



State of New Mexico
OFFICE OF THE STATE AUDITOR

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June 30, 2003

The Honorable Mayor Segura
and Council Members
City of Sunland Park
1000 McNutt Rd., Ste. A
Sunland Park, NM 88063

To The Honorable Mayor Segura and Council Members:

At the request of the New Mexico Department of Finance and Administration (DFA), the Office of the State Auditor (Auditor) conducted a special audit of selected City of Sunland Park (City) financial records and related information. The DFA Secretary requested the audit in accordance with Section 10-5-2 NMSA 1978, *Power of secretary to suspend certain officials; grounds for suspension; secretary to take charge of office*. The objective of the special audit was to determine if there are grounds to suspend certain public officials for any of the following:

- Fraudulent misappropriation or embezzlement of public money;
- Fiscal management of an office resulting in violation of law or willful violation of the fiscal regulations of DFA; or
- Willful failure to perform any duty imposed by any law that the secretary of the DFA is charged with enforcing.

The Office of the Attorney General also requested that the audit:

- Inquire into the existence on any meeting minutes during this period, and
- Review those minutes to determine if they accurately represent a record of decisions made by the governing body.

OVERVIEW

We audited selected City financial records and related information from July 1, 1999 through October 31, 2002; however, the audit report also provides information that came to the attention of the Auditor before and after this period and pertains to the findings in this report.

The City is a political subdivision of the State of New Mexico and operates under a mayor-council form of government. The governing body consists of the Mayor and a

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six-member Council. The City provides the following services: public safety, highways and streets, sanitation, health and welfare, social services, culture-recreation, public improvements, planning and zoning, and general administrative services.

The Councilors are elected for staggered four-year terms so that an election for three Council positions is held every two years. The Mayor is elected for a four-year term. The Mayor shall direct the day-to-day operations of the City. The Mayor and Council serve as the Board of Directors for the City, legislating policy, receiving input from the electorate and acting in the best interests of the citizens. The Mayor shall implement the policies of the governing body.

There are statutes that prescribe the responsibilities of a City's governing body and appointed officials. For example:

- Any officer elected or appointed to any municipal office shall take an oath or affirmation to support the constitution of the United States, the constitution and laws of New Mexico and to faithfully perform the duties of his office. (Section 3-10-2 NMSA 1978)
- The Mayor is the chief executive officer and shall cause the ordinances and regulations of the municipality to be obeyed. (Section 3-11-4 NMSA 1978)
- The mayor shall:
 - Supervise the employees of the municipality;
 - Examine the grounds of reasonable complaint made against any employee; and
 - Cause any violations or neglect of the employees' duties to be corrected promptly, or reported to the proper authority for correction and punishment. (Section 3-11-6 NMSA 1978)
- The governing body shall:
 - Manage and control the finances and all property, real and personal, belonging to the municipality;
 - Keep minutes of its proceedings, which shall be open to examination by any citizen;
 - Adopt rules and regulations necessary to effect the powers granted municipalities; and
 - Prescribe the compensation and fees to be paid municipal officers and employees. (Section 3-12-3 NMSA 1978)
- The treasurer of any city in this state or any public officer or employee having in his custody or under his control any public money...who shall use or permit the use of any of the money for any purpose not authorized by law...shall be deemed

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guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than (\$5,000) or by imprisonment for not more than ten years or both. (Section 6-10-40 NMSA 1978)

- Any city officer elected by the people, and any officer appointed to fill out the unexpired term of any such officer, may be removed from office on any of the grounds mentioned in this chapter and according to the provision hereof. The following shall be causes for removal of any officer belonging to the class mentioned in the preceding section:
 - A. conviction of any felony or of any misdemeanor involving moral turpitude;
 - B. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;
 - C. knowingly demanding or receiving illegal fees as such officer;
 - D. failure to account for money coming into his hands as such officer;
 - E. gross incompetence or gross negligence in discharging the duties of the office; and
 - F. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office. (Section 10-4-1 and 10-4-2 NMSA 1978)
- When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be deemed a misdemeanor, punishable by imprisonment in the county jail for not less than ten nor more than sixty days or by a fine of not less than \$100, nor more than \$500. (Section 10-17-12 NMSA 1978)

METHODOLOGY

1. We reviewed documentation from the DFA Local Government Division, and the Office of the Attorney General notifying the City of violations of fiscal regulations and state statutes.
2. We reviewed the financial audits for the fiscal years ended June 30, 1998, 1999, 2000 and 2001. The financial audit of the City for the fiscal year ended June 30, 2002 had not been completed as of the date of this report.
3. We reviewed Council meeting minutes and requests for information for compliance with the Open Meetings Act, Inspection of public records Act and City regulations.
4. We reviewed documentation relevant to the interim loan to purchase the Santa Teresa Services Company (STSC) and the ownership of the STSC for compliance with the State constitution, State statutes and City regulations.

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5. We judgmentally selected contracts and amendments and reviewed relevant documentation for compliance with requests for proposal, contracts, the New Mexico Procurement Code and applicable State statutes and City rules and regulations.
6. We judgmentally selected expenditures for compliance with the New Mexico Procurement Code and applicable State statutes and City rules and regulations.
7. We judgmentally selected per diem and mileage reimbursements for compliance with the Mileage and Per Diem Act, and DFA and City rules and regulations.

AUDIT RESULTS

Based on the results of audit procedures performed and audit findings documented in this report, the Auditor found the City's Mayor and Governing Council to have:

- Willfully violated State laws with regard to the Open Meetings Act; Inspection of public records Act; State Constitution anti-donation clause; State statutes regarding loans, nepotism and residency; Procurement Code; and Mileage and Per Diem Act;
- Willfully violated DFA fiscal regulations; and
- Willfully failed to perform duties imposed by laws that the secretary of the DFA is charged with enforcing.

The Auditor recommends that the Secretary of DFA suspend the City's Mayor and Governing Council on these grounds and for the Secretary of DFA to take charge of the City.

It should be noted that prior fiscal year audit reports for the years ended June 30, 1998, 1999, 2000 and 2001 included findings that support our position in the following areas:

- Minutes were not written, or not approved timely;
- Procurement violations showing improper advance payments, and purchase orders being issued after the purchases were initialized and completed;
- Failure to report income to the Internal Revenue Service (Forms 1099); and
- Budget overruns and not establishing a budget.

FINDINGS AND RECOMMENDATIONS

Finding No. 1 – Noncompliance with the Open Meetings Act (Because of many discrepancies in this area, finding No. 1 has been divided into subsections A through K)

A. Untimely Notice of Meetings

Criteria

The Open Meetings Act, Section 10-15-1.F. NMSA 1978, states meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency, the agenda shall be available to the public at least twenty-four hours prior to the meeting.

The City's agenda form contains spaces that are to be used for the date the Clerk-Treasurer filed the agenda and for the Clerk-Treasurer's signature.

The City Open Meetings Resolution No. 02-01, requires the Clerk-Treasurer to notify the public seven days in advance of a regular meeting.

Condition

1. The agenda for the November 16, 1999 meeting indicated the Clerk-Treasurer filed the addendum to the minutes on November 18, 1999. This date was after the meeting. The agenda for the April 17, 2001 meeting indicated the Clerk-Treasurer filed the agenda on April 24, 2001. This date was after the meeting. In addition, the agendas for three special meetings and one regular meeting did not indicate the date the Clerk-Treasurer filed the agenda; therefore, we could not determine if the agendas were available to the public at least twenty-four hours prior to the meetings as required by the Open Meetings Act or seven days in advance as required by the City's Open Meetings Resolution No. 02-01. The Clerk-Treasurer is required to sign agendas, but did not sign the agenda in nine instances.
2. The City staff posted the agenda for the August 1, 2000 meeting only 4½ hours before the meeting, per a statement made by the City worker who posted the agenda. In addition, the Clerk-Treasurer filed agendas for the January 29, 2002 and February 5, 2002 regular meetings on the day before the meetings rather than seven days in advance as required by City Open Meetings Resolution No. 02-01.
3. In a December 14, 2000 letter to the Mayor, a Councilor complained that the Clerk-Treasurer called her on the same day to inform her of a meeting scheduled for that

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day. She informed the Mayor that he was violating the constitutional rights of the people who elected the Councilor to represent them.

B. Improper Agenda Addition and Notice Posting Denials

Criteria

In a December 3, 1999 letter to the Council and the City, the former City attorney opined that the Mayor or Clerk-Treasurer could not lawfully refuse a request to place items for action on a Council agenda. The attorney indicated the issue had come up before, and as in the past, advised the Mayor to place items on the agenda. The attorney indicated that refusing to add items to the agenda would unlawfully give the Mayor and Clerk-Treasurer veto power over actions a majority of the Council wished to take.

In a June 15, 2001 letter to the Clerk-Treasurer, the City attorney opined that the Clerk-Treasurer must include items on the agenda if requested by a Councilor. The attorney stated that absent any rule requiring a majority vote of the Council to place a matter on the agenda, any one Councilor could require that the Clerk-Treasurer place items on the agenda. The Open Meetings Act, Section 10-15-1.F NMSA 1978 and the City Open Meetings Resolution No. 02-01, do not require a majority of the Council to approve adding items to the agenda.

Condition

1. On March 24, 1998, Councilors by themselves approved an agenda for a special organizational meeting to submit names of candidates to fill the appointive offices of the City. The Mayor stated he considered the meeting illegal because he believed that the governing body had already held the official meeting on March 17, 1998. The City was unable to provide written minutes of a March 17, 1998 meeting.
2. On October 8, 1999, Councilors requested the Clerk-Treasurer add items to the agenda for the next regular meeting. The Mayor did not place those items on the agenda.
3. At an April 18, 2000 meeting, the governing body discussed that a Councilor requested the Clerk-Treasurer to add an item to the agenda. The Mayor stated the request was not in accordance with statutes that indicate the addition of items is at the discretion of the Mayor and at least four members of the governing body.
4. For the May 2, 2000 meeting, the Mayor received identical requests to add items to the agenda. Three Councilors signed one of the identical requests to add items to the agenda, and another Councilor signed the other identical request to add the same items. The Mayor refused to place the items on the agenda and indicated that statutes require signatures of four Councilors. In addition, the items to be added to the agenda were scheduled for closed session but did not comply with requirements for

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discussion in closed session. The items added were travel reimbursement for the governing body, discussion of public records, check signatures and discussion of minutes.

5. On May 25, 2000, Councilors requested the Clerk-Treasurer place items on the agenda for the May 27, 2000 meeting. The Mayor did not allow items to be placed on the agenda until June 8, 2000.
6. On July 24, 2000, four Councilors submitted a request to the Clerk-Treasurer calling a special meeting. According to affidavits, the Mayor refused to allow the Clerk-Treasurer to post notice of the meeting, so the Councilors posted the notice themselves. In a July 26, 2000 letter to the Mayor, the City attorney stated that according to the Clerk-Treasurer, the Clerk-Treasurer received the special meeting agenda signed by a majority of the governing body of the City at approximately 9:20 a.m. The Mayor instructed her not to post the agenda as requested. In his letter, the Mayor stated that the agenda "was submitted after the 10:00 a.m. deadline."

In a July 31, 2000 letter to the Mayor, the City attorney stated the Mayor informed the County Manager that the special meeting agenda was not posted. The Clerk-Treasurer signed the agenda indicating she filed and posted the agenda on July 28, 2000. The City attorney asked the Mayor to rectify any incorrect statements made regarding the posting of the special meeting agenda.

7. In a December 13, 2000 letter to the Council, the Mayor stated that allowing Camino Real landfill representatives to make a presentation in front of the governing body violated the Open Meetings Act because it was not on the agenda. The Council argued that this was not an action item and the agenda allowed for items from the floor.
8. In a May 17, 2001 letter to the Assistant Attorney General, a Councilor and the Mayor Pro-Tem stated the Mayor had refused to allow posting of notices of special meetings called by a majority of the Council in an effort to prevent the Council from taking action on issues the Mayor opposed.
9. On January 10, 2002, Councilors requested the Mayor add an item to the agenda for the next meeting, but the Mayor did not do so.
10. On August 14, 2002 and September 27, 2002, Councilors requested the Clerk-Treasurer add items to the agenda. The Mayor stated these requests were at his discretion and he could refuse, although he did add the items to the agendas.

C. Improper Meeting Cancellations and Failure to Postpone

Criteria

Attorney General Opinion No. 71-46 states that action by the governing body and not the Mayor, acting alone, is necessary to cancel a regularly scheduled meeting.

Condition

1. The Mayor refused to postpone an infrastructure meeting scheduled November 2, 2000 as requested by a majority of the Council.
2. The Clerk-Treasurer cancelled the January 2, and January 16, 2001 regular meetings without governing body approval.
3. In a January 19, 2001 memorandum to the Mayor, the Mayor Pro-Tem stated the Mayor should not unilaterally cancel regular meetings of the Council without obtaining approval of the majority of the Council.
4. The Mayor cancelled the February 6, 2001 regular meeting to allow a Councilor to attend the school board election, but without posting the cancellation. Councilors discussed that this was not an adequate reason to cancel the meeting. Councilors also requested timelier notification of meetings and cancellations.

D. Meeting Discussions Included Items Not on the Agenda

Criteria

The Open Meetings Act, Section 10-15-1.A NMSA 1978, states the formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. Section 10-15-1.F NMSA 1978 states that meeting notices shall include an agenda containing a list of specific items of business to be discussed and that except for emergency matters, a public body shall take action only on items appearing on the agenda.

Section 10-15-1.H NMSA 1978 indicates provisions that do not apply to Sections 10-15-1.A, B and G. Section 10-15-1.H (2) indicates that limited personnel matters means the discussion of hiring, promotion, demotion, dismissal or resignation of or the investigation or consideration of complaints or charges against any individual public employee. Budgetary discussions, while sometimes related to personnel matters, are not to be held behind closed doors.

Section 10-15-1.I NMSA 1978 states that the authority for the closure of a meeting and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting. If the City calls for a closed meeting, the

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meeting shall not be held until public notice is given to the governing body and to the general public.

The Open Meetings Act, Section 10-15-1.B NMSA 1978, states all meetings of a quorum of the policymaking body, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the policymaking body are declared to be public meetings open to the public at all times. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for permitting the closing of the meeting.

The Open Meetings Act, Section 10-15-1.E NMSA 1978, states that only matters appearing on the agenda of the original meeting may be discussed at the reconvened meeting.

Condition

1. In eight instances, the Council closed the meeting to discuss certain items, but the agenda did not indicate the closed meetings.
2. In a November 14, 2000 letter to a Councilor, the City attorney indicated the City gave sufficient notice for the governing body to discuss emergency action to repair a well because the agenda item stated the purpose of the closed session was to discuss pending litigation for the STSC assets. The repair of the well and STSC assets litigation are separate issues.
3. The governing body discussed and took action on the following items, although the items were not on the agendas:
 - October 19, 1999 – The Council approved salary increases for each department.
 - December 5, 2000 – The Council closed the meeting to discuss whether the City should hire a City attorney or continue to contract with an attorney. The discussion does not appear to be exempt from discussion in an opening meeting.
 - June 16, 2001 – The Council closed the meeting to consider a settlement agreement with American Eagle Brick Company. No closed session was listed on the agenda.
4. The agendas for the September 21, 2000 and February 27, 2001 reconvened meetings include several items that were not on the original meeting agenda. At the February 20, 2001 meeting, the Mayor stated that the governing body could only discuss matters that appeared on the agenda of the original meeting at the reconvened meeting.

E. Inappropriate Method of Meeting Conduct

Criteria

Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, states the governing body may compel the attendance of absent members in such manner and under such penalties it deems desirable.

