IDES spokesperson Rebecca Cisco said they were necessary “to ensure Illinoisans can receive their benefits in a timely manner.”¹⁵³ Governor Pritzker expressed confidence in the new system’s launch and predicted that everything would go smoothly.¹⁵⁴

Unfortunately, the launch of the system did not proceed as smoothly as hoped. In mid-May, IDES announced that it would notify over 32,000 claimants that their personal information may have been exposed to outside scrutiny due to a system “glitch.”¹⁵⁵ According to the media, that “glitch” allowed one claimant to view over 50 pages of identifying information for other claimants in the system, including claimant numbers, names, and full Social Security numbers.¹⁵⁶ One woman, who wished to remain anonymous, provided screen shots to reporters as proof, and said “she couldn’t believe” that she could see over 50 pages of personal information for other claimants by just clicking through the online application.¹⁵⁷

IDES issued a news release asserting that “only one PUA claimant was able to inadvertently view personal identifying information,” and there was no indication “that any

¹⁴⁸ Illinois State Comptroller. *Contract with Employment Security and Deloitte Consulting*. Retrieved from <https://illinoiscomptroller.gov/financial-data/state-expenditures/contracts/contract-details/?ID=04100127387&ID2=2020&ID3=427&ID4=&contractAgency=0&contractAward=0&contractType=0&contractClass=0&FindVendor=deloitte&contractFY=2020&varClassCode=49&VName=DELOITTE%20CONSULTING%20LLP>.

¹⁴⁹ Mihalopoulos, *supra* note 144.

¹⁵⁰ Illinois State Comptroller. *Contract with Employment Security and Deloitte Consulting*. Retrieved from <https://illinoiscomptroller.gov/financial-data/state-expenditures/contracts/contract-details/?ID=04100127483&ID2=2020&ID3=427&ID4=&contractAgency=0&contractAward=0&contractType=0&contractClass=0&FindVendor=deloitte&contractFY=2020&varClassCode=49&VName=DELOITTE%20CONSULTING%20LLP>.

¹⁵¹ Mihalopoulos, *supra* note 144.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Nowicki, Jerry. (May 22, 2020). Illinois to notify 32,000 unemployment claimants of data breach out of ‘abundance of caution’. *Southern Illinoisan*. Retrieved from https://thesouthern.com/news/local/govt-and-politics/illinois-to-notify-32-000-unemployment-claimants-of-data-breach-out-of-abundance-of-caution/article_ae4aad19-9903-58c0-ae9d-a4009e08439a.html.

¹⁵⁶ Hickey, Megan. (May 18, 2020). IDES User Sees Data Breach Exposing Social Security Numbers, Other Info. *CBS2 Chicago*. Retrieved from <https://chicago.cbslocal.com/2020/05/18/ides-user-sees-data-breach-exposing-social-security-numbers-other-info/>.

¹⁵⁷ *Id.*

personal information was improperly used nor is it likely to happen in the future.”¹⁵⁸ In the same news release, IDES stated that the agency was contacting claimants out of “an abundance of caution” and had worked with Deloitte to quickly resolve the software issue. Deloitte also released a statement offering 12 months of free credit monitoring as recompense to the claimants being notified.¹⁵⁹

In response to the data breach, some Illinois state legislators called for a state audit of the Deloitte contracts.¹⁶⁰ Leading the effort was Illinois Republican Rep. Terri Bryant who indicated she had received a “panicked call” from a constituent who claimed to be able to see the personal data of other claimants.¹⁶¹ Rep. Bryant called the data breach evidence of “unacceptable failures” under the contract.¹⁶² In addition, Rep. Bryant and three other Republican representatives who had called for the audit questioned the state’s decision to use a no-bid emergency contract award. Rep. Charlie Meier said, for example, “This contract should have been put out for a bid. We want to know the facts, the truth about the failures at IDES with Deloitte.”¹⁶³

On May 29, Rep. Bryant, along with five other state House representatives, filed a formal resolution calling for the state Auditor General Frank Mautino, a Democrat who was appointed by the governor, to conduct a full audit of IDES.¹⁶⁴ Among other measures, the resolution called for the audit to learn whether the data breach had been fully resolved, the risk of a future breach, and a review of all IDES contracts awarded to Deloitte.¹⁶⁵ The resolution also urged the Legislative Audit Commission (LAC), a bicameral legislative body with equal numbers of Republican and Democrat legislators charged with oversight related to state audits, to “review the findings of this audit in a public meeting.”¹⁶⁶ The resolution also urged the General Assembly “to take any actions that it deems necessary or desirable to implement the recommendations made by the audit and to remedy any problems or dysfunctions uncovered by

¹⁵⁸ Illinois Department of Employment Security. *IDES Notifying Claimant Whose Information May Have Been Viewed by a Single Individual Due to PUA System Access Issue*. [Press release]. (May 26, 2020). Retrieved from <https://www2.illinois.gov/ides/SitePages/NewsArticleDisplay.aspx?NewsID=502>.