The Open Meetings Act, Section 10-15-1.C NMSA 1978, states that if otherwise allowed by law or rule of the public body, a member of a public body may participate in a meeting of the public body by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting in person.

In a September 6, 2001 letter to the Mayor, the Assistant Attorney General stated the Open Meetings Act expressly indicates, a person's physical attendance as the rule, and telephone conference attendance is the rare exception. When choosing to run for public office, persons must consider the obligation of physical attendance at meetings.

At the June 4, 2002 meeting, the governing body amended the Open Meetings resolution on participation by telephone conference only: (1) if on vacation leave; (2) if out of town or unable to attend personally due to business matters; and (3) if there is a family emergency such as an accident or injury.

Condition

In a May 17, 2001 letter to the Assistant Attorney General, Councilors complained that they spoke to the Mayor about allowing a Councilor on at least four occasions to attend council meetings on the telephone instead of in person. The letter did not state the reason that the Councilor could not attend meetings in person; however, the letter said that it was clear that the Councilor was inebriated.

F. Final Action Not Specific

Criteria

The Open Meetings Act, Section 10-15-1.H (6) NMSA 1978, states that the actual approval of a purchase of an item or final action regarding the selection of a contractor shall be made in an open meeting.

Condition

1. At a November 30, 2000 emergency meeting, the Council voted to approve an interim 15-day operation and maintenance contract for the STSC utility as published in the agenda. However, the Council approved a second contract that was not on the agenda

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by approving a settlement agreement. In a December 5, 2000 letter to the Mayor, the City attorney advised the City to add an item to the agenda of the next meeting to correct and approve the settlement agreement. The Mayor did not comply with this advice.

2. The minutes of the October 15, 2002 meeting indicate the Council closed the meeting to discuss a purchase acquisition. When the open meeting continued, the Council granted the Mayor permission for a "specific project," not to exceed \$200,000, subject to final approval on such project; however, the Council did not define the "specific project."

G. No Written Minutes

Criteria

Section 3-11-3 NMSA 1978, *Mayor; presiding officer of governing body; limitation on vote*, states the mayor is the presiding officer of the governing body. In all municipalities, the mayor shall vote only when there is a tie vote.

Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, states the governing body shall keep minutes of its proceedings.

Section 3-13-1 NMSA 1978, *Clerk; duties*, prescribes the duties of the clerk. These duties include:

1. Keep in custody all minutes, ordinances and resolutions approved by the governing body;
2. Attend all meetings of the governing body; and
3. Record all proceedings, ordinances and resolutions of the governing body.

The Open Meetings Act, Section 10-15-1.G NMSA 1978, requires the governing body to keep written minutes of all of its meetings. The minutes are required to include, at a minimum, the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted.

Section 10-17-1 NMSA 1978, *County, municipal and educational boards; monthly summary of minutes; contents*, states that on or before the tenth day of each month there shall be prepared by every city in this state, a summary of the minutes of all meetings held by such board during the preceding calendar month, such summary to mean a full and correct account of all business transacted, showing all matters presented, the action taken thereon, or other disposition thereof, and a statement of all moneys received during the preceding calendar month, showing the source from which received and the amount received from each source, and a detailed statement of all expenditures made during such preceding calendar month, including a list of all warrants issued, to whom issued, the

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amount of each warrant and the purpose for which the warrant was issued. Section 10-17-2, *Filing summary of minutes; furnishing to legal newspapers*, states such summary of minutes shall be filed with the clerk and such summary shall be a public record and open to inspection of the public, provided, however, that a copy thereof shall be mailed to each and every legal newspaper published in the county for such use as such newspaper may see fit.

Condition

1. The auditors asked to review 161 minutes from January 1, 1998 to December 17, 2002, but the City could not locate written minutes for the following twelve meetings:

Meeting Date	Meeting Type	Approval Date
03/17/98	Organizational	None
06/01/98	Unknown	None
02/15/99	Special	None
04/06/99	Special Workshop	05/18/99
04/10/99	Special Workshop	05/18/99
05/08/99	Special Workshop	06/15/99
05/15/99	Special Workshop	09/07/99
08/21/00	Special	None
01/18/01	Unknown	06/05/01
07/19/01	Public Hearing	None
03/19/02	Regular	04/16/02
05/15/02	Special Workshop	None
07/30/02	Workshop	None

2. The Clerk-Treasurer stated the City does not require minutes for workshops so she did not prepare them. The former Clerk-Treasurer, who left City employment approximately mid-2000, however, did prepare written minutes for workshops and the governing body approved those minutes.
3. In an April 24, 2002 letter to the Mayor, the Attorney General's Office stated that despite prior direction by the Office of the Attorney General to correct Open Meetings Act (OMA) and Inspection of Public Records Act (IPRA) violations, the City continued to violate these laws. The Assistant Attorney General requested a public meeting to address the governing body and staff of the City on the OMA and IPRA. On May 15, 2002, an Assistant Attorney General met with the governing body to discuss the OMA and the IPRA. No minutes were prepared for this meeting as the Clerk-Treasurer considered it a special workshop.
4. In an August 23, 2002 letter to the Mayor, the Attorney General's Office requested the City respond in fourteen days to a May 7, 2002 investigation letter regarding OMA and IPRA violations. In a September 18, 2002 letter, the Mayor indicated that the Attorney General's May 7, 2002 letter was sent to the wrong address and asked

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for an additional 14 days to respond once the City received the complaint. The Mayor did not subsequently respond to the complaint.

5. The Housing Authority Board did not prepare written minutes for meetings even though the Housing Authority is a component unit of the City and the Council acts as the Housing Authority Board. The Clerk-Treasurer prepared agendas for the meetings. The Housing Director recorded the minutes and tapes were available; but due to a proclaimed lack of personnel, the Director was unable to transcribe the tapes and present them for board approval.

H. *Incorrect Minutes*

Criteria

Section 3-11-3 NMSA 1978, *Mayor; presiding officer of governing body; limitation on vote*, states that in all municipalities the mayor shall vote only when there is a tie vote.

The Open Meetings Act, Section 10-15-1.G NMSA 1978 requires the governing body to keep written minutes of all of its meetings. The minutes are required to include, at a minimum, the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted.

Condition

1. Minutes do not document the vote taken on the motion or the vote of each member of the governing body in 32 of the 148 minutes reviewed.
2. On November 19, 2002, the Mayor asked for the record to reflect that when two abstentions are present, they become ayes or approval for all purposes. He further stated the Mayor does not have to vote or break a tie.
3. There were instances of minutes that indicated motions carried, but the recorded votes indicated the motions failed, as follows:

Meeting Date	Motion
05/10/99	The minutes indicate the governing body approved a Memorandum of Understanding with Dona Ana County (County) for joint ownership and operation of the STSC utility. The votes, however, indicate three nays, three ayes, and then the Mayor voting nay.
09/07/99	The minutes indicate the governing body accepted a deed for 0.565 acres that Jack Pickel of POST Land Ltd donated to allow the City to have presence at the port of entry. The recorded votes, however, indicate three nays and two ayes.

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Meeting Date	Motion
01/18/00	The minutes indicate the governing body voted unanimously to approve a salary increase for an employee. The governing body approved the minutes on September 21, 2000 after amending the minutes to indicate that two Councilors voted nay.
06/27/01	The minutes indicate a Councilor voted in favor of tabling a motion; however, the minutes also indicate the Councilor left the meeting before the Clerk-Treasurer took the vote.
10/01/02	The minutes indicate the motion carried to close the meeting, but the votes indicate three ayes and three nays.

4. Our review of 148 minutes show that the Clerk-Treasurer had not corrected minutes in 25 instances and 14 minutes contained errors, for example:
 - The roll call for the June 8, 2000 minutes indicate one Councilor was not present but discussions in the minutes indicate the Councilor was present. Another Councilor was on the roll call twice.
 - The November 30, 2000 minutes indicate a Councilor attended the meeting, but the Clerk-Treasurer's handwritten meeting notes indicate the Councilor did not attend the meeting.
5. Numerous minutes contained typographical errors, nonsensical statements, incomplete sentences and discussions and actions taken were difficult to understand.

I. Minutes Not Approved Timely

Criteria

The Open Meetings Act, Section 10-15-1.G NMSA 1978, states that the City Clerk shall prepare draft minutes within ten working days after the meeting and the governing body shall approve, amend or disapprove the minutes at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

Condition

1. The governing body did not approve, amend or disapprove the meeting minutes at the next meeting where a quorum was present in 123 of 148 meetings reviewed.
2. As of December 17, 2002, the governing body had not taken action to approve, amend or disapprove the minutes for the August 21, 2000 special meeting.

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3. The governing body approved 13 minutes more than two years late:

Meeting Date	Approval Date
01/04/00	12/17/02
06/01/00	12/17/02
06/08/00	12/17/02
07/18/00	12/17/02
08/01/00	12/17/02
08/08/00	12/03/02
08/29/00	12/17/02
09/20/00	12/17/02
09/21/00	12/17/02
09/25/00	12/17/02
10/03/00	12/17/02
11/13/00	12/03/02
11/21/00	12/03/02

4. In addition, the governing body approved 6 minutes more than one year but less than two years late and 14 minutes more than six months but less than one year late.
5. On numerous occasions, the governing body tabled approval of minutes to future meetings. In most cases, the governing body received the minutes at the meeting and did not review them before approving them. Councilors continually requested the Clerk-Treasurer prepare the minutes for approval as required by the Open Meetings Act, for example:

Meeting Date	Comments
04/18/00	A Councilor stated that statutes require the minutes of one meeting to be ready for the next meeting, but the Mayor stated that the statutes specify only regular meeting minutes. The Mayor also said that minutes of one meeting do not necessarily need to be ready for the next meeting.
12/05/00	A Councilor asked when the Clerk-Treasurer would complete minutes from previous meetings. The Clerk-Treasurer stated that minutes would be done when a receptionist was hired.
05/15/01	A Councilor asked if there were any other minutes missing. The Clerk-Treasurer stated the governing body approved most of the minutes. The Mayor stated that the minutes were accurate.

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Meeting Date	Comments
09/24/01	A Councilor read an August 21, 2000 letter from a Councilor to the Mayor stating the Clerk-Treasurer failed to provide minutes, among other issues. The Council discussed a letter from the Attorney General regarding compliance with the Open Meetings Act and the Inspection of Public Records Act. The Attorney General's letter addressed failure to approve minutes among other issues. The Mayor stated the Attorney General was aware that the delay in approval of minutes was due to personnel changes, and the minutes were up-to-date.
09/17/02	The governing body tabled approval of minutes because they received the minutes the night of the meeting. The Clerk-Treasurer stated that due to workload, some minutes were in revision.

Additional correspondence indicates the lack of minutes was a continuous problem, as follows:

- In a December 14, 2000 letter to the Mayor, a Councilor expressed concern that it was months since the governing body approved any minutes. In addition to the letter, Councilors repeatedly asked about minutes. The Mayor told them the staff was working on the minutes. A Councilor, in a letter, reminded the Mayor about statutory requirements.
- In a March 30, 2001 letter to the Mayor, the City attorney stated that the Judge hearing the case of American Eagle Brick Company v. the City was not pleased that the City did not produce the tapes and minutes of the July 6, 2000 Council meeting. The attorney indicated that although the City could have destroyed the tapes pursuant to City policy, the City needed to produce the minutes of the meeting as soon as possible. An April 2, 2001 letter from the City's Attorney to the Mayor required the City to produce the tape recordings and copies of final minutes of the meeting. The governing body approved the July 6, 2000 minutes on June 5, 2001.
- In a May 17, 2001 letter to the Attorney General's Office, Councilors complained that the governing body had gone months without the City providing minutes for approval.
- In a September 6, 2001 letter to the Mayor, the Assistant Attorney General indicated the City continually failed to approve minutes, and at times, failed to take minutes of its Council meetings. The letter stated that the Open Meetings Act required the City to keep written minutes of all meetings.
- In a September 10, 2001 letter to the Mayor and Councilors, DFA recommended the City take minutes of every public meeting and prepare draft minutes within ten working days after the meeting for approval at the next meeting where a

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quorum is present. The Mayor responded that the City is up to par with all the minutes and the City sent all current minutes to the governing body for review and approval. In a September 17, 2001 letter to DFA, the Mayor indicated the City is "up to par with all our minutes and all current minutes are being sent to the governing body for review and approval.

- In a July 16, 2002 memo to the Clerk-Treasurer, a Councilor listed numerous minutes that the Clerk-Treasurer had not provided to the governing body for approval.
 - At the October 15, 2002 meeting, the Administrative Assistant Clerk stated the New Mexico Municipal League had stated that draft minutes had to be prepared and available in ten days, but not necessarily approved in ten days.
 - In a November 27, 2002 memorandum to Councilors, the Mayor recommended the Council submit any proposed changes to minutes a day prior to the meeting. In a response to the memorandum, a Councilor reminded the Mayor of statutory requirements for approval and corrections to minutes.
6. The minutes indicate the Council approved the minutes on one date; subsequent minutes indicate the Council approved them on a different date as follows:

Meeting Date	Indicated Approval Date	Actual Approval Date
09/16/98	11/17/98	10/06/98
09/18/98	11/17/98	10/06/98
02/15/99	03/16/99	None

7. Our review of 148 minutes revealed:
- There was no approval date in 72 instances,
 - The Mayor did not sign the minutes in 80 instances; and
 - The Clerk-Treasurer did not sign the minutes in 82 instances.

J. Employee Actions Not in Compliance with the Open Meetings Act, State Law, City Ordinance or City Attorney Opinion

Criteria

The Open Meetings Act, Section 10-15-1.H. (2) NMSA 1978, states that discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee shall be discussed in closed session; provided further that this section does not exempt final actions on personnel from being taken at open public meetings.

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Section 3-11-6 NMSA 1978, *Mayor; authority to appoint, supervise and discharge employees*, states that subject to the approval of a majority of all members of the governing body, the mayor shall appoint all officers and employees. The mayor may appoint temporary employees. The employee shall serve only until the next regular meeting of the governing body at which a quorum is present. The temporary employment shall cease and the employee shall not be reappointed unless the governing body confirms his appointment. The governing body may discharge an appointed official or employee by a majority of all the members of the governing body. The Mayor may discharge an appointed official or employee upon the approval of a majority of all the members of the governing body.

Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, states the governing body shall prescribe the compensation and fees to be paid municipal officers and employees.

City Personnel Rules and Regulations Section 3-2-2, *Chain of Command*, states that subject to provisions of these Rules and Regulations, the Mayor, subject to approval of the Council, may discharge all employees. Exempt employees are subject to discharge by the Mayor, subject to approval of the Council without regard to the provisions of these Rules and Regulations.

City Personnel Rules and Regulations Section 3-2-3, *Personnel Duties of the Clerk*, states the Clerk, in addition to the powers and duties given by municipal ordinance, shall as directed by the Mayor and approved by the Council, administer the personnel system provided by these Rules and Regulations or other applicable law. The Clerk shall, among other duties, perform the duties and have the powers concerning personnel matters as follows:

- Administer and maintain on behalf of the Mayor and Council these Rules and Regulations, Pay Plan and Classification System, supplemental procedures and any other rules and regulations established by these Rules and Regulations;
- As necessary for all personnel in the classified service, on behalf of the Mayor and Council, develop, maintain and apply procedures for the recruitment, compensation, promotion, training and disciplinary action and related aspects of personnel management in the City, subject to the provisions of these Rules and Regulations, Council policy and any additional personnel rules and regulations; and
- As directed by the Mayor and subject to approval of the Council, employ, suspend, demote and discharge all persons engaged in the administrative service of the municipality in accordance with these Rules and Regulations.

City Personnel Rules and Regulations Section 3-5-4, *Job Specifications*, states the Clerk shall establish and maintain specifications for all positions in the classified service. Such specifications shall include title, class features, salary range and typical tasks and minimum and/or desirable qualifications. Such specifications shall be reviewed annually

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by the Mayor to maintain accuracy. The Mayor shall make recommendations to the Council for the establishment of new or revised classes or the abolishment of existing classes. Job and class specifications shall be established in the classification system as adopted by the governing body.

City Personnel Rules and Regulations Section 3-5-16.C, *Selection of Candidates*, states that no candidate shall be considered officially employed until the Council have approved such appointment by the Mayor. Section 3-5-17, *Provisional Appointment*, states the Mayor may authorize the provisional appointment of an individual who appears to meet the minimum qualifications for such a position. Such appointment shall be for an interim period pending further recruitment and examination. To be considered for a permanent appointment, the provisional employee must qualify on a competitive basis with all other applicants for the position. If the provisional appointee proves proficient in the position, the Mayor may direct that the employee be assigned to a permanent appointment status subject to approval of the Council.

City Personnel Rules and Regulations Section 3-7-11, *Salary on Promotion*, states that pay rate on promotion should be based on the same criteria as the initial pay rate, with written justification submitted to the Council. The Mayor and Council shall make the final salary determination when an employee is promoted. Section 3-8-5, *Demotions*, states demotions shall be recommended by the Mayor subject to approval by a majority of all of the members of the Council. Section 3-8-6, *Reclassification*, states documentation for job expansion or reduction will be presented to the Council for evaluation to determine the extent of reclassification. A new job description must accompany any reclassification request. When an employee is reclassified, there may be a salary adjustment. The Mayor, with the approval of a majority vote by the members of the Council, will make the final determination. Section 3-8-7, *Reorganization*, states the Mayor with the approval of the Council must approve all reorganization. Section 3-10-10, *Right of Appeal*, states disciplinary actions taken against permanent employees in the classified service shall be subject to appeal and review before the Council.

City Personnel Rules and Regulations Section 3-14-1, *Emergency Appointment*, states that nothing in these Rules and Regulations shall prevent the Mayor from appointing a person in an emergency, temporarily, prior to consideration by the Council. Existence of an emergency shall be determined solely by the Mayor. In the event of such an emergency appointment, the person so appointed shall serve only until the next regular meeting of the Council. If the Council refuses to approve such appointment, the person may continue to serve only until the position is filled through the regular process.

City Personnel Rules and Regulations Section 3-14-2, *Temporary Position*, states that a position established for six months or less, shall be a temporary position, to be filled by appointment by the Mayor. The appointment will be filled from a list of qualified eligibles recommended by the Council, or by an emergency appointment if necessary if the Mayor determines that an emergency exists. A temporary employee may work for a

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six-month period. The six-month period may be extended with the approval of the Mayor, but in no event shall a temporary position exceed nine months.

City Personnel Rules and Regulations Section 3-15-1, *Violations*, states:

- A. Any employee of the City who by himself or with others, violates any provisions of these Rules and Regulations is subject to suspension or dismissal, in addition to any other penalty imposed for such violation.
- B. Any member of the governing body, including the Mayor and the Councilors who violates any of the provisions of these Rules and Regulations will be subject to the penalties imposed under New Mexico statutes.

A City ordinance states the Mayor shall work Monday to Friday from 8:00 a.m. to 5:00 p.m.

In a November 30, 2000 opinion, the City attorney stated that City Personnel Rules and Regulations require Council approval for temporary hires and that when the Council does not approve a hire, the City must immediately terminate the employee.

Condition

The Council did not take action in a public meeting to appoint, promote, discharge or transfer employees, as follows:

1. On November 17, 1998, the Police Chief announced that he promoted an employee, but the City did not present the promotion to the Council for approval.
2. In a November 21, 2000 memorandum to the Mayor, a Councilor indicated the City failed to dismiss an employee after the governing body disapproved the employment. The November 13, 2000 meeting minutes do not indicate the governing body voted in the open meeting to disapprove the individual, but the minutes mention a closed session to discuss personnel matters.
3. In a November 22, 2000 memorandum to the Mayor, a Councilor stated that a part-time employee was now working full-time. The Mayor did not bring the change of employee status or related budget matters to the governing body for approval.
4. At a February 7, 2001 meeting, the Council approved the appointment of two part-time Community Organizers for the Child and Family Development Department. The City did not seek Council approval for the Community Organizer job description until March 6, 2001. The two employees are now working full-time as Educators. The Mayor has not brought a recommendation for these employees to the Council for approval as full-time employees.

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5. In a May 17, 2001 letter to the Assistant Attorney General, Councilors stated:
 - The Mayor was teaching part time at a community college without the Council's authorization and he was teaching during working hours. The City ordinance pertaining to the Mayor states the Mayor shall work Monday to Friday from 8:00 a.m. to 5:00 p.m.
 - The Mayor appointed personnel to positions without them having the required minimum qualifications.
 - The Mayor used unqualified and unlicensed City employees to renovate a park, and the Mayor did not bring the project to the governing body for approval.
6. At the April 16, 2002 meeting, the Council tabled appointment of an individual as Library Assistant. A Councilor asked when the Council approved the job description. The City Clerk clarified that the Council approved the position at the last regular meeting. A review of the minutes indicated that the issue neither was on the agenda nor acted on by the Council. Later at a May 21, 2002 meeting, the Council approved a resolution establishing the Library Assistant position.
7. The Mayor transferred the purchasing officer from Finance to the Motor Vehicle Department and a Motor Vehicle Department employee to Finance. The Mayor did not seek Council approval for the transfers and the City continues to pay the employees out of the budgets of their former departments.
8. On February 10, 2003, the Mayor appointed an individual to the Community Development Department. The Mayor has not brought the appointment to the Council for approval.

K. Noncompliance with Officer Appointments

Criteria

Section 3-11-5 NMSA 1978, *Mayor; appointment of officers after election*, states that at the organizational meeting of the governing body, the mayor shall submit, for confirmation by the governing body, the names of persons who shall fill the appointive offices of the municipality. If the governing body fails to confirm any person, the Mayor at the next regular meeting of the governing body shall submit the name of another person to fill the appointed office.

City Personnel Rules and Regulations Section 3-2-1 *Form of Government*, states that the Mayor appoints the Clerk-Treasurer and Department Directors, with the advice and consent of the Councilors. The Departments of the City are:

1. Public Works
2. Finance and Administration
3. Police

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4. Social Services
5. Fire
6. Economic Development & Tourism
7. Housing

City Personnel Rules and Regulations Section 3-11-11, *Dismissal of Exempt Employees*, states that all exempt employees in the service of the City serve at the pleasure of the Mayor and Council and may be dismissed with or without cause at any time without prior notice. Exempt employees will be paid unused accrued annual leave, and wages earned through the effective date of termination.

City Personnel Rules and Regulations Section 3-15-1, *Violations*, states:

- A. Any employee of the City who by himself or with others, violates any provisions of these Rules and Regulations is subject to suspension or dismissal, in addition to any other penalty imposed for such violation.
- B. Any member of the governing body, including the Mayor and the Councilors who violates any of the provisions of these Rules and Regulations will be subject to the penalties imposed under New Mexico statutes.

Condition

The Mayor did not take action as approved by the governing body, for example:

1. At the March 24, 1998 meeting, the governing body voted not to affirm the City Clerk's position. The Mayor stated he considered this a direct threat to his administration. Subsequent minutes indicate the Mayor did not submit another name to fill the position, as required. At the March 21, 2000 meeting, the governing body voted not to accept submission of appointed positions for the Fire Chief, Police Chief and Clerk-Treasurer and for the individuals filling these positions to vacate them immediately. Although the Mayor submitted names to fill the positions at the next meeting, he did not immediately vacate the positions. The former Clerk-Treasurer remained in the position until May 13, 2000 when the Mayor submitted another name to fill the position.
2. In a May 17, 2001 letter to the Attorney General, Councilors stated the Mayor refused to comply with the Council's decision to terminate the Clerk-Treasurer, Police Chief and Fire Chief. As a result, in the litigation that followed, the Mayor refused to cooperate with the City attorney leaving the City exposed to a wrongful termination claim. The City settled with payment to the Police Chief.
3. The Mayor did not bring all the appointed Department Directors to the Council for approval. The Mayor only brought the Clerk-Treasurer, Community Development Director, Police Chief and Fire Chief to the Council for approval.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 2 – The City Did Not Comply With the Inspection of public records Act (see A and B below)

A. Criteria

Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, states the governing body shall keep minutes of its proceedings, which shall be open to examination by any citizen.

Section 3-13-1.A (4) NMSA 1978, *Clerk; duties*, states that the clerk of the municipality shall, upon request, furnish copies of municipal records.

Section 3-37-3 NMSA 1978, *Finance officer; duties; records open to inspection*, states the records of the finance officer shall be open to inspection by any citizen during the regular business hours of the municipality. In addition, a copy of the financial report shall be filed in the office of the municipal clerk as a public document.

The Inspection of Public Records Act (Act), Section 14-2-1 NMSA 1978, states that every person has a right to inspect any public records of this state. Public records include all papers or memoranda in the possession of public officers, which are required by law to be kept by them.

Section 14-2-5 NMSA 1978, *Purpose of act; declaration of public policy*, states that recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Act is to ensure that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. This is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

Section 14-2-8 NMSA 1978, *Procedure for requesting records*, states:

- Any person wishing to inspect public records may submit an oral or written request to the custodian.
- A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three

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business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request.

- In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester.

Section 14-2-11 NMSA 1978, *Procedure for denied requests*, states that the custodian shall provide the requester with a written explanation of the denial, delivered or mailed to the requester within fifteen days after the request for inspection was received.

Condition

On numerous occasions, Councilors requested information in writing but did not receive the information. Examples of information requested, but not provided include:

1. February 25, 2000 – Request for the early voting signature roster. A Councilor requested this information on six different occasions.
2. November 30, 2000 – Request for the Open Meetings Resolution.
3. February 7, 2001 – Request for the costs to the City of a river jump attempt. The Clerk-Treasurer did not respond. The Clerk-Treasurer stated at a later meeting that the amounts were not available.
4. August 8, 2001 – Request for voucher support for a vendor and a copy of the approved fiscal year 2002 budget.
5. March 28, 2002 – Request for the signature roster for the election held March 5, 2002.
6. May 29, 2002 – Request for the Declaration of Candidacy for the office of City Council.
7. July 31, 2002 – Request for the findings or report the auditors gave to the City after the exit conference. The Mayor denied the auditors provided anything, but the auditors stated they provided the audit report to the Mayor.
8. October 17, 2002 – Request for advertisements of the request for proposals for audits for the fiscal year 2002 City audit.

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Additional correspondence indicates information requests were a continuous problem, as follows:

- In an August 21, 2000 letter to the Mayor, a Councilor expressed concern over the Clerk-Treasurer's refusal to comply with reasonable Councilor requests for information regarding City business. On September 24, 2001, the Councilor read the letter at a public meeting.
- In a May 17, 2001 letter to the Attorney General's Office, Councilors complained the Mayor instructed City employees not to inform or to call Councilors about issues. Employees were to refer Councilors to the Mayor, but when Councilors attempted to meet with the Mayor, he was often inaccessible.
- In a July 12, 2001 memorandum to a Councilor, a City employee indicated that all requests for information must go through the Mayor or Clerk-Treasurer as per a July 11, 2001 memorandum to City staff.
- In an August 21, 2001 letter to the Mayor, Councilors requested the check register on a bi-weekly basis and a resolution requiring Councilors to approve all City checks on a bi-monthly basis. The Councilors stated that examination of these records was a prudent control on the Councilors' part. In a September 6, 2001 letter to the Mayor, the Assistant Attorney General stated it is important that the City respond to requests to inspect public records timely, in accordance with the law. In a September 10, 2001 letter to the Council and Mayor, DFA clarified that the City was not to deny any member of the governing body the right to request and review any documents from their respective municipality. The Mayor responded that all requests had been complied with in a timely manner and there were no pending matters regarding requests. The Mayor responded to the Councilors stating that as of September 10, 2001, all Councilors would receive the check register. He also stated he gave direction to the City attorney to draft a resolution requiring Council approval of City checks. In a September 17, 2001 letter to DFA, the Mayor indicated the majority of the Council expressed, at a June 19, 2001 meeting, that if a particular Councilor wished to inquire of a particular issue or item that he/she could, on an individual basis.
- At the September 24, 2001 meeting, the Council discussed a letter from the Attorney General regarding compliance with the Act. At the meeting, a Councilor mentioned a specific occasion where the Clerk-Treasurer did not provide her request. The Clerk-Treasurer stated she was in the middle of a meeting. The Mayor recommended requests for information be put in writing and for the Clerk-Treasurer to comply within three days to avoid future problems. The Council also discussed the letter from DFA regarding the right of the governing body to review documents.

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- In an April 24, 2002 letter to the Mayor, an Assistant Attorney General requested a public meeting to address the governing body and staff of the City on the Open Meetings Act and Inspection of Public Records Act. On May 15, 2002, an Assistant Attorney General held a meeting with the governing body to discuss the Open Meetings Act and the Inspection of Public Records Act. Minutes were not taken for this meeting.
- At a May 21, 2002 meeting, a Councilor asked that the agenda for the next regular meeting include discussion of the custodial hierarchy for City records. At the June 4, 2002 meeting, the governing body approved the custodial hierarchy of records in the absence of the Clerk-Treasurer. The first contact is the Clerk-Treasurer, in her absence the Clerk Assistant, and in both of their absence, the receptionist. On August 27, 2002, a Councilor requested the Clerk-Treasurer provide the letter sent to DFA responding to DFA's August 12, 2002 letter. On August 28, 2002, the Clerk-Treasurer responded to the Councilor that the City did not have knowledge of such a letter; yet on August 27, 2002, the City attorney sent a letter to DFA requesting public information that pertained to the August 12, 2002 letter.
- According to a Councilor, in a September 7, 2002 letter, the Mayor stated that he had requested the City attorney draft a resolution regarding Council bi-weekly check register examination and approval, but the City attorney stated the Mayor never instructed him to draft such a resolution.
- At a September 17, 2002 meeting, the Mayor stated he had not seen the May 7 or August 23, 2002 letters from the Attorney General, but at an October 15, 2002 meeting, the Mayor stated the City responded to the August 23, 2002 letter.
- At an October 15, 2002 meeting, Councilors requested copies of the personnel rules and regulations. The Mayor stated the copies would be available at the next council meeting, but as of December 17, 2002, the copies were not distributed to the Council.
- In a December 11, 2002 memorandum to DFA, a Councilor stated she went to City Hall on December 4, 2002 to listen to tapes of Council minutes. The Clerk-Treasurer had told the Councilor to come in to review the tapes, but the Assistant Clerk informed the Councilor she could not provide the tapes because the Clerk-Treasurer was not in. On December 6, 2002, the Councilor received a response indicating the City destroyed the tapes, but on December 6, 2002, the Auditor overheard the Mayor suggest the Clerk-Treasurer have the Councilor review the tapes. The Council had voted to amend certain minutes because of errors and requested the tapes.

When the Auditor began the audit on October 15, 2002, the City had boxes of tapes for most Council meetings. The tapes were in envelopes along with draft

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minutes and handwritten notes, and the Auditor listened to some of these tapes and used this information to conduct the audit. On December 4, 2002, however, the Clerk-Treasurer informed the Auditor that most tapes had been destroyed. She said it was the City's policy to destroy the tapes after meetings. On December 11, 2002, the auditors, after consulting with the New Mexico Attorney General's Office, informed the City not to destroy any more tapes. At that time, the Auditor confiscated 12 tapes dating from May 5, 1999 to May 28, 2002.