¹⁵⁹ Hickey, *supra* note 156.

¹⁶⁰ Orner, Ben. (May 28, 2020). Illinois GOP lawmakers want audit of state employment agency. *Southern Illinoisian*. Retrieved from https://thesouthern.com/news/local/govt-and-politics/illinois-gop-lawmakers-want-audit-of-state-employment-agency/article_3ffb15be-d075-584b-a723-cc11f000eb4a.html.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ HR 860, 101st Gen. Assemb., Reg. Sess. (Ill. 2020).

¹⁶⁵ *Id.* at 3-4.

¹⁶⁶ According to an Illinois state website, “The Legislative Audit Commission is responsible for the oversight of the State Audit Program, review of the stewardship of public funds, and the monitoring action to correct weaknesses disclosed by the audits of state agencies. The membership consists of 12 legislators appointed by the General Assembly leadership and is equally apportioned between the two houses and political parties. . . . The Legislative Audit Commission is mandated by law (25 ILCS 150/0.01-0.06) to review all audits conducted by the State Auditor General. Primary responsibilities of the Commission are: [p]ublic hearings on all major audits of State agencies . . . [i]nitiation and review of management and program audits and investigations [and] . . . recommendations to the General Assembly and agency management for corrective legislation and other measures to remedy weaknesses disclosed through audits or at Commission hearings.” Retrieved from https://ilga.gov/commission/lac/lac_home.html.

the audit.”¹⁶⁷ To date, that resolution, though introduced, has not been brought before state legislators for a vote.

The Center for Urban Studies report on state-level oversight gave the Illinois state legislature an overall “high” rating for its oversight capacity and activities, but a “limited” rating when it came to overseeing state contracts.¹⁶⁸ According to the report, the LAC has great potential to conduct oversight due to its bipartisan, bicameral membership and “substantial use” of Auditor General reports.¹⁶⁹ At the time of this writing, however, it is unclear whether the Auditor General or LAC has initiated a review of the Deloitte contracts.

Another issue involves contract transparency. Illinois law requires that “notice of all emergency procurements shall be provided to the Procurement Policy Board and published in the online electronic bulletin.”¹⁷⁰ The Procurement Policy Board is part of the state’s executive branch, and the electronic bulletin is intended to provide public notice of state contracts. Illinois law also requires, at the end of each fiscal quarter, that the Auditor General “shall file with the Legislative Audit Commission and the Governor a complete listing of all emergency procurements reported during the fiscal quarter.” The LAC is then to review those procurements and report to the General Assembly any procurements that “constitute an abuse.”¹⁷¹ Despite those legal requirements, the Deloitte contracts are not listed in the emergency purchase filings reports currently published on the Auditor General’s website. The 2020 edition of the Illinois Audit Advisory states, however, that “COVID-19 expenditures are likely to be scrutinized in future audits,” and that “tracking of expenditures of state and federal dollars to combat COVID-19 will be important in determining, evaluating, and improving our reaction to this or any future crisis.”¹⁷² This Audit Advisory suggests that the Deloitte contract remains subject to review by the Auditor General.

If the Auditor General, in fact, conducts a special audit as requested by some legislators, existing state rules would require the audit to be filed with the LAC for further consideration. It remains to be seen the extent to which the Auditor General, LAC, and state legislature will devote resources to reviewing the emergency, no-bid, multi-million-dollar contracts awarded to Deloitte, the high fees charged at Illinois call centers, and the data breach.

Ohio

Ohio ran into consulting issues very similar to those confronting Illinois. On April 13, 2020, the state of Ohio signed a no-bid emergency contract with Deloitte, awarding it about \$10

¹⁶⁷ *Id.* at 4.

¹⁶⁸ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 304.

¹⁶⁹ *Id.*

¹⁷⁰ 30 Ill. Comp. Stat. 500/20(b) (2019). According to an Illinois state website, the Procurement Policy Board “has the authority and responsibility to review, comment upon, and recommend, consistent with the Procurement Code, rules and practices governing the procurement, management, control, and disposal of supplies, services, professional and artistic services, construction and real property and capital improvement leases procured by the State.” Retrieved from <https://www2.illinois.gov/agencies/PPB>.