B. Criteria

Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, states the governing body shall adopt rules and regulations necessary to effect the powers granted municipalities.

The Inspection of Public Records Act, Section 14-2-7 NMSA 1978, *Designation of custodian; duties*, states that the custodian shall post in a conspicuous location at the administrative office of each public body a notice describing:

1. The right of a person to inspect a public body's records;
2. Procedures for requesting inspection of public records;
3. Procedures for requesting copies of public records;
4. Reasonable fees for copying public records; and
5. The responsibility of a public body to make available public records for inspection.

Condition

The City did not have written rules and regulations regarding the Inspection of Public Records and therefore, did not post the required notice.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 3 – Noncompliance with Statutes for a \$2 Million Loan

Criteria

The State Constitution, Article VIII Section 4, *Misuse and deposit of public money* states any public officer making any profit out of public money or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office.

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According to the State Constitution, Article IX, Section 12, *Municipal indebtedness; restrictions*, no City shall contract any debt...unless the question of incurring the debt, at a regular election for councilmen or at any special election called for such purpose, has been submitted to a vote of qualified electors.

An Attorney General opinion (No. 67-84), states that if an obligation is to be paid out of a special fund and the municipality is not liable to pay the obligation if the special fund is insufficient, then a debt is not created within the meaning of the term in Article IX Section 12 of the State Constitution. Section 12 provides that a municipality cannot incur a debt unless the question of incurring the debt has been submitted to the voters in either a general or a special election.

In *State ex rel. Capitol Addition Bldg. Comm'n v. Connelly*, 39 N.M. 312, 46 P.2d 1097 (1935), the "debt" whose creation is prohibited, or the amount of which is limited by this section, is one pledging general faith and credit of the municipality, with consequent right in holders of such indebtedness to look to general taxing power for payment.

In *Henning v. Town of Hot Springs*, 44 N.M. 321, 102 P.2d 25 (1940), providing for municipal payment if assessments are insufficient requires a referendum. The town sewer certificates specifying payment from special assessments, or by the town in case of deficiency, were debts for which an election was required.

According to Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, the governing body of a municipality having a mayor-council form of government shall manage and control the finances and all property, real and personal, belonging to the municipality.

Section 3-17-1 NMSA 1978, *Ordinances; purposes*, states the governing body of a municipality may adopt ordinances or resolutions, not inconsistent with the laws of New Mexico for:

- Effecting or discharging the powers and duties conferred by law upon the municipality; and
- Providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants.

Section 3-17-3 NMSA 1978, *Notice of publication of certain proposed ordinances*, states:

1. Notice by publication of the title and subject matter of any ordinance proposed for adoption by the governing body of any municipality must take place at least two weeks prior to consideration of final action upon the ordinance in open session of the governing body, except that this section shall not apply to ordinances dealing

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with an emergency declared by the chairman of the governing body or the mayor, to be an immediate danger to the public health, safety and welfare of the municipality. It is sufficient defense to any suit or prosecution to show that no notice by publication was made.

2. Notice of the proposed ordinance shall be published one time as a legal advertisement in a newspaper of general circulation in the municipality.
3. Copies of a proposed ordinance shall be available to interested persons during normal and regular business hours of the municipal clerk upon request and payment of a reasonable charge beginning with the date of publication and continuing to the date of consideration by the municipality's elected commission.

According to Section 3-17-4 NMSA 1978, *Ordinances; roll call vote; adoption*, within three days after the adoption of an ordinance, the mayor shall validate the ordinance or resolution by endorsing "Approved" upon the ordinance and signing the ordinance.

Section 3-17-5 NMSA 1978, *Proof of ordinance; authentication; publication; effective date; codification*, states an ordinance shall be recorded in a book kept for that purpose, shall be authenticated by the signature of the presiding officer of the governing body and the municipal clerk and shall bear the seal of the municipality. The ordinance shall be published one time either in its entirety or by title and a general summary of the subject matter contained in the ordinance, whichever the governing body elects to do.

Section 3-18-1 NMSA 1978, *General powers; body politic and corporate powers*, states a municipality may establish rates for services provided by municipal utilities and revenue-producing projects, including amounts which the governing body determines to be reasonable and consistent with amounts received by private enterprise in the operation of similar facilities.

Section 3-23-3 NMSA 1978, *Municipal utility; approval of New Mexico public utility commission*, states:

- A. If the acquisition of a utility is to be financed from funds received from the issuance and sale of revenue bonds, the price of the acquisition of the utility shall be approved by the New Mexico public utility commission, now the Public Regulation Commission (Commission) and the Commission shall require:
 - (1) a determination by appraisal or otherwise of the true value of the utility to be purchased; or
 - (2) an engineer's estimate of the cost of the utility to be constructed.
- B. No revenue bonds shall be issued for the acquisition of such a utility until the Commission has approved the issue and its amount, date of issuance, maturity, rate of interest and general provisions.

Section 3-23-4 NMSA 1978, *Municipal utility; use of revenue*, states income derived from the operation of a municipal utility that has funds received from a revenue bond issue shall be used in the following priority:

1. to maintain the municipal utility in good repair and to pay legitimate expenses of operation;
2. to pay interest on revenue bonds issued for the purpose of acquiring, repairing, improving or enlarging the municipal utility;
3. to create a sinking fund and a reasonable reserve fund as required by the ordinance authorizing the revenue bonds and the law governing their issue; and
4. to pay the cost of improving and extending the municipal utility and the redemption of revenue bonds prior to their maturity if permitted by the ordinance authorizing their issuance.

Section 3-26-1 NMSA 1978, *Sanitary sewers; authority to acquire; condemnation; jurisdiction over system*, states a municipality may, within and without the municipality acquire, maintain, contract for or condemn for use as a municipal utility privately owned sewer facilities used or to be used for the collection, treatment and disposal of sewage of the municipality or its inhabitants.

Section 3-26-2 NMSA 1978, *Sanitary sewers; charges and assessments for maintenance and extension; lien*, states a municipality, for the purpose of maintaining, enlarging, extending, constructing and repairing sewer facilities and for paying the interest and principal on revenue bonds issued for the acquisition, condemnation or construction of sewer facilities, may levy **by general ordinance** [emphasis added] a just and reasonable service charge.

Section 3-27-2 NMSA 1978, *Potable; methods of acquisition; condemnation; conveyances authorized; land for appurtenances; public and private use; compensation*, states municipalities, within and without the municipal boundary, may acquire, maintain, contract for or condemn for use as a municipal utility privately owned water facilities used or to be used for the furnishing and supply of water to the municipality or its inhabitants.

Section 3-27-3 NMSA 1978, *Potable; jurisdiction over water facilities and source*, states, for the purpose of acquiring, maintaining, contracting for, condemning or protecting its water facilities and water from pollution, the jurisdiction of the municipality extends within and without its boundary to:

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- A. All territory occupied by the water facilities;
- B. All reservoirs, streams and other sources supplying the reservoirs and streams;
and
- C. Five miles above the point from which the water is taken.

In exercising its jurisdiction to acquire, maintain, contract for or condemn, the municipality shall not act so as to physically isolate and make nonviable any portion of the water facilities, within or without the municipality. The municipality may adopt any ordinance and regulation necessary to carry out the power conferred by this section.

Section 3-27-4 NMSA 1978, *Potable; charges and assessments for maintenance and extension; lien; frontage tax for water service*, states a municipality owning and operating a water utility may, for the purpose of maintaining, enlarging, extending, constructing and repairing water facilities and for paying the interest and principal on revenue bonds issued for the acquisition, condemnation or construction of water facilities, levy **by general ordinance** [emphasis added] a just and reasonable service charge.

Section 3-31-4 NMSA 1978, *Ordinance authorizing revenue bonds; three-fourths majority required; resolution authorizing revenue bonds to be issued and sold to the New Mexico finance authority*, states:

- A. At a regular or special meeting called for the purpose of issuing revenue bonds, the governing body may adopt an ordinance that:
 - (1) declares the necessity for issuing revenue bonds;
 - (2) authorizes the issuance of revenue bonds by an affirmative vote of three-fourths of all the members of the governing body; and
 - (3) designates the source of the pledged revenues.
- B. If a majority of the governing body, but less than three-fourths of all the members, votes in favor of adopting the ordinance authorizing the issuance of revenue bonds, the ordinance is adopted but shall not become effective until the question of issuing the revenue bonds is submitted to a vote of the qualified electors for their approval at a special or regular municipal election.

Section 3-31-6 NMSA 1978, *Revenue bonds; mandatory rates for utility, joint utility or revenue-producing project; mandamus; impairment of payment*, states:

- A. The governing body of any municipality issuing utility revenue bonds, shall establish rates for services rendered by the municipal utility, to provide revenue sufficient to meet the following requirements:

1. pay all reasonable expenses of operation;
 2. pay all interest on the revenue bonds as it comes due; and
 3. provide a sinking fund adequate to discharge the revenue bonds as they mature. Such rates shall remain in effect until the bond issue is liquidated.
- B. In the event the governing body fails or refuses to establish rates for the utility, any bondholder may apply to the district court for a mandatory order requiring the governing body to establish rates or to enter into such applicable leases or agreements that will provide revenues adequate to meet the requirements of this section.
- C. Any law which authorizes the pledge of any or all of the pledged revenues to the payment of any revenue bonds or which affects the pledged revenues, or any law supplemental thereto or otherwise appertaining thereto, shall not be repealed or amended or otherwise directly or indirectly modified in such a manner as to impair adversely any such outstanding revenue bonds, unless such outstanding revenue bonds have been discharged in full or provision has been fully made therefor.

Section 3-37-2 NMSA 1978, *Finance; authorization*, states the governing body shall:

1. Control the finances and property of the municipality;
2. Appropriate money for municipal purposes only; and
3. Provide for payment of debts and expenses of the municipality.

Section 3-37-3 NMSA 1978, *Finance officer; duties; records open to inspection*, states the treasurer shall be the finance officer for the municipality unless another officer is directed by ordinance to be the finance officer. The finance officer shall expend the money only as directed by the governing body.

Section 6-6-2 NMSA 1978, *Local government division; powers and duties*, states:

1. That in case of a need necessitating the expenditure for an item not provided for in the budget, upon approval of the secretary of the DFA, the budget may be revised to authorize the expenditure;
2. With written approval of the secretary of the DFA, increase the total budget of any local public body in the event the local public body undertakes an activity, service, project or construction program which is not contemplated at the time the final budget was adopted and approved and which activity, service, project or construction program will produce sufficient revenue to cover the increase in the budget or the local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget; provided, however, that the attorney general shall review legal questions identified by the secretary of the DFA arising in connection with such budget increase requests;

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3. Supervise the disbursement of funds to the end that expenditures will not be made in excess of budgeted items or for items not budgeted and that there will not be illegal expenditures.

Section 6-6-6 NMSA 1978, *Approved budgets; claims or warrants in excess of budget; liability*, states when any budget for a local public body has been approved and received by a local public body, it is binding upon all officials and governing authorities, and no governing authority or official shall allow or approve claims in excess thereof, and no official shall pay any check or warrant in excess thereof, and the allowances or claims or checks or warrants so allowed or paid shall be a liability against the officials so allowing or paying those claims or checks or warrants, and recovery for the excess amounts so allowed or paid may be had against the bondsmen of those officials.

Section 6-6-11 NMSA 1978, *Yearly expenditures limited to income; Bateman Act*, states it is unlawful for any municipal governing body, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year, and any indebtedness for any current year which is not paid and cannot be paid, as above provided for, is void.

According to a 1970 court case, *City of Hobbs v. State ex rel. Reynolds*, 82 NM 102, 476 P.2d 500, the Bateman Act was designed to require municipalities to live within their annual incomes.

The Procurement Code Section 13-1-157 NMSA 1978, *Receipt; inspection; acceptance or rejection of deliveries*, states the using agency is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity is as specified in the purchase order or contract and whether the quality conforms to the specifications referred to or included in the purchase order or contract. Section 13-1-158, *Payments for purchases*, states no warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property unless the central purchasing office or the using agency certifies that the services, construction or items of tangible personal property have been received and meet specifications.

The Procurement Code Section 13-1-196 NMSA 1978, *Civil penalty*, states that any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than \$1,000 for each procurement in violation of any provision of the Procurement Code. Section 13-1-199, *Misdemeanor*, states that any business or person that violates the Procurement Code is guilty of a misdemeanor.

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Section 42A-1-27 NMSA 1978, *Proof of payment; recording judgment*, states:

- A. After the condemnor has made payment in full to the clerk of the district court in accordance with the judgment in the condemnation action, the clerk shall certify upon the judgment that payment has been made.
- B. A copy of the judgment showing payment shall be recorded in the office of the county clerk of the county in which the property is located, and thereupon the title or interest in the property affected shall vest in the condemnor.

Section 62-8-7 NMSA 1978, *Change in rates*, states:

- At any hearing involving an increase in rates or charges sought by a public utility, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility.
- Whenever there is filed with the commission by any public utility a complete application as prescribed by commission rule proposing new rates, the commission may, upon complaint or upon its own initiative, except as otherwise provided by law, upon reasonable notice, enter upon a hearing concerning the reasonableness of the proposed rates. If the commission determines a hearing is necessary, it shall suspend the operation of the proposed rates before they become effective but not for a longer initial period than nine months beyond the time when the rates would otherwise go into effect, unless the commission finds that a longer time will be required, in which case the commission may extend the period for an additional three months. The commission shall hear and decide cases with reasonable promptness. The commission shall adopt rules identifying criteria for various rate and tariff filings to be eligible for suspension periods shorter than what is allowed by this subsection and to be eligible for summary approval without hearing.
- If after a hearing the commission finds the proposed rates to be unjust, unreasonable or in any way in violation of law, the commission shall determine the just and reasonable rates to be charged or applied by the utility for the service in question and shall fix the rates by order to be served upon the utility; or the commission by its order shall direct the utility to file new rates respecting such service that are designed to produce annual revenues no greater than those determined by the commission in its order to be just and reasonable. Those rates shall thereafter be observed until changed, as provided by the Public Utility Act [Chapter 62, Articles 1 to 6 and 8 to 13 NMSA 1978].
- The commission may eliminate or condition a particular adjustment clause if it finds such elimination or condition is consistent with the purposes of the Public Utility Act, including serving the goal of providing reasonable and proper service at fair, just and reasonable rates to all customer classes; provided, however, that

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no such elimination or condition shall be ordered unless such elimination or condition will not place the affected utility at a competitive disadvantage. The commission rules shall also provide for variances and may provide for separate examination of a utility's adjustment clause based upon that utility's particular operating characteristics.

City Ordinance No. 2001-01, Section 2 states the Interim Loan shall be secured by the RUS Commitment to make the Permanent Loan; provided that if the Permanent Loan is not funded, for any reason whatsoever, then the Interim Loan shall be secured by a pledge of all utility revenues generated by the City in connection with its operation of the Assets, until such time as the Interim Loan shall be repaid.

The Original and Amended Interim Financing Notes with Wells Fargo state:

“As security for its Interim Loan, the Payee hereby agrees that it will look to the funding of the Permanent Loan as the source of repayment of its Interim Loan; provided, however, that if the Permanent Loan is not funded, for any reason whatsoever, then the Interim Loan shall be secured by a pledge of all utility revenues generated by the Maker in connection with its operation of the STSC Assets, together with a pledge of utility revenues generated by the Maker in connection with its operation of existing City water or wastewater utilities, which latter pledge shall be subordinated to the rights of existing pledges, until such time as the Interim Loan shall be repaid.”

City Procurement Regulations Section 2.3, *Central Purchasing Office*, states the office of the Clerk-Treasurer shall be the central purchasing office. The deputy clerk/purchasing agent shall be the procurement officer. Section 2.16, *Procurement Officer*, states this is the person authorized to enter into or administer contracts and make written determinations with respect thereto as determined by the chief administrative officer or the governing body. Section 2.15, *Procurement*, defines procurement as:

- A. The purchasing, renting, leasing, lease-purchasing or otherwise acquiring items of tangible personal property, services or construction.
- B. All aspects of procurement, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration. Thus, it is far more than the act of buying and bidding that forms the procurement process. Preparation of specifications upon which bidders will rely is also a part of procurement as is contract administration after the contract has been let.

City Procurement Regulations Section 14.1, *Receipt of Goods*, states the department is responsible for inspecting and accepting or rejecting deliveries. Section 14.2, *Payment of Purchases*, states no payment shall be made unless the central purchasing office or using

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agency certifies that the services, construction or items of personal property have been received and meet specifications.

City Personnel Rules and Regulations, Section 3-2-1 *Form of Government*, states the Mayor shall direct the day-to-day operations of the City. The Mayor and Council serve as the Board of Directors for the city, legislating policy, receiving input from the electorate and acting in the best interests of the citizens. The Mayor shall implement the policies of the governing body.

Condition

In 1996, the City filed a petition to condemn certain Santa Teresa Services Company (STSC) assets to construct, reconstruct and improve public water and sewer utilities for public purposes. The STSC assets were part of the Chapter 11 Bankruptcy in the Phyllis Crowder Bankruptcy Estate, later converted to a Chapter 7 Bankruptcy Trustee. In May 2000, a jury trial set the value of the STSC assets at \$2 million.

1. The City awarded a professional services contract to ECO Resources (ECO) to operate City and STSC utilities; however, the contract included a \$1.8 million loan from ECO to the City so that the City could purchase STSC. Municipalities do not have authority to borrow from private entities. The City was to repay the loan through an increase in the management fee. The City published and posted an ordinance approving the ECO loan to acquire STSC assets without prior Council approval.
2. Because of questions regarding the legality of the ECO loan, the Mayor, acting on behalf of the City, obtained a \$2 million interim loan from Wells Fargo Bank; however, municipalities do not have authority to borrow funds from private entities. Doing so is in violation of the Bateman Act. Additionally, the City did not submit a budget increase request to DFA that reflected loan proceeds or loan repayment.
3. In November 2001, the Mayor extended the Wells Fargo interim loan for six months without obtaining Council approval. On May 20, 2002, the Mayor extended the Wells Fargo loan for one year to May 2003 without obtaining prior Council approval. In addition, the City did not submit a budget increase request to DFA for the additional interest that resulted from extending the Wells Fargo loan.

In March 2003, the governing body approved a resolution authorizing the Mayor to repay the interim loan and interest due using unencumbered reserves in the general and enterprise funds. The Mayor repaid the loan using \$1,371,957 borrowed from the general fund and \$683,043 borrowed from a City enterprise fund. The City planned to repay the general and enterprise funds using water and wastewater revenues.

According to a DFA e-mail, DFA/LGD verbally approved the payoff of the loan, subject to DFA/LGD review and approval of a proposed City Council resolution. The

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e-mail further stated that the LGD attorney had reviewed a draft of the resolution and he did not have a problem with the format or context of the draft. LGD said that a properly presented and executed resolution by the City Council should satisfy LGD's requirements on this matter. DFA approved the resolution on March 27, 2003.

4. The City indicated that it planned to secure the Wells Fargo interim loan with \$2,156,000 in USDA Rural Utility Service (RUS) funding. However, if RUS did not provide funding, the City then planned to issue revenue bonds to pay for the STSC acquisition and use utility revenues (water and wastewater revenues) to repay the bonds and interest. Although the governing body approved the ordinance at the May 26, 2001 meeting, the City was unable to provide a copy of an ordinance signed by the Mayor.
5. The RUS proposed \$500,000 in funding to be provided by utility revenue bonds. The City encumbered utility revenues to secure the bonds. The utility revenues were also used to secure other loans with current balances totaling over \$1,000,000 and to pay for ECO management fees. Borrowing \$683,043, securing loans of \$500,000 and over \$1,000,000, and paying ECO management fees may have been over-committing the utility fund. According to the City's underwriter, the City would not be able to obtain \$2,000,000 in bonds to purchase STSC if the City's system was already encumbered by RUS loans, unless RUS would agree to take a second position and allow the bondholders to have a first lien on the system.
6. In August 2001, the City began charging STSC customers at City rates. Some STSC customers refused to pay the increased rates. On February 1, 2002, the Public Regulation Commission (PRC) declared the rate increase void and ordered the City to refund the difference in rates to STSC customers, but the City has not refunded the difference. In addition, the City submitted a rate increase plan to RUS without Council approval.
7. The City paid a Bankruptcy Trustee \$20,000 in settlement of the STSC condemnation interest claim. The City did not obtain prior Council approval to pay this settlement. In addition, in a matter related to STSC, the Mayor authorized the City attorney to file a condemnation action for Well No. 8 without seeking prior Council approval, and the City paid \$75,000 in settlement of the lawsuit on Well No. 8 without seeking Council approval.
8. The City purchased the debt of one of the STSC creditors for \$5,849 without seeking Council approval. Actually, the City attorney purchased the debt with the understanding that the City would reimburse the attorney through the attorney's billings. By doing this, the purchase was hidden from the Council and DFA, and the amount involved was not reflected in the budget.

[Chronological detail regarding the \$2 million loan can be found in **Appendix 1.**]

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 4 – Noncompliance with the Procurement Code in Entering a Contract with ECO Resources

Criteria

Section 3-17-1 NMSA 1978, *Ordinances; purposes*, states the governing body of a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico for the purpose of:

- Effecting or discharging the powers and duties conferred by law upon the municipality; and
- Providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants.

Section 3-37-2 NMSA 1978, *Finance; authorization*, states the governing body shall:

1. Control the finances and property of the municipality;
2. Appropriate money for municipal purposes only; and
3. Provide for payment of debts and expenses of the municipality.

Section 3-37-3 NMSA 1978, *Finance officer; duties; records open to inspection*, states the treasurer shall be the finance officer for the municipality unless another officer is directed by ordinance to be the finance officer. The finance officer shall expend the money only as directed by the governing body.

According to Section 13-1-158 NMSA 1978, *Payments for purchases*, upon certification by the central purchasing office that the services, construction or items of tangible personal property have been received and accepted, payment shall be tendered to the contractor within thirty days of the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month. For purchases funded by state or federal grants to local public bodies, if the local public body has not received the funds from the federal or state funding agency, payments shall be tendered to the contractor within five working days of receipt of funds from that funding agency.

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Section 6-6-2 NMSA 1978, *Local government division; powers and duties*, states:

1. That in case of a need necessitating the expenditure for an item not provided for in the budget, upon approval of the secretary of the DFA, the budget may be revised to authorize the expenditure;
2. With written approval of the secretary of the DFA, increase the total budget of any local public body in the event the local public body undertakes an activity, service, project or construction program which is not contemplated at the time the final budget was adopted and approved and which activity, service, project or construction program will produce sufficient revenue to cover the increase in the budget or the local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget; provided, however, that the attorney general shall review legal questions identified by the secretary of the DFA arising in connection with such budget increase requests;
3. Supervise the disbursement of funds to the end that expenditures will not be made in excess of budgeted items or for items not budgeted and that there will not be illegal expenditures.

Section 6-6-6 NMSA 1978, *Approved budgets; claims or warrants in excess of budget; liability*, states when any budget for a local public body has been approved and received by a local public body, it is binding upon all officials and governing authorities, and no governing authority or official shall allow or approve claims in excess thereof, and no official shall pay any check or warrant in excess thereof, and the allowances or claims or checks or warrants so allowed or paid shall be a liability against the officials so allowing or paying those claims or checks or warrants, and recovery for the excess amounts so allowed or paid may be had against the bondsmen of those officials.

According to Section 6-6-9 NMSA 1978, *Limitation on municipal expenditures during year officials terms expire*, it is unlawful for the governing board or council of any City to disburse, expend or contract for the expenditure of more than the proportionate share of the fiscal year budget during any fiscal year in which the terms of office of such officials will expire, as the number of months such officials are in office bears to the entire fiscal year.

Section 6-6-10 NMSA 1978, *Violation of expense limit; penalty*, states that any member of the governing body, or any other official who shall violate the provisions of Sections 6-6-7 through 6-6-10 NMSA 1978 shall be deemed guilty of a misdemeanor. Any official whose duty it is to allow claims and issue warrants therefore, who issues warrants or evidences of indebtedness contrary to these provisions shall be liable to his respective municipality for such violations and recovery may be made against the bondsmen of such official.

The Open Meetings Act, Section 10-15-1.F NMSA 1978 states that meeting notices shall include an agenda containing a list of specific items of business to be discussed and that

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except for emergency matters, a public body shall take action only on items appearing on the agenda.

The Procurement Code Section 13-1-29 NMSA 1978, *Rules of construction; purposes*, states the purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. Section 13-1-30, *Application of the code*, states that except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services, and construction.

The Procurement Code Section 13-1-126 NMSA 1978, *Sole source procurement*, states a contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the central purchasing office makes a determination, after conducting a good-faith review of available sources and consulting the using agency, that there is only one source for the required service, construction or item of tangible personal property. The central purchasing office shall conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the local public body.

The Procurement Code Section 13-1-128 NMSA 1978, *Sole source and emergency procurements; content and submission or record*, states that all central purchasing offices shall maintain, for a minimum of three years, records of sole source and emergency procurements. The record of each such procurement shall be public record and shall contain:

- A. the contractor's name and address;
- B. the amount and term of the contract;
- C. a listing of the services, construction or items of tangible personal property procured under the contract; and
- D. the justification for the procurement method.

The Procurement Code Section 13-1-149 NMSA 1978, *Types of contracts*, states that subject to the limitations of Sections 13-1-150 to 13-1-154 NMSA 1978 of the Procurement Code, any type of contract, including but not limited to definite quantity contracts, indefinite quantity contracts and price agreements, which will promote the best interests of the local public body may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited except for the purchase of insurance. A cost-reimbursement contract may be used when such contract is likely to be less costly or it is impracticable to otherwise obtain the services, construction or items of tangible personal property required.

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The Procurement Code Section 13-1-150 NMSA 1978, *Multi-term contracts; specified period*, states:

- A. A multi-term contract for items of tangible personal property, construction or services except for professional services, in an amount under \$25,000, may be entered into for any period of time deemed to be in the best interests of the state agency or a local public body not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting. If the amount of the contract is \$25,000 or more, the term shall not exceed eight years, including all extensions and renewals, except that for any such contract entered into pursuant to the Public Building Energy Efficiency and Water Conservation Act [Public Facility Energy Efficiency and Water Conservation Act, Chapter 6, Article 23 NMSA 1978], the term shall not exceed ten years, including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

- B. A contract for professional services may not exceed four years, including all extensions and renewals, except for ... a multi-term contract for the services of trustees, escrow agents, registrars, paying agents, letter of credit issuers and other forms of credit enhancement and other similar services, excluding bond attorneys, underwriters and financial advisors with regard to the issuance, sale and delivery of public securities, may be for the life of the securities or as long as the securities remain outstanding.

The Procurement Code Section 13-1-152 NMSA 1978, *Multi-term contracts; cancellation due to unavailability of funds*, states when funds are not appropriated or otherwise made available to support continuation of performance of a multi-term contract in a subsequent fiscal period, the contract shall be cancelled.

The Procurement Code Section 13-1-157 NMSA 1978, *Receipt; inspection; acceptance or rejection of deliveries*, states the using agency is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity is as specified in the purchase order or contract and whether the quality conforms to the specifications referred to or included in the purchase order or contract. Section 13-1-158, *Payments for purchases*, states:

- No warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property unless the central purchasing office or the using agency certifies that the services, construction or items of tangible personal property have been received and meet specifications.

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- Unless otherwise agreed upon by the parties or unless otherwise specified in the invitation for bids, request for proposals or other solicitation, within fifteen days from the date the central purchasing office or using agency receives written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site and received, the central purchasing office or using agency shall issue a written certification of complete or partial acceptance or rejection of the services, construction or items of tangible personal property.
- Upon certification by the central purchasing office or the using agency that the services, construction or items of tangible personal property have been received and accepted, payment shall be tendered to the contractor within thirty days of the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month. For purchases funded by state or federal grants to local public bodies, if the local public body has not received the funds from the federal or state funding agency, payments shall be tendered to the contractor within five working days of receipt of funds from that funding agency.

The Procurement Code Section 13-1-196 NMSA 1978, *Civil penalty*, states that any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than \$1,000 for each procurement in violation of any provision of the Procurement Code. Section 13-1-199, *Misdemeanor*, states that any business or person that violates the Procurement Code is guilty of a misdemeanor.

The condemnation judgment for the City to take possession of STSC on November 24, 2000 granted the City the right to immediately enter, occupy and operate STSC. The judgment did not state the City was to assume the STSC contract with ECO.

City Procurement Regulations Section 2.3, *Central Purchasing Office*, states the office of the Clerk-Treasurer shall be the central purchasing office. The deputy clerk/purchasing agent shall be the procurement officer. Section 2.16, *Procurement Officer*, states this is the person authorized to enter into or administer contracts and make written determinations with respect thereto as determined by the chief administrative officer or the governing body. Section 2.15, *Procurement*, defines procurement as:

- A. The purchasing, renting, leasing, lease-purchasing or otherwise acquiring items of tangible personal property, services or construction.
- B. All aspects of procurement, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration. Thus, it is far more than the act of buying and bidding that forms the procurement process.

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Preparation of specifications upon which bidders will rely is also a part of procurement as is contract administration after the contract has been let.

City Procurement Regulations Section 2.18, *Purchase Order*, states a purchase order is the document issued by the central purchasing office directing a contractor to deliver items of tangible personal property, services or construction pursuant to a contract. The statute requires that there be an existing contract.

City Procurement Regulations Section 11.2, *Multi-Term Contracts*, states a multi-term contract may be entered into for any period not to exceed:

1. four years for items of tangible personal property, construction or services (except for professional services) if the contract amount is under \$25,000;
2. eight years including all extensions and renewals for items of tangible personal property, construction or services (except for professional services) if the contract amount is over \$25,000;
3. A contract for professional services may not exceed a term of four years including all extensions and renewals.

The Section further states that payment and performance of obligations for any succeeding fiscal periods are subject to the availability and appropriation of funds therefore. If funds are not appropriated or otherwise made available to support continuation of the multi-term contract, the contract shall be cancelled.

City Procurement Regulations Section 14.1, *Receipt of Goods*, states the department is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity and quality of the goods meet the specifications of the purchase order or contract.

City Procurement Regulations Section 14.2, *Payment of Purchases*, states no payment shall be made unless the central purchasing office or using agency certifies that the services, construction or items of personal property have been received and meet specifications. Payments shall be tendered to the contractor within 30 days of the date of certification. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month.

City Personnel Rules and Regulations, Section 3-2-1 *Form of Government*, states the Mayor shall direct the day-to-day operations of the City. The Mayor and Council serve as the Board of Directors for the city, legislating policy, receiving input from the electorate and acting in the best interests of the citizens. The Mayor shall implement the policies of the governing body.