¹⁷¹ 30 Ill. Comp. Stat. 500/20(c) (2019).

¹⁷² Illinois Auditor General. (2020 Annual Edition). *Illinois Audit Advisory*. Retrieved from <https://www.auditor.illinois.gov/Other-Public-Documents/AuditAdvisory/2020%20Audit%20Advisory.pdf>.

million in exchange for building a new computer system enabling gig workers and independent contractors to file state unemployment insurance claims.¹⁷³ A month later on May 15, the Ohio Department of Jobs and Family Services (ODJFS) discovered that some claimants using the new system had their personal data exposed. In a press release, ODJFS stated that “about two dozen individuals inadvertently had the capability to view other PUA claimants’ correspondence.”¹⁷⁴ It was estimated that more than 120,000 people risked having had their names, street addresses, and Social Security numbers exposed.¹⁷⁵ Deloitte again offered one year of free credit monitoring to those affected.¹⁷⁶

In addition to concerns about the data breach, some questioned why the state paid \$10 million to Deloitte for an off-the-shelf product that took only one month to install. Zach Schiller, research director for Policy Matters Ohio, for example, was quoted in the press asking, “Why did we need to go to Deloitte at all?”¹⁷⁷ In another publication, an ODJFS spokesperson explained: “Considering the urgency of the Covid-19 pandemic, it was critical for our agency to move swiftly in procuring a system.”¹⁷⁸

In Ohio, according to the Center for Urban Studies report on state-level oversight, the office of the state Inspector General (IG) is responsible for oversight of state contracts.¹⁷⁹ The current Ohio IG is Randall G. Meyer, a Republican, who was appointed to that office by Republican Governor John Kasich, with the approval of the Ohio Senate, and who has continued in office during the term of the current Ohio Republican Governor Michael DeWine. According to the CUS report, the Ohio IG seems to have authority to work collaboratively with the Ohio legislative branch regarding contracts in some instances.¹⁸⁰ However, the CUS report also found that the Ohio legislature’s track record of actually exercising contract oversight was “limited.” To date, no evidence has surfaced of any IG review of the Deloitte contract or of any IG communications with the legislature related to the Deloitte procurement.

Also tasked with oversight of contracts in the state is the Controlling Board, a seven-member board within the state’s Office of Budget and Management consisting of the Director of Budget and Management and six legislators from both houses and both political parties. This hybrid executive-legislative board, with its bipartisan, bicameral legislative membership, is charged with providing “legislative oversight over certain capital and operating expenditure by

¹⁷³ Monk, Dan. (May 28, 2020). Ohio is paying Deloitte \$9.6M to process jobless benefits. Is it working? *Wcpo9 Cincinnati*. Retrieved from <https://www.wcpo.com/news/local-news/i-team/ohio-is-paying-deloitte-9-6m-to-process-jobless-benefits-is-it-working>.

¹⁷⁴ Ohio Department of Job and Family Services. (May 20, 2020). *Pandemic Unemployment Assistance Data Issue Discovered, Corrected*. [News release]. Retrieved from <https://jfs.ohio.gov/RELEASES/pdf/052020-Pandemic-Unemployment-Data.stm>.

¹⁷⁵ Otte, Jim. (May 20, 2020). Coronavirus: Data breach exposes personal information of some Ohio unemployment applicants. *WHIO TV7*. Retrieved from https://www.whio.com/news/coronavirus/coronavirus-ohio-jfs-investigates-possible-data-breach-through-unemployment-system/ETIBQSQGANBUPOFUUXOUYRVZ2M/#continue_below.

¹⁷⁶ Monk, supra note 173.

¹⁷⁷ *Id.*

¹⁷⁸ Marr, Chris and Ebert, Alex (July 29, 2020). Deloitte, Others Reap Big Contracts from Unemployment Deluge. *Bloomberg Law*. Retrieved from <https://news.bloomberglaw.com/daily-labor-report/deloitte-others-reap-big-contracts-from-unemployment-deluge>.

¹⁷⁹ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 750.