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Condition

1. On September 8, 1998, the City issued a request for proposals (RFP) for a professional services contract to operate and maintain the City and STSC water and wastewater utilities when the City acquired STSC assets. The RFP required the contractor to provide, in return, a \$1.8 million grant to the City to purchase STSC. The governing body approved the RFP on December 3, 1998, after, instead of before, the City issued the RFP.
2. In violation of statutes:
 - a. At the October 1, 1998 meeting, the governing body awarded ECO an eight-year contract. The Procurement Code allows a maximum four-year contract.
 - b. Contract provisions provided the City would pay a set amount to ECO for reserve accounts to pay expenses, plus 10 percent more if the reserves did not have enough funds at year-end to cover actual expenses. The City cannot pre-pay expenses or use cost-plus-a-percentage of cost contracts.
 - c. A subsequent amendment extended the eight-year contract by one-year and committed ECO to fund a grant to the City of \$1.8 million so the City could purchase the STSC. The City was to repay the grant through increased management fees. The annual fees were to increase by \$1,289,393. The City does not have the authority to borrow funds from private entities.
 - d. The budget and budget increases did not reflect the ECO contract fees.
3. In September 2000, the City began paying ECO to operate and maintain the STSC utility. There is no indication that the governing body approved a contract to do this and the City does not have a contract with ECO to operate and maintain the STSC utility.

The base fee of \$862,981 on this STSC-ECO contract with 1,000 customer accounts in Santa Teresa was higher than a base fee of \$696,118 on the City-ECO contract with 2,300 customer accounts. ECO management indicated that as part of the condemnation agreement with STSC, the City assumed ECO's contract. The condemnation agreement does not state that the City was to assume the ECO contract with STSC.

4. The governing body notified ECO of contract termination on September 25, 2000; then, soon after, ECO sued the City seeking an injunction to prevent the City from terminating the ECO contract to operate and maintain the City's water and sewer utility. On November 30, 2000, the governing body approved an interim 15-day contract with ECO to operate the STSC utility. In a November 27, 2000 letter to the Mayor and Council, the City attorney suggested the City negotiate with ECO because of the required \$324,000 early termination clause. In a December 1, 2000 letter to ECO attorneys, the City attorney stated the City agreed that ECO would manage the City utility in accordance with the City-ECO contract until March 24, 2001. The City

would take possession of STSC assets on December 1, 2000, and the City would enter a temporary contract with ECO to continue to operate STSC for fifteen days. The actual motion on November 30, 2000 stated ECO would operate the City and STSC utilities. The agenda was not sufficient because the agenda only covered ECO's operation of the STSC utility, not the City utility. The City attorney indicated the governing body improperly approved the contract to operate the City utility. On December 5, 2000, the governing body subsequently approved a settlement agreement with ECO and authorized the Mayor to negotiate a second amendment to the 15-day ECO contract. As of December 31, 2002, the last day of our audit fieldwork, however, the City did not have an amended contract with ECO; and in a May 15, 2003 letter to ECO attorneys, the City attorney acknowledges that the City does not have a contract with ECO to operate the STSC utility.

5. The City paid ECO \$2,862,678 from October 1999 to July 2002. The Clerk-Treasurer received the invoices and the Mayor and Clerk-Treasurer approved the checks. The City was in arrears to ECO for three to four months at any given time and the City did not pay the gross receipts taxes due on the invoices. In a May 15, 2003 letter to ECO attorneys, the City attorney offered to settle outstanding claims with ECO at \$468,776 and to keep current on a new base fee of \$70,000 per month, plus gross receipts taxes.

[A detailed chronological summary of the ECO, STSC and City events regarding the water utility is in **Appendix 2.**]

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 5 – Noncompliance with the Procurement Code in Purchasing Legal Services

Criteria

The Open Meetings Act, Section 10-15-1.H (6) NMSA 1978, states that the actual approval of a purchase of an item or final action regarding the selection of a contractor shall be made in an open meeting.

Section 3-17-3 NMSA 1978, *Notice of publication of certain proposed ordinances*, states:

1. Notice by publication of the title and subject matter of any ordinance proposed for adoption by the governing body of any municipality must take place at least two

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weeks prior to consideration of final action upon the ordinance in open session of the governing body, except that this section shall not apply to ordinances dealing with an emergency declared by the chairman of the governing body or the mayor, as the case may be, to be an immediate danger to the public health, safety and welfare of the municipality... It is sufficient defense to any suit or prosecution to show that no notice by publication was made.

2. Notice of the proposed ordinance shall be published one time as a legal advertisement in a newspaper of general circulation in the municipality.
3. Copies of a proposed ordinance shall be available to interested persons during normal and regular business hours of the municipal clerk upon request and payment of a reasonable charge beginning with the date of publication and continuing to the date of consideration by the municipality's elected commission.

Section 3-17-4 NMSA 1978, *Ordinances; roll call vote; adoption*, states that within three days after the adoption of an ordinance or resolution, the mayor shall validate the ordinance or resolution by endorsing "Approved" upon the ordinance or resolution and signing the ordinance or resolution.

Section 3-17-5 NMSA 1978, *Proof of ordinance; authentication; publication; effective date; codification*, states an ordinance shall be recorded in a book kept for that purpose, shall be authenticated by the signature of the presiding officer of the governing body and the municipal clerk and shall bear the seal of the municipality. The ordinance shall be published one time either in its entirety or by title and a general summary of the subject matter contained in the ordinance, whichever the governing body elects to do.

Section 3-37-2 NMSA 1978, *Finance; authorization*, states the governing body shall:

1. Control the finances and property of the municipality;
2. Appropriate money for municipal purposes only; and
3. Provide for payment of debts and expenses of the municipality.

Section 3-37-3 NMSA 1978, *Finance officer; duties; records open to inspection*, states the treasurer shall be the finance officer for the municipality unless another officer is directed by ordinance to be the finance officer. The finance officer shall expend the money only as directed by the governing body.

The Procurement Code Section 13-1-29 NMSA 1978, *Rules of construction; purposes*, states the purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. Section 13-1-30, *Application of the code*, states that except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by local public bodies for the procurement of items of tangible personal property, services and construction.

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The Procurement Code Section 13-1-102 NMSA 1978, *Competitive sealed bids required*, states that all procurement shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 to 13-1-110 NMSA 1978 of the Procurement Code, except procurement achieved pursuant to the following sections of the Procurement Code:

- A. Section 13-1-111 to 13-1-117, 13-1-118, 13-1-119, 13-1-120 to 13-1-124 NMSA 1978, competitive sealed proposals;
- B. Section 13-1-125 NMSA 1978, small purchases;
- C. Section 13-1-126 NMSA 1978, sole source procurement;
- D. Section 13-1-127 NMSA 1978, emergency procurements;
- E. Section 13-1-129 NMSA 1978, existing contracts; and
- F. Section 13-1-130 NMSA 1978, purchases from antipoverty program businesses.

The Procurement Code Section 13-1-126 NMSA 1978, *Sole source procurement*, states a contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the central purchasing office makes a determination, after conducting a good-faith review of available sources and consulting the using agency, that there is only one source for the required service, construction or item of tangible personal property. The central purchasing office shall conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the local public body.

The Procurement Code Section 13-1-128 NMSA 1978, *Sole source and emergency procurements; content and submission or record*, states that all central purchasing offices shall maintain, for a minimum of three years, records of sole source and emergency procurements. The record of each such procurement shall be public record and shall contain:

- A. the contractor's name and address;
- B. the amount and term of the contract;
- C. a listing of the services, construction or items of tangible personal property procured under the contract; and
- D. the justification for the procurement method.

The Procurement Code Section 13-1-150 NMSA 1978, *Multi-term contracts; specified period*, states:

- A. A multi-term contract for items of tangible personal property, construction or services except for professional services, in an amount under \$25,000, may be entered into for any period of time deemed to be in the best interests of the local public body not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting. If the amount of the contract is \$25,000 or more, the term shall not exceed eight years, including all extensions and renewals, except that for any such contract entered

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into pursuant to the Public Building Energy Efficiency and Water Conservation Act [Public Facility Energy Efficiency and Water Conservation Act, Chapter 6, Article 23 NMSA 1978], the term shall not exceed ten years, including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

- B. A contract for professional services may not exceed four years, including all extensions and renewals, except for the following a multi-term contract for the services of trustees, escrow agents, registrars, paying agents, letter of credit issuers and other forms of credit enhancement and other similar services, excluding bond attorneys, underwriters and financial advisors with regard to the issuance, sale and delivery of public securities, may be for the life of the securities or as long as the securities remain outstanding.

The Procurement Code Section 13-1-196 NMSA 1978, *Civil penalty*, states that any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than \$1,000 for each procurement in violation of any provision of the Procurement Code. Section 13-1-199, *Misdemeanor*, states that any business or person that violates the Procurement Code is guilty of a misdemeanor.

City Procurement Regulations Section 2.3, *Central Purchasing Office*, states the office of the Clerk-Treasurer shall be the central purchasing office. The deputy clerk/purchasing agent shall be the procurement officer. Section 2.16, *Procurement Officer*, states this is the person authorized to enter into or administer contracts and make written determinations with respect thereto as determined by the chief administrative officer or the governing body. Section 2.15, *Procurement*, defines procurement as:

- A. The purchasing, renting, leasing, lease-purchasing or otherwise acquiring items of tangible personal property, services or construction.
- B. All aspects of procurement, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration. Thus, it is far more than the act of buying and bidding that forms the procurement process. Preparation of specifications upon which bidders will rely is also a part of procurement as is contract administration after the contract has been let.

City Procurement Regulations Section 2.18, *Purchase Order*, states a purchase order is the document issued by the central purchasing office directing a contractor to deliver items of tangible personal property, services or construction pursuant to a contract. The statute requires that there be an existing contract.

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City Procurement Regulations Section 7.5, *Public Notice*, states the request for proposals shall be published not less than ten (10) calendar days prior to the date set for the receipt of the proposals.

City Procurement Regulations, Section 14.1, *Receipt of Goods*, states the using agency shall determine whether the quantity and quality of the goods meet the specifications of the purchase order or contract. Section 14.2, *Payment of Purchases*, states no payment shall be made unless the central purchasing office or using agency certifies that the services, construction or items of personal property have been received and meet specifications. Payments shall be tendered to the contractor within 30 days of the date of certification. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month.

City Procurement Regulations Section 16.1, *Sole Source Procurement*, states a professional service contract may be awarded without competitive sealed proposals when the purchasing office makes a written determination after conducting a good-faith review on available sources, that there is only one source for the required professional service. In cases of reasonable doubt, competition should be solicited. However, no sole source contract may be awarded unless the written determination is presented to and approved by the governing body.

City Personnel Rules and Regulations, Section 3-2-1 *Form of Government*, states the Mayor shall direct the day-to-day operations of the City. The Mayor and Council serve as the Board of Directors for the city, legislating policy, receiving input from the electorate and acting in the best interests of the citizens. The Mayor shall implement the policies of the governing body.

Condition

1. The City did not have a written contract with Bauman & Dow, Attorneys at Law. The minutes for April 18, 2000 identified Bauman & Dow as the City's attorney. The City did not have a written contract with the attorneys and did not submit a request for proposals (RFP) for legal services. On May 5, 2000, the governing body approved a 30-day extension of legal services with Bauman & Dow. On June 1, 2000, the governing body approved Bauman & Dow as a sole-source contractor for one month, or until the City hired a staff attorney, whichever came first.

On June 20, 2000, the governing body approved an ordinance establishing the position of City attorney. The duties and responsibilities were to serve at the pleasure of the Mayor and Council. On July 6, 2000, the governing body again extended the legal services with Bauman & Dow for one month. On December 23, 2000, the governing body voted to re-advertise the City attorney position and retain Bauman & Dow until the City made a final decision on the City attorney position. On December 28, 2000, the City issued an RFP for legal services for the City. The RFP indicated

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the City proposed to continue the practice of contracting for attorney services. The governing body did not take action on the RFP.

Bauman & Dow submitted a cost proposal and enclosed a contract form in response to the City's December 28, 2000 RFP. On February 27, 2001, the governing body voted to retain Bauman & Dow as City attorney and authorized the Mayor to negotiate and sign a contract with them. The Mayor did not sign a contract with Bauman & Dow and the governing body continued to discuss a City attorney position. The City continued to pay Bauman & Dow without a written contract. As of October 31, 2002, the City paid \$466,215 to Bauman & Dow from June 2000 to August 28, 2002.

2. The City had a contract with Coppler & Aragon, now Coppler & Mannick, from July 1, 1993 through July 1, 1997. The contract stated the contract would continue in full force and effect from year-to-year thereafter unless either party notified the other, in writing, of termination. The City did not renew the contract with Coppler & Mannick, but continued to receive their services. The City paid Coppler & Mannick at least \$420,000 without a valid contract.

The governing body terminated Coppler & Mannick in March 2000, but the City continued to pay Coppler & Mannick after March 2000. The City paid \$85,640 for services from April 2000 through May 2001. The Mayor told the Council that this was money owed to the former attorneys for prior services rendered, but the City was paying bills that showed services were provided after they were terminated.

3. The City did not have a contract with Fulbright & Jaworski for bond and disclosure counsel services, but on April 20, 1999, the governing body approved a resolution authorizing the retention of Fulbright & Jaworski as bond and disclosure counsel for issuance of its water and sewer revenue bonds not to exceed \$10 million. The Clerk-Treasurer did not have a signed and dated resolution in the City's official resolutions book.

On July 18, 2000, the governing body tabled retention of Fulbright & Jaworski as bond counsel. On July 24, 2000, the City issued an RFP for bond counsel services. The governing body was to approve the four-year contract. The proposal due date was September 1, 2000. The City did not present the RFP to the Council for prior approval. On September 25, 2000, the governing body selected Fulbright & Jaworski as bond counsel.

4. The City did not have a contract with Mendel, Guzman, Blumenfeld, LLP as bond counsel. On July 24, 2000, the City issued an RFP for bond counsel services. On September 25, 2000, the governing body selected Fulbright & Jaworski, but in a September 26, 2000 letter to Mendel, Guzman, Blumenfeld, LLP, the Mayor informed the firm that the City Council selected their firm at a special meeting on

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September 25, 2000. The City could not locate a contract with Mendel, Guzman, Blumenfeld, LLP.

5. On December 19, 2000, the governing body approved a firm (Mangel) as bond counsel for the \$2.8 million loan and RUS bond ordinance. The minutes are incomplete.
6. On December 20, 2000, the Mayor, Clerk-Treasurer and RUS loan specialist entered an agreement with Modrall Sperling, Roehl Harris & Sisk as bond counsel for financing the wastewater treatment improvements. The City paid Modrall Sperling, Roehl Harris & Sisk \$12,348 for legal services in connection with \$500,000 Joint Water and Wastewater Bonds, Series 2002, but the City did not seek proposals for these services.
7. On April 20, 1999, the governing body approved O'Connor & Company Securities as underwriter for an issuance of its water and sewer revenue bonds not to exceed \$10 million. The Clerk-Treasurer did not have a signed and dated resolution in the City's official resolutions book. At the July 6, 2000 meeting, O'Connor & Company offered to perform financial analysis and determine the bond rate at no expense to the City.

On July 18, 2000, the governing body tabled retention of O'Connor & Company as underwriter. The City issued an RFP and George K. Baum & Company and O'Connor & Company submitted proposals for bond underwriting services to the City on September 1, 2000. On September 25, 2000, the governing body selected O'Connor & Company as underwriter. The City could not locate the RFP for bond underwriter services and the City did not present the RFP to the Council for prior approval. The City could not locate a contract with O'Connor & Company.