¹⁸⁰ *Id.*

state agencies and has approval authority over various other state fiscal activities.”¹⁸¹ The board meets every two weeks to consider and vote on requests for action submitted by state agencies.¹⁸²

According to Controlling Board documents published on its website, ODJFS asked the board for an increase in appropriations to support the state’s unemployment insurance program.¹⁸³ The request was approved in a May 2020 board meeting without objection.¹⁸⁴ That approval presumably included board consent to the \$10 million, no-bid Deloitte contract. During the same meeting, the minutes note that Representative Jack Cera, a Democrat, stated that he had read an article relating to the data breach and asked if there were any other security issues.¹⁸⁵ The ODJFS Assistant Director for Employment Services, Bruce Madson, assured Rep. Cera that the issue was “low risk” and had been taken care of.¹⁸⁶ While the minutes of the May meeting do not disclose any additional detail about the board’s review of the Deloitte contract or the extent to which it dug into the facts, the minutes nevertheless provide an example of an innovative, bipartisan, legislative oversight mechanism at work – one that continued to operate throughout the pandemic. At the same time, questions remain about the effectiveness of the board’s oversight efforts and the extent to which the Ohio legislature as a whole was cognizant of its activities.

California

California is a third state that experienced problems with a no-bid, emergency Deloitte contract issued to address unemployment insurance problems. However, having problems with Deloitte with respect to state unemployment claims was not new for the state.

A decade earlier, in 2010, California had contracted with Deloitte to update its unemployment claims system and encountered a number of problems, including watching the project cost rise to \$110 million or almost double the original cost estimate.¹⁸⁷ At the time, state lawmakers held hearings questioning Deloitte about both the cost overrun and a variety of problems with the new system.¹⁸⁸ The California State Auditor, who is appointed to office by the governor, published two reports at the time, one which criticized state officials for

¹⁸¹ Ohio Office of Budget and Management. *Controlling Board: About Us*. Retrieved from <https://obm.ohio.gov/wps/portal/gov/obm/areas-of-interest/controlling-board/about-us/>.

¹⁸² *Id.*

¹⁸³ State of Ohio Controlling Board. (April 17, 2020) *Fund/Appropriation from The Ohio Department of Job and Family Services*. Retrieved from <https://www.ecb.ohio.gov/Print/PrintCBR.aspx?CBR=JFS0100560>.

¹⁸⁴ State of Ohio Controlling Board. (May 11, 2020). *Minutes of the May 11, 2020 Meeting*.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Assembly Insurance Committee Oversight Hearing. (Nov. 6, 2013). *Unemployment Insurance Benefit Delays*. Retrieved from <https://ains.assembly.ca.gov/sites/ains.assembly.ca.gov/files/Final%20Background%20Paper.pdf>.

misrepresenting the contract's progress¹⁸⁹ and another that cited nine months of delays in a subproject "because of unacceptable levels of defects before its internal system was accepted."¹⁹⁰

Despite Deloitte's poor contract performance, in May 2020, when the COVID-19 pandemic hit California and over 5 million applications for unemployment began pouring into the state's system, California again issued a no-bid, emergency contract to the firm.¹⁹¹ The \$16.5 million cost was to obtain Deloitte's assistance in expanding a state call center to house around 500 call takers to process the new claims.¹⁹² As in Ohio, the contract explicitly allowed Deloitte to charge the state \$55 per hour for each of the 500 call takers managed by Deloitte.¹⁹³ California Governor Gavin Newsom announced at the time that the state objective was to provide benefits within three weeks of a claim, but in June, California officials estimated that 20% of claimants were not receiving their payments within the target time frame. Further, it was reported that when the Employment Development Department (EDD) missed the three-week deadline, the delays often extended many more weeks.¹⁹⁴

The California legislature again exercised its oversight powers. Spearheading the legislative effort was state Assemblymember David Chiu. Mr. Chiu sat on the relevant Budget Subcommittee which, on June 30, 2020, held a hearing and questioned EDD Director Sharon Hilliard about the shortcomings of the state unemployment claims system.¹⁹⁵ Five days later, Mr. Chiu was the first of 61 state legislators, all Democrats, who sent a letter to Democratic Governor Newsom demanding action to resolve the EDD problems.¹⁹⁶ In the letter, the legislators called for "vendor reform and accountability," and noted EDD's "very poor history of engaging with the private sector to modernize and upkeep its IT systems, continuing to mostly default to its long-standing relationship with its consultant Deloitte."¹⁹⁷

The letter stated that, despite all of the money paid to Deloitte, the firm had not been successful in its contract performance, and "[t]he public is owed a clear explanation of all pending system updates, the responsibility that each contract has to address each work item, and reasonably estimated timelines."¹⁹⁸ The letter concluded by asking the governor to take action,

¹⁸⁹ California State Auditor. (March 2015). *High Risk Update—California Department of Technology*. Retrieved from <https://www.auditor.ca.gov/pdfs/reports/2014-602.pdf>.

¹⁹⁰ California State Auditor. (2014). *California Department of Consumer Affairs' BreEZe System*. Retrieved from <https://auditor.ca.gov/pdfs/reports/2014-116.pdf>.

¹⁹¹ Rodd, Scott. (May 22, 2020). Deloitte Gets No-Bid Contract to Improve California's Unemployment System Despite Criticism Over Previous Work. *CapRadio*. Retrieved from <https://www.capradio.org/articles/2020/05/22/deloitte-gets-no-bid-contract-to-improve-californias-unemployment-system-despite-criticism-over-previous-work/>.

¹⁹² *Id.*

¹⁹³ Venteicher, B. and Lightman, D. (June 25, 2020). California unemployment agency keeps turning to same IT firm despite delays, cost overruns. *Sacramento Bee*. Retrieved from <https://www.sacbee.com/article243611952.html>.

¹⁹⁴ *Id.*

¹⁹⁵ Subcommittee No. 4 on State Administration. (July 30, 2020). AGENDA. Retrieved from <https://abgt.assembly.ca.gov/sites/abgt.assembly.ca.gov/files/Sub%204%20July%2030%20Agenda%20update.pdf>.

¹⁹⁶ Letter from David Chiu et.al. to Governor Gavin Newsom. (Aug. 5, 2020). Retrieved from <https://a65.asmdc.org/sites/a65.asmdc.org/files/pdf/Legislative%20EDD%20Letter%20to%20Governor%20Newsom.pdf>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

and expressed hope “that our Legislature and your Administration can work in true partnership to address the suffering of our constituents.”¹⁹⁹

This case study recounts how three states, Illinois, Ohio, and California, employed no-bid, multi-million-dollar contracts to obtain consulting services from Deloitte to address urgent unemployment claims filed by residents who were often in dire straits. Despite spending millions of taxpayer dollars, all three states experienced problems with Deloitte’s performance. This case study shows a range of oversight activities by state legislators, on both a cross-party and same-party basis, to review their states’ use of no-bid contracts, payment of expensive consulting fees, and response to performance problems.

McKinsey & Company

Deloitte was not the only consulting firm tapped by states for help during the pandemic. McKinsey & Company, another prominent, high-paid, private consultant, was hired by some states to assist with their response. In 2019, using consulting revenue to compare firms, one publication listed McKinsey as the twelfth largest consulting firm in the country with over \$8 billion in annual revenue.²⁰⁰

Washington State

The state of Washington, for example, signed three separate COVID-related contracts with McKinsey totaling nearly \$5 million.²⁰¹ Even though Washington law normally prohibits no-bid contracts, the state used its emergency authority to waive the competition requirement “for goods and services that are directly related to the state’s response to the coronavirus.”²⁰² The first contract was for a term of eight weeks and cost \$1.3 million to utilize a McKinsey data tool that promised to help the governor’s office make informed decisions about COVID-19.²⁰³ Second was a \$2.4 million contract to help the state combat unemployment insurance fraud schemes.²⁰⁴ Last was a \$1.2 million contract signed by Washington’s Health Care Authority to speed up contact tracing of persons who tested positive for the virus.²⁰⁵

Republican state Senator John Braun raised a number of concerns about the three McKinsey contracts. He noted, first, that all three were awarded on a no-bid basis through the

¹⁹⁹ *Id.*

²⁰⁰ Consulting.com. (Undated). *The Top 50 Consulting Firms in 2019*. Retrieved from <https://www.consulting.com/top-consulting-firms>.

²⁰¹ Consulting.us. (August 2020). *McKinsey wins \$5 million healthcare consulting contract in Washington state*. Retrieved from <https://www.consulting.us/news/4700/mckinsey-wins-5-million-healthcare-consulting-contract-in-washington-state>.

²⁰² See O’Sullivan, Joseph. (Aug. 10, 2020). Global Consulting firm lands \$5 million in coronavirus-related, no-bid contracts in Washington state. *Seattle Times*. Retrieved from <https://www.seattletimes.com/seattle-news/politics/global-consulting-firm-mckinsey-lands-5-million-in-coronavirus-related-no-bid-contracts-in-washington/>.

²⁰³ State of Washington Office of Financial Management contract with McKinsey & Company, Inc. (June 2020). Retrieved from <https://assets.documentcloud.org/documents/7031648/McKinsey-OFM-COVID-19-06-10-2020.pdf>.

²⁰⁴ Washington State Employment Security Department contract with McKinsey Company, Inc. (May 2020). Retrieved from <https://assets.documentcloud.org/documents/7031649/ESD-McKinsey-Contract.pdf>.