In addition, the O'Connor and Company proposal mentioned a June 14, 2000 presentation to the Council, but the City did not have minutes for a June 14, 2000 meeting.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 6 – Noncompliance with the Procurement Code in Making and Approving Purchases

Criteria

Section 3-37-2 NMSA 1978, *Finance; authorization*, states the governing body shall:

1. Control the finances and property of the municipality;
2. Appropriate money for municipal purposes only; and
3. Provide for payment of debts and expenses of the municipality.

Section 3-37-3 NMSA 1978, *Finance officer; duties; records open to inspection*, states the treasurer shall be the finance officer for the municipality unless another officer is directed by ordinance to be the finance officer. The finance officer shall expend the money only as directed by the governing body.

The Open Meetings Act, Section 10-15-1.H (6) NMSA 1978, states that the actual approval of a purchase of an item or final action regarding the selection of a contractor shall be made in an open meeting.

The Procurement Code Section 13-1-29 NMSA 1978, *Rules of construction; purposes*, states the purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. Section 13-1-30, *Application of the code*, states that except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by local public bodies for the procurement of items of tangible personal property, services and construction.

The Procurement Code Section 13-1-37 NMSA 1978, *Definition; central purchasing office*, states that "Central purchasing office" means that office or officer within a local public body responsible for the control of procurement of items of tangible personal property, services or construction.

The Procurement Code Section 13-1-125 NMSA 1978, *Small purchases*, states:

- A. A central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding \$10,000 in accordance with the applicable small purchase regulations adopted by a local public body or a central purchasing office that has the authority to issue regulations.
- B. Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding \$20,000, excluding applicable state and local gross receipts taxes, except for the services of architects, landscape architects, engineers or surveyors for local public works projects, in accordance with professional services

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procurement regulations promulgated by the DFA, the general services department or a central purchasing office with the authority to issue regulations.

- C. Notwithstanding the requirements of Subsection A of this section, a local public body may procure services, construction or items of tangible personal property having a value not exceeding \$1,500 by issuing a direct purchase order to a contractor based upon the best obtainable price.
- D. Procurement requirements shall not be artificially divided to constitute a small purchase under this section.

The Procurement Code Section 13-1-126 NMSA 1978, *Sole source procurement*, states a contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the central purchasing office makes a determination, after conducting a good-faith review of available sources and consulting the using agency, that there is only one source for the required service, construction or item of tangible personal property. The central purchasing office shall conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the local public body.

The Procurement Code Section 13-1-128 NMSA 1978, *Sole source and emergency procurements; content and submission or record*, states that all central purchasing offices shall maintain, for a minimum of three years, records of sole source and emergency procurements. The record of each such procurement shall be public record and shall contain:

- A. the contractor's name and address;
- B. the amount and term of the contract;
- C. a listing of the services, construction or items of tangible personal property procured under the contract; and
- D. the justification for the procurement method.

The Procurement Code Section 13-1-135 NMSA 1978, *Cooperative procurement authorized*, states that any local public body may either participate in, sponsor or administer a cooperative procurement agreement for the procurement of any services, construction or items of tangible personal property with any other state agency, local public body or external procurement unit in accordance with an agreement entered into and approved by the governing authority of each of the state agencies, local public bodies or external procurement units involved. The cooperative procurement agreement shall clearly specify the purpose of the agreement and the method by which the purpose will be accomplished. Any power exercised under a cooperative procurement agreement entered into pursuant to this subsection shall be limited to the central purchasing authority common to the contracting parties, even though one or more of the contracting parties may be located outside this state. An approved and signed copy of all cooperative procurement agreements entered into pursuant to this subsection shall be filed with the state purchasing agent. A cooperative procurement agreement entered into pursuant to

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this subsection is limited to the procurement of items of tangible personal property, services or construction.

The Procurement Code Section 13-1-157 NMSA 1978, *Receipt; inspection; acceptance or rejection of deliveries*, states the using agency is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity is as specified in the purchase order or contract and whether the quality conforms to the specifications referred to or included in the purchase order or contract. Section 13-1-158, *Payments for purchases*, states:

- A. No warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property unless the central purchasing office or the using agency certifies that the services, construction or items of tangible personal property have been received and meet specifications or unless prepayment is permitted under Section 13-1-98 NMSA 1978 by exclusion of the purchase from the Procurement Code.
- B. Unless otherwise agreed upon by the parties or unless otherwise specified in the invitation for bids, request for proposals or other solicitation, within fifteen days from the date the central purchasing office or using agency receives written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site and received, the central purchasing office or using agency shall issue a written certification of complete or partial acceptance or rejection of the services, construction or items of tangible personal property.
- C. Except as provided in Subsection D of this section, upon certification by the central purchasing office or the using agency that the services, construction or items of tangible personal property have been received and accepted, payment shall be tendered to the contractor within thirty days of the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month.
- D. If the central purchasing office or the using agency finds that the services, construction or items of tangible personal property are not acceptable, it shall, within thirty days of the date of receipt of written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site, provide to the contractor a letter of exception explaining the defect or objection to the services, construction or delivered tangible personal property along with details of how the contractor may proceed to provide remedial action.

The Procurement Code Section 13-1-169 NMSA 1978, *Purchase request; specifications; purchase orders*, states all using agency requests for procurement shall contain:

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- (1) a statement of need and the general characteristics of the item, construction or service desired; and
- (2) a statement of the quantity desired and a general statement of quality.

The Procurement Code Section 13-1-196 NMSA 1978, *Civil penalty*, states that any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than \$1,000 for each procurement in violation of any provision of the Procurement Code. Section 13-1-199, *Misdemeanor*, states that any business or person that violates the Procurement Code is guilty of a misdemeanor.

The Procurement Code Section 13-1-75 NMSA 1978, *Definition; procurement officer* defines procurement officer as any person or a designee authorized by a local public body to enter into or administer contracts and make written determinations with respect thereto. Section 13-1-77, *Definition; purchase order*, defines purchase order as the document issued by a central purchasing office that directs a contractor to deliver items of tangible personal property, services or construction. Section 13-1-78 *Definition; purchase request*, defines purchase request as the document by which a using agency requests that a contract be obtained for a specified service, construction or item of tangible personal property and may include but is not limited to the technical description of the requested item, delivery schedule, transportation requirements, suggested sources of supply and supporting information.

The Procurement Code Section 13-1-97 NMSA 1978, *Centralization of procurement authority* states that all procurement for local public bodies shall be performed by a central purchasing office designated by the governing authority of the local public body except as otherwise provided in the Procurement Code.

The Procurement Code Section 13-1-102 NMSA 1978, *Competitive sealed bids required*, states that all procurement shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 to 13-1-110 NMSA 1978 of the Procurement Code, except procurement achieved pursuant to the following sections of the Procurement:

1. Section 13-1-111 to 13-1-117, 13-1-118, 13-1-119, 13-1-120 to 13-1-124 NMSA 1978, competitive sealed proposals;
2. Section 13-1-125 NMSA 1978, small purchases;
3. Section 13-1-126 NMSA 1978, sole source procurement;
4. Section 13-1-127 NMSA 1978, emergency procurements;
5. Section 13-1-129 NMSA 1978, existing contracts; and
6. Section 13-1-130 NMSA 1978, purchases from antipoverty program businesses.

The Procurement Code Sections 13-1-104 NMSA 1978, *Competitive sealed bids; public notice* and 13-1-113 NMSA 1978, *Competitive sealed proposals; public notice*, states an invitation for bids or a notice thereof shall be published not less than ten calendar days prior to the date set forth for the opening of bids. In the case of purchases made by other

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central purchasing offices, the invitation or notice shall be published at least once in a newspaper of general circulation in the area in which the central purchasing office is located. These requirements of publication are in addition to any other procedures that may be adopted by central purchasing offices to notify prospective bidders that bids will be received, including publication in a trade journal, if available. If there is no newspaper of general circulation in the area in which the central purchasing office is located, such other notice may be given as is commercially reasonable.

The Procurement Code Section 13-1-117.1 NMSA 1978, *Procurement of professional services; local public bodies; legislative branch; selection and award*, states:

- A. Each local public body shall adopt regulations regarding its selection and award of professional services contracts.
- B. The award shall be made to the responsible offeror or offerors whose proposal is most advantageous to the local public body, taking into consideration the evaluation factors set forth in the request for proposals.

According to 1.4.1.57 A. NMAC, Records of Sole Source Procurements, the office or officer within a local public body responsible for the control of procurement of items of tangible personal property, services or construction shall maintain records of sole source procurements for a minimum of three years. The record of each such procurement shall be a public record and, according to Subparagraph (4), shall contain the justification for the procurement method that shall include any written determinations and written approvals.

City Procurement Regulations Section 2.3, *Central Purchasing Office*, states the office of the Clerk-Treasurer shall be the central purchasing office. The deputy clerk/purchasing agent shall be the procurement officer. Section 2.16, *Procurement Officer*, states this is the person authorized to enter into or administer contracts and make written determinations with respect thereto as determined by the chief administrative officer or the governing body. Section 2.15, *Procurement*, defines procurement as:

- A. Includes the purchasing, renting, leasing, lease-purchasing or otherwise acquiring items of tangible personal property, services or construction.
- B. Includes all aspects of procurement, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration. Thus, it is far more than the act of buying and bidding that forms the procurement process. Preparation of specifications upon which bidders will rely is also a part of procurement as is contract administration after the contract has been let.

City Procurement Regulations Section 2.18, *Purchase Order*, states a purchase order is issued by the central purchasing office directing a contractor to deliver items of tangible personal property, services or construction pursuant to a contract. The statute requires

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that there be an existing contract. Section 2.19, *Purchase Request*, states a purchase request is submitted by a department or division to request that the central purchasing office obtain a contract for a specified service, construction or item of tangible personal property. Section 8.3, *Purchase Requests*, states the department's requests for procurement must contain a statement of need, the general characteristics of the item of tangible personal property, construction or service desired, and a statement of the quantity desired and quality desired.

City Procurement Regulations Section 4.2, *Centralized Purchasing*, states the central purchasing office shall perform all procurement functions for the municipality, except:

- A. The governing body may expressly retain the power to exercise the power of the central purchasing office regarding the procurement of professional services or other procurement as the governing body sees fit, without stifling the entire operation; or
- B. When otherwise expressly authorized by statute or ordinance or regulation of the municipality.

City Procurement Regulations Section 11.1, *In General*, states use of a cost-plus-a-percentage-of-cost contract is prohibited except for the purchase of insurance.

City Procurement Regulations Section 14.1, *Receipt of Goods*, states the department is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity and quality of the goods meet the specifications of the purchase order or contract. If delivery is acceptable, the using agency shall certify property delivery to the central purchasing office. Section 14.2, *Payment of Purchases*, states that no payment shall be made unless the central purchasing office or using agency certifies that the services, construction or items of personal property have been received and meet specifications. Payments shall be tendered to the contractor within 30 days of the date of certification. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month.

City Procurement Regulations Section 15, *Small Purchases*, states the central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding \$10,000 in accordance with this small purchase regulation. For purposes of this regulation, the following process shall apply:

- A. All purchases under \$500 shall be made at the best obtainable price.
- B. All purchases between \$500 and \$3,000 shall be made by oral, telephone or written bid from no fewer than three businesses that are recorded and placed in the procurement file.
- C. All purchases between \$3,000 and \$10,000 shall be with written quotes or bids.

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- D. Prior to award, the contents of any quotation shall not be disclosed to any other business from which a quotation is solicited.
- E. Quotations from local businesses may be obtained by the department and attached to the purchase request submitted to the central purchasing office.

The Section further states, a central purchasing office may procure professional services having a value not exceeding \$20,000, a value not exceeding \$25,000 for architects and engineers, and \$5,000 for landscape architects and surveyors, in accordance with professional services procurement regulations promulgated by the central purchasing office with the authority to issue regulations. For purposes of this regulation, the following process shall apply:

- A. All professional services under \$10,000, and for architects or engineers under \$25,000, and for surveyors or landscape architects under \$5,000 shall be procured by the central purchasing officer calling a reasonable number of firms to obtain either verbal, telephone or written offers. All proposals over this amount shall be procured by competitive sealed proposals or in the case of design professionals by qualifications-based competitive sealed proposals.
- B. The central purchasing officer shall provide such information as is necessary to provide the potential offeror the opportunity to provide a proper and timely response.
- C. The governing body or its designated representative shall select the best offer and direct the central purchasing officer to negotiate a contract with the selected business. The negotiated contract shall then be brought back to the governing body for approval.
- D. Notwithstanding this regulation, the governing body, pursuant to statutory authority, retains the prerogative to utilize "sole source" or "emergency procurement", if the situation so warrants for professional services pursuant to the requirements of the Procurement Code.

City Procurement Regulations Section 16.1, *Sole Source Procurement*, states:

- A. A contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the central purchasing office makes a determination, after conducting a good faith review of available sources and consulting the using agency, that there is only one source for the required service, construction or item of tangible personal property.
- B. If such a situation exists, the central purchasing office shall conduct negotiations as appropriate in order to obtain the most advantageous terms for the municipality.
- C. Any request by a using agency that procurement be restricted to one potential contractor shall be accompanied by a written explanation as to why no other will be suitable or acceptable to meet the need.
- D. A professional service contract may be awarded without competitive sealed proposals when the purchasing office makes a written determination after

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conducting a good-faith review on available sources, that there is only one source for the required professional service. In cases of reasonable doubt, competition should be solicited. However, no sole source contract may be awarded unless the written determination is presented to and approved by the governing body.

City Procurement Regulations Section 16.3, *Records*, states:

- A. The central purchasing office shall maintain for a minimum of three years records of all sole source or emergency procurements.
- B. The record of each such procurement shall be public record and shall contain:
 1. the contractor's name and address;
 2. the amount and term of the contract;
 3. a listing of the services, construction or items of tangible personal property procured under the contract; and
 4. the conditions necessitating the purchase.

Thorough records of your sole source or emergency purchases and the justification for the auditors review shall be kept.

City Procurement Regulations Section 17.1, *Procurement under Existing Contracts*, states the central purchasing office may contract for services, construction or items of tangible personal property without use of competitive sealed bids or competitive sealed proposals, as follows:

1. when procuring at a price equal to or less than the federal supply contract price or catalog price, whichever is lower, and the purchaser adequately identifies the contract relied upon; or
2. with a business which has a current contract or price agreement with the state purchasing agent or central purchasing office for the items, services or construction meeting the same standard of specifications as the items that are to be procured if the following conditions are met:
 - a. the quantity purchased does not exceed the quantity which may be purchased under the applicable contract; and
 - b. the purchase order adequately identifies the contract relied upon by number, if applicable, or by other appropriate reference.
3. The central purchasing office shall retain a copy of the state purchasing agreement relied upon for public inspection and for the use of auditors.

City Procurement Regulation Section 17.2, *Cooperative Procurement*, states municipalities may participate in, sponsor or administer a cooperative procurement

agreement for procurement of any services, construction or items of tangible personal property with a state agency, local public body, or external procurement unit in accordance with a joint powers agreement.

City Personnel Rules and Regulations, Section 3-2-1 *Form of Government*, states the Mayor shall direct the day-to-day operations of the City. The Mayor and Council serve as the Board of Directors for the city, legislating policy, receiving input from the electorate and acting in the best interests of the citizens. The Mayor shall implement the policies of the governing body.