²⁰⁵ Consulting.us, *supra* note 198.

state's emergency powers. He also questioned the price of the contracts: "It sounds to me like, once again, kind of the high-end, high-tech folk of the world are making out like bandits during this pandemic at the expense of everyone else."²⁰⁶ Sen. Braun also noted that the contracts had been awarded without any input from the legislative branch.

According to the Center for Urban Studies report, legislative oversight in Washington state has been "limited" with much of the oversight instead being provided by non-legislative entities such as the State Auditor's Office.²⁰⁷ Additionally, the CUS report noted that the state's legislative sessions last only 60 days in an even numbered year, with special sessions allowed only at the call of the governor, making legislative oversight difficult.²⁰⁸ Washington state's regular session for 2020 began on Jan. 13 and ended on March 12, leaving little time for the legislative branch to deal with the pandemic.²⁰⁹

In response, Sen. Braun was a leading voice calling for a special session to address concerns about the autonomous spending of Democratic Governor Jay Inslee to combat the virus. In a July letter penned by Sen. Braun to other legislators, he warned that the legislative body was "ceding [its] role too easily to the executive branch."²¹⁰ While the letter didn't mention the McKinsey contracts specifically, the senator took issue with the unilateral spending decisions being made by the governor saying, "our state is not designed to be run by a single individual — however well-intentioned — with the ability to suspend laws, close schools and businesses, decide personally how to spend billions of dollars, and unilaterally issue proclamations affecting millions of people for months on end."²¹¹ His letter continued: "The state constitution explicitly endows our branch with the legislative authority. It is we who have the power to make laws and spend funds. It is a power that we should carefully and jealously guard."²¹²

At the time of this writing, however, no special session has been called, and it appears the legislature will not convene again until its regular session in January 2021.²¹³ There is also no evidence of a broader legislative effort to call on the Washington State Auditor to review the McKinsey contract.

Florida

²⁰⁶ O'Sullivan, Joseph. (Aug. 10, 2020). Global Consulting firm lands \$5 million in coronavirus-related, no-bid contracts in Washington state. *Seattle Times*. Retrieved from <https://www.seattletimes.com/seattle-news/politics/global-consulting-firm-mckinsey-lands-5-million-in-coronavirus-related-no-bid-contracts-in-washington/>.

²⁰⁷ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 937-950.

²⁰⁸ Washington State Legislature. Overview of the Legislative Process. Retrieved from <http://leg.wa.gov/legislature/Pages/Overview.aspx#:~:text=Extraordinary%20sessions%20are%20called%20by,no%20more%20than%2030%20days.>

²⁰⁹ Washing State Legislature. 2020 Session Cutoff Calendar. Retrieved from <http://leg.wa.gov/legislature/pages/cutoff.aspx>.

²¹⁰ Letter from Sen. John Braun to his legislative colleagues. (July 13, 2020). Retrieved from <https://www.washingtonpolicy.org/library/docLib/July-letter-to-legislators.pdf>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Wilson, D.J. (July 14, 2020). Why there won't be a special session this summer—or at all. *Washington State Wire*. Retrieved from <https://washingtonstatewire.com/why-there-wont-be-a-special-session-this-summer-or-at-all/>.

Florida is another state in which McKinsey won a contract to provide assistance during the pandemic. In April 2020, Florida's largest county, Miami-Dade, entered into a \$500,000 contract with McKinsey to assist the county with collecting COVID-related data and using that data to develop a plan to reopen local businesses, schools, and facilities.²¹⁴

Some county officials raised concerns about McKinsey's effectiveness, pricing, and willingness to provide contract transparency when working for the public. For example, the media published an internal email from Jennifer Moon, Deputy Mayor of Miami-Dade County, in which she wrote: "Basically they are compiling data for us. And putting it in pretty formats. They are doing the research that I am too burned out at this point to do. I'm quite flattered that it takes 4 people to replace me."²¹⁵ In another email, Deputy Mayor Moon wrote that "apparently it takes 5 people with staff support to do what I've been doing myself."²¹⁶

Her concerns raised questions not only about the usefulness of the services being provided by McKinsey, but also about McKinsey staffing practices that led to higher pricing. In a "Pandemic Pricing" table sent by McKinsey to the county, the firm provided six different "packages" from which a prospective client could choose.²¹⁷ The McKinsey packages offered lower-priced options that included part-time help by a McKinsey partner as well as more expensive packages that included more staffing assistance, "COVID analytics" and "best practices." According to one source quoted by the media, the \$142,000 price being paid per week for the COVID package selected by Miami-Dade County exceeded "the combined annual salaries of the two staffers who had been helping Moon prepare the reopening plan."²¹⁸

In addition to pricing, concerns were raised about the duration of the contract. As Miami-Dade County and McKinsey were negotiating the terms of the deal, McKinsey contract manager pushed back on the county's attempt to limit the contract to four weeks in duration.²¹⁹ McKinsey suggested that an unspecified end date was important to "provide flexibility." But that flexibility could not only delay the county's planning efforts, it could, again, lead to more money being paid to the firm, since the fees were calculated on a per week basis.

²¹⁴ Miami-Dade County contract with McKinsey & Company, Inc. (April 2020). Retrieved from <https://beta.documentcloud.org/documents/20191669-mck-miami-dade-final-contract>.

²¹⁵ Email from Jennifer Moon to Hugo Benitez. *Miami-Dade and McKinsey*. (April 29, 2020). Retrieved from documents placed on the Internet by ProPublica, https://beta.documentcloud.org/documents/20193105-moon_mck-work-email.

²¹⁶ Email from Jennifer Moon to Andrea Dua. *Quick follow up*. (April 24, 2020). Retrieved from documents placed on the Internet by ProPublica, https://beta.documentcloud.org/documents/20193103-moon_5-people-email.

²¹⁷ McKinsey Pricing Sheet. Retrieved from documents placed on the Internet by ProPublica, <https://www.documentcloud.org/documents/6988833-McKinsey-Pricing-Sheet-Email.html#document/p1/a571760>.

²¹⁸ McDougall, Ian. (July 15, 2020). How McKinsey is Making \$100 Million (and Counting) Advising on the Government's Bumbling Coronavirus Response. *ProPublica*. Retrieved from https://www.propublica.org/article/how-mckinsey-is-making-100-million-and-counting-advising-on-the-governments-bumbling-coronavirus-response?sourceid=1043943&utm_source=thepapertrail&utm_medium=email&utm_campaign=tpt-200721&emci=baaa0805-64cb-ea11-9b05-00155d03bda0&emdi=196b61c2-77cb-ea11-9b05-00155d03bda0&ceid=10755.

²¹⁹ *Id.*

Still another issue involved contract transparency. Miami-Dade officials objected to inclusion of a confidentiality clause in the contract, explaining that the public had a right to know the content of and results produced by the county's contracts.²²⁰ Initially, McKinsey took a hard stance on this issue, describing removal of the confidentiality clause as a "show stopper."²²¹ While the firm did eventually compromise, the contract allowed the county to share information about the firm's work product with only "specific entities," limiting the government's ability to share information about the advice McKinsey was providing.²²²

Being a difficult contract partner was not new for McKinsey. According to one media report, "McKinsey ha[d] a long-standing policy of refusing to reveal the names of its clients and demanding that clients likewise not reveal that they'[d] retained McKinsey, unless they're legally obligated to."²²³ The same media report indicated that the firm had gone even further in its pandemic-related contracts, demanding that its clients not disclose they'd hired the firm, while also allowing McKinsey to unilaterally disclose the work so that it could "market its government work online."²²⁴

When in mid-May, Miami-Dade County finally issued its 175-page reopening plan, it was "widely panned for its needless complexity, which sowed confusion among the public."²²⁵ Xavier Suarez, a county commissioner and former mayor of Miami, was quoted as saying the \$500,000 paid to McKinsey was "a colossal waste of money."²²⁶

The McKinsey contract with Miami-Dade County was featured in an investigative report by ProPublica on how McKinsey was making more than \$100 million advising governments on their COVID response.²²⁷ Concerns about the contract were also raised in a number of Florida media outlets. Despite that attention, no evidence has yet surfaced of any state legislator raising questions about the Miami-Dade no-bid contract, its high cost, the firm's work, or the lack of full transparency. To date, there is little to suggest that either a formal or informal investigation of the procurement by either the legislative or executive branch has taken place or will take place.²²⁸

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ In contrast, a new controversy has recently arisen in Florida in connection with a \$40 million contract issued in 2011 by the state to Deloitte Consulting to modernize the state's unemployment insurance benefits system. Despite the millions of taxpayer dollars spent on that update, the system has been continually criticized for poor performance, leading at one point to the state's imposing an \$8 million fine on Deloitte. During the pandemic, after the system failed repeatedly, Florida Governor Ron DeSantis ordered the Florida Inspector General to initiate a new review of the 2011 contract. In response, Deloitte has rejected the ongoing criticism, noting that it stopped working on the system in 2015. In a surprise development, just three months after ordering the IG investigation of the older contract, Governor DeSantis announced plans to issue a new \$135 million contract to Deloitte to manage the state's Medicaid data. See Kirby Wilson and Lawrence Mower. (Aug. 5, 2020). Firm behind Florida's faulty unemployment website gets \$135 million state contract. *Tampa Bay Times*. Retrieved from

The Center for Urban Studies report on state-level oversight has rated the Florida legislature as exercising only “limited” oversight of contracts.²²⁹ Instead, in Florida, the authority to oversee contracts is seen primarily as the duty of the executive branch.²³⁰ The procurement process is overseen by the state’s Department of Management Services which, in turn, reports to the governor.²³¹ The CUS report noted that a state Commission on Ethics did report to the legislature and could make recommendations, however, it seemed as if that commission was limited to addressing conflicts of interest.²³² The CUS report states that the Florida legislature may possess some “informal mechanism of oversight,” but those mechanisms seemed to be reserved for cases of extreme maleficence.²³³

The experience of Washington state and Miami-Dade County in Florida illustrate issues related to McKinsey’s ability to win no-bid contracts during an emergency, its high fees, the quality of its services, and its resistance to contract transparency. Their experience also raises questions about whether those state legislatures need to conduct better contract oversight to serve as a check on executive branch procurement practices, including whether those legislatures should be able to call a special session without governor approval during an extended emergency.

Conclusion

This third case study focuses on high-priced consultant contracts issued on a no-bid, emergency basis to address a variety of COVID-related problems. Each contract involved substantial taxpayer funds and questionable results, yet in Illinois, Ohio, Washington, and Florida, the state legislatures appear to have taken no action to review the procurements. Complaints by a few individual legislators seem to have had little or no impact. In contrast, in California, one committee held a hearing and over 60 state legislators sent a joint letter to their governor, who belonged to the same political party, raising concerns about a problematic contract. While the governor did not immediately respond publicly to the letter, that level of oversight seems difficult to ignore and may have a salutary impact on the state’s procurement practices. The contrasting state responses to the Deloitte and McKinsey consulting contracts demonstrate, again, the significant variation in state-level oversight by legislatures. They also show that state legislatures can exercise contract oversight, and legislators can join together to address procurement problems.

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<https://www.tampabay.com/florida-politics/buzz/2020/08/05/firm-behind-floridas-faulty-unemployment-website-gets-135-million-state-contract/>.

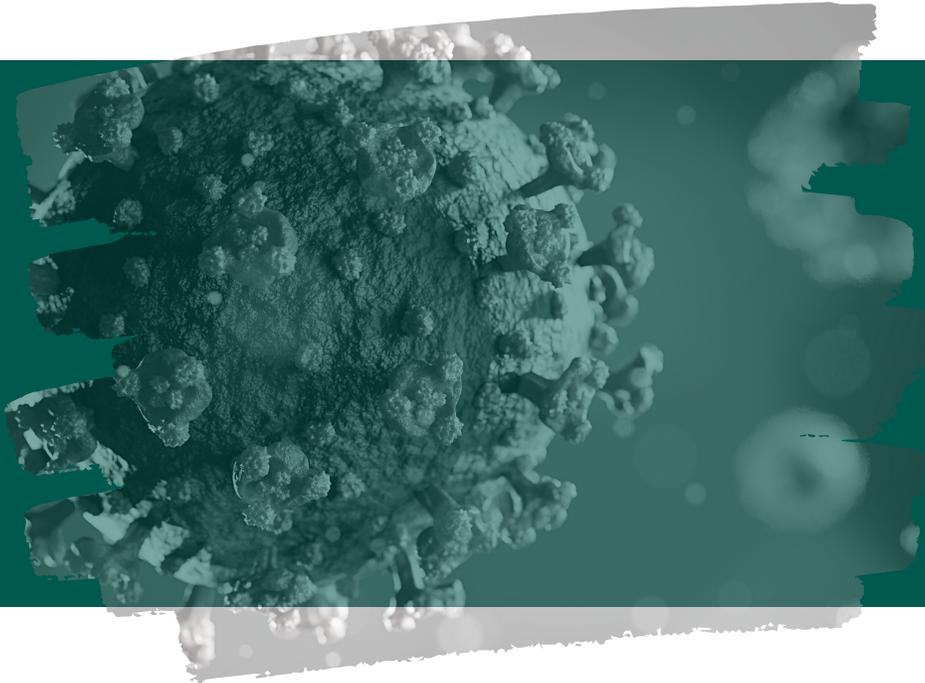
²²⁹ Thompson, L., Sarbaugh-Thompson, M., *supra* note 11 at 230.

²³⁰ *Id.* at 242.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*



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