Condition

The auditors judgmentally selected sixty expenditure transactions based on individually significant amounts and based on payee. We tested the transactions for the following attributes:

1. Item or service was received;
2. Invoice with the receiving stamp, purchase requisition and purchase order were present, complete and properly authorized;
3. Invoice agreed with the purchase requisition and purchase order;
4. Unit price per the invoice agreed to the unit price per the purchase order, contract, quote or bid;
5. City properly obtained quotes or bids;
6. Expenditure was authorized or reimbursable under the terms of the contract;
7. Any indication the expenditure was for social amenities or political activity;
8. Any indication of a split purchase to avoid quotes, bids or other parts of the procurement process noted;
9. Noncompliance with the procurement code; and
10. Governing body approval of transaction.

We noted the following exceptions:

1. The Mayor recommended Blackham, Underwood, Gunaji & Associates for the engineering contract for streetlights, Phase II. On April 2, 2002, the governing body awarded the contract to Molzen-Corbin. However, the City awarded the contract to Blackham, Underwood, Gunaji & Associates for \$28,000. There is no evidence that the governing body approved the award to Blackham, Underwood, Gunaji & Associates.

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The City paid Blackham, Underwood, Gunaji & Associates the following amounts:

Check Date	Invoice Date	Receiving Date	Check Amount
06/17/02	05/17/02	06/03/02	\$ 6,714.92
07/17/02	06/24/02	07/15/02	6,266.65
08/28/02	06/18/02	None	<u>15,852.51</u>
Total Paid			<u>\$28,834.08</u>

The City pre-paid the \$15,853 to Blackham, Underwood, Gunaji & Associates because the City was spending money before the end of the fiscal year, June 30, 2002. The company has since performed the services.

2. On September 8, 2000, the City pre-paid Airvac, Inc. \$57,500 as a down payment on vacuum station equipment. The City paid the balance of \$57,250 upon delivery on July 25, 2002.
3. The central purchasing office is the only office authorized to procure services. Contractors made award recommendations without evidence of City staff input or review as follows:
 - The governing body approved an emergency contract to repair Well No. 6 on November 13, 2000. A Molzen-Corbin and Associates December 8, 2000 letter indicated that the City requested Molzen-Corbin engineers to negotiate directly with well drilling contractors. Molzen-Corbin recommended West Texas Water Well Service. There was no evidence of City staff input or review of the recommendation. The Mayor and Clerk-Treasurer signed the contract on December 11, 2000.
 - On April 9, 2002, the governing body awarded a contract to West Texas Water Well Service to repair Well No. 8 for \$160,650. The ECO manager made the presentation and recommended West Texas Water Well Service as the low bidder. There was no evidence of City staff input or review of the bid.
 - On April 9, 2002, the governing body awarded a contract to West Texas Water Well Service to repair Well No. 2 for \$30,535. The ECO manager made a presentation and recommended West Texas Water Well Service as the low bidder. There was no evidence of City staff input or review of the recommendation. Although the governing body awarded the contract to West Texas Water Well, the City awarded the contract and paid \$32,458 to Alpha Southwest, Inc. There was no support for why the City awarded the contract to Alpha Southwest, Inc.
4. The City purchased two pumps from James, Cooke & Hobson, but the purchase requisition and quote were for only one pump at \$4,718. The purchase order and

receiving report were for two pumps. In addition, the purchase requisition and purchase order indicated a sole source purchase, but the voucher packet and related files did not contain a written sole source determination. The City was aware of the requirement for a written sole source determination and the Auditor reviewed other transactions that contained the proper sole source documentation.

In addition to this City purchase, we noted that where ECO staff made purchases and the documentation indicated sole source, the voucher packet and related files did not contain a written sole source determination. ECO staff indicated it was not aware of the State requirement for a written sole source determination.

5. There was no evidence of quotes or bids in the voucher packet or related files in two instances and no evidence of a contract for the services, as follows:

Payee	Amount	Check Date
Hi-Fi Av Concepts	\$13,400	07/24/01
Productive Data Solutions, Inc	15,872	01/23/02

6. There was no evidence of Council approval for expenditure transactions in 23 instances. One instance lacking evidence of expenditure approval involved the Housing Board that does not maintain written minutes.
7. The voucher packet did not contain a purchase requisition or a purchase order in 27 instances.
8. There were instances in which the dates on the purchase orders or requisitions were after the dates on the invoices as follows:

Payee	Invoice Date	Requisition Date	Purchase Order Date	Invoice Amount
Zia Bus Sales Inc	05/22/02	05/28/02	06/07/02	\$12,424
Rollag & Associates Inc	03/15/02	03/26/02	04/10/02	2,700
Artic Heating & Cooling	01/17/02	01/14/02	02/01/02	8,141
Ink Impressions	01/30/02	02/04/02	01/04/02	9,465
Salt Lake County Fleet	08/07/01	07/26/01	08/16/01	95,662

9. The City did not sign a receiving report in one instance.
10. The governing body approved a budget increase resolution that had an incorrect transfer of funds.
11. The City purchased vehicles for \$147,058 from Salt Lake County Fleet Management in Utah, but the City did not present the purchases to the governing body for prior approval. In addition, the files did not contain the cooperative procurement agreement or other justification for using this contractor.

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12. The City did not make payment within 30 days of certification of receipt in six instances.
13. During our review of the travel and per diem expenditures, we noted there is no evidence that the City Council discussed and approved the \$5,000 sole source purchase for hazardous-materials course supplies. There is no written determination or evidence of a good faith review of available sources to support sole source procurement.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 7 – Noncompliance with the Mileage and Per Diem Act

Judgmentally, we selected a sample of 37 travel transactions. Testing of these transactions revealed a disregard for State Law, State Administrative Code and City Rules and Regulations. As shown in the following table, we discovered **72 exceptions** in 33 of 37 transactions tested:

Number of Exceptions	Condition	Criteria
23	Travel advances were paid at 100% of per diem rates and mileage cost or for the actual cost of lodging and meals.	<ul style="list-style-type: none">• Section 2.42.2.10A of 2.42.2 NMAC, Regulations Governing the Per Diem and Mileage Act, states, "...governing boards of local public bodies or their authorized designees may approve a public officer's or employee's request to be advanced up to 80 percent (80%) of per diem rates and mileage cost or for the actual cost of lodging and meals..."
15	Claims for travel reimbursement have incorrect partial day calculations.	<ul style="list-style-type: none">• Section 2.42.2.9C of 2.42.2 NMAC, Regulations Governing the Per Diem and Mileage Act, states, "On the last day of travel when overnight lodging is no longer required, partial day reimbursement shall be made. To calculate the number of hours in the partial day, begin with the time the traveler initially departed on the travel. Divide the total number of hours traveled by 24. The hours remaining constitute the partial day which shall be reimbursed as follows:

Number of Exceptions	Condition	Criteria
		(1) for less than two hours, none; (2) for two hours but less than six hours, \$8.00; (3) for six hours or more, but less than 12 hours, \$16.00; (4) for 12 hours or more, \$22.50; (5) no reimbursement for actual expenses will be granted in lieu of partial day per diem rates."
14	Claims for reimbursement lacked supporting documentation to prove travelers attended meetings, classes or conferences.	<ul style="list-style-type: none"> • City Supplemental Rules and Regulations, Sec. VI.5.D states, "the clerk shall be responsible for detailed accounting of travel advances and subsequent documentation of proof of expenditure claimed for advance travel payment." • Usually, there were complete voucher packets with a carbon of the per diem check made out to the employee, the request form, the advance affidavit, and supporting documentation to show what training occurred or conference attended and when. When the accounts payable clerk was asked about the lack of supporting documentation, she said the employee is supposed to provide it and most do, but not always; and, since the Mayor and Clerk approve the request form, she prepares the per diem advance check anyway. • City Supplemental Rules and Regulations, Sec. VI.3.D states, "No per diem, mileage or expenses shall be reimbursed ... unless ... the voucher has been approved for payment by the Mayor and certified as true by the Clerk."
10	Vouchers do not have the required stated purpose, or the purpose stated is inadequate; for example, three voucher packets show a Saturday to Monday weekend airline flight and daily per diem to Las Vegas, NV with no purpose provided.	<ul style="list-style-type: none"> • City Supplemental Rules and Regulations, Sec. VI.3.C states, "Every travel voucher shall set forth: destination of the traveler, the purpose served by the travel and the date and hour of departure and return;"

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Number of Exceptions	Condition	Criteria
	<p>Councilors asked for verification that it was City business, but none was provided. Other voucher packets only had the word "training" or "meeting" for the stated purpose, but there was no indication of what kind of course was involved, who was conducting it or what skills or expertise would be gained.</p>	
4	<p>Travel advance checks were dated five weeks to four months prior to travel.</p>	<ul style="list-style-type: none"> • Section 2.42.2.10A of 2.42.2 NMAC, Regulations Governing the Per Diem and Mileage Act, states, "...Requests for travel advances shall not be submitted...more than two weeks prior to travel..."
2	<p>The receipts attached to travel claims did not equal the amounts claimed; and in one instance, a worksheet identifying expenses of one employee was photocopied and used by another employee. The two individuals were underpaid \$6.70 and \$8.50. The photocopied request for reimbursement totaled \$218.30.</p>	<ul style="list-style-type: none"> • Section 6-5-8. NMSA 1978, Vouchers, states, "...Vouchers for the reimbursement of public officers and employees must have receipts attached for all money claimed..." • City Supplemental Rules and Regulations, Sec. VI.3.B.2 states, "... (reimbursement claims for actual lodging or food costs must have receipts attached);" • Good accounting practices require verification of mathematical accuracy of numbers. • Good accounting practices require original documentation, not photocopies.
2	<p>Travel/training documents were missing authorizing signatures.</p>	<ul style="list-style-type: none"> • Section 2.42.2.10A of 2.42.2 NMAC, Regulations Governing the Per Diem and Mileage Act, states, "Upon written request accompanied by a travel voucher, agency heads and governing boards of local public bodies or their authorized designees may approve..." • City Supplemental Rules and Regulations, Sec.

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Number of Exceptions	Condition	Criteria
		VI.3.D states, "No per diem, mileage or expenses shall be reimbursed...unless...the voucher has been approved for payment by the Mayor and certified as true by the Clerk."
1	Date and time of travel claimed and reimbursed was inconsistent with the conference agenda. The conference agenda indicated the end of the conference was February 24, 2001 at 1:00 p.m. The traveler claimed reimbursement through February 25, 2001 at 6:00 p.m. There was no reason provided for the extra day. The amount overpaid in meals and lodging was \$97.50.	<ul style="list-style-type: none"> • City Supplemental Rules and Regulations, Sec. VI.3.D states, "No per diem, mileage or expense shall be reimbursed to any public officer or employee unless ... the voucher has been approved for payment by the Mayor and certified as true and correct by the Clerk."
1	Travel claim was submitted 10 days after the traveler returned.	<ul style="list-style-type: none"> • City Supplemental Rules and Regulations, Sec. VI.5.B states, "The public officer, employee or non-salaried public officer shall submit, within five (5) days of return from a trip, a copy of the airline ticket and receipts for expenditures and refund to the City any excess advance payment."
Total: 72		

In addition to the test of 37 travel transactions, we noted the following three conditions related to travel:

Criteria

Section 10-8-4.J NMSA 1978 states, "In addition to any other penalties prescribed by law for false swearing on an official voucher, it shall be cause for removal or dismissal from office."

Section 10-8-7 NMSA 1978 states, "Any public officer or employee covered by the Per Diem and Mileage Act ... who knowingly authorizes or who knowingly accepts payment

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in excess of the amount allowed by the Per Diem and Mileage Act ... is liable to the state in an amount that is twice the excess payment.”

Section 2.42.2.8C (3) NMAC states, “*Members serving in dual capacities.* Nonsalaried public officers who also serve as public officers or employees of state agencies or local public bodies may receive mileage or per diem rates from only one public entity for any travel or meeting attended.”

Condition

One City Councilor, who was also a member of a school board, submitted claims and was reimbursed by both the City and the School for the same trip. The City reimbursed the Councilor \$238 (Check No. 015654) and Gadsden Independent School District reimbursed him \$319 (Check No. 150756).

Criteria

City Supplemental Rules and Regulations, Section VI 3.B.5 indicates that affidavits are used in case of loss of receipts, not on a routine basis.

Condition

The City often used affidavits in place of actual documents. For eleven travel advances after August 18, 2002 that had been advanced 80%, the travelers submitted signed affidavits in lieu of receipts to collect the remaining 20%.

Criteria

Section 10-8-7 NMSA 1978 states, “Any public officer or employee covered by the Per Diem and Mileage Act ... who knowingly authorizes or who knowingly accepts payment in excess of the amount allowed by the Per Diem and Mileage Act ... is liable to the state in an amount that is twice the excess payment.”

Condition

The City paid the hotel charges for the Mayor and another City employee on a trip to Chicago, but the Mayor and this City employee also requested reimbursement for lodging on their Expense and Per Diem Request forms.

The City issued check number 023960 for \$319.42 to the Fairmont Hotel in Chicago for payment of purchase order number 11806. Purchase order number 11806 was for two rooms at the hotel on February 19, 2003 for the Mayor and a City employee.

The City issued check numbers 023963 and 024209 to the Mayor totaling \$101 that included \$95 per diem for February 19, 2003. This \$95 reimbursement was for both

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meals and lodging at the state per diem rate. Because lodging was previously paid by the City and not by the traveler, the Mayor made an inappropriate claim for reimbursement. The Mayor was overpaid \$72.50.

The City issued check numbers 023964 and 024211 to a City employee totaling \$101 that included \$95 per diem for February 19, 2003. This \$95 reimbursement was for both meals and lodging at the state per diem rate. Because lodging was previously paid by the City and not by the traveler, the City employee made an inappropriate claim for reimbursement. The City employee was overpaid \$72.50.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 8 – Items Not Brought Before the Council

Criteria

Section 3-12-3 NMSA 1978, *Governing body; powers and duties*, states the governing body shall manage and control the finances and all property, real and personal, belonging to the municipality.

Section 3-37-2 NMSA 1978, *Finance; authorization*, states the governing body shall:

- A. Control the finances and property of the municipality;
- B. Appropriate money for municipal purposes only; and
- C. Provide for payment of debts and expenses of the municipality.

Section 3-37-3 NMSA 1978, *Finance officer; duties; records open to inspection*, states the treasurer shall be the finance officer for the municipality unless another officer is directed by ordinance to be the finance officer. The finance officer shall expend the money only as directed by the governing body.

Section 6-6-2 NMSA 1978, *Local government division; powers and duties*, states:

- In case of a need necessitating the expenditure for an item not provided for in the budget, upon approval of the secretary of the DFA, the budget may be revised to authorize the expenditure;
- With written approval of the secretary of the DFA, increase the total budget of any local public body in the event the local public body undertakes an activity, service, project or construction program which is not contemplated at the time the final budget was adopted and approved and which activity, service, project or

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construction program will produce sufficient revenue to cover the increase in the budget or the local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget; provided, however, that the attorney general shall review legal questions identified by the secretary of the DFA arising in connection with such budget increase requests;

- Supervise the disbursement of funds to the end that expenditures will not be made in excess of budgeted items or for items not budgeted and that there will not be illegal expenditures.

Section 6-6-6 NMSA 1978, *Approved budgets; claims or warrants in excess of budget; liability*, states when any budget for a local public body has been approved and received by a local public body, it is binding upon all officials and governing authorities, and no governing authority or official shall allow or approve claims in excess thereof, and no official shall pay any check or warrant in excess thereof, and the allowances or claims or checks or warrants so allowed or paid shall be a liability against the officials so allowing or paying those claims or checks or warrants, and recovery for the excess amounts so allowed or paid may be had against the bondsmen of those officials.

City Personnel Rules and Regulations, Section 3-2-1 *Form of Government*, states that the Mayor shall direct the day-to-day operations of the City. The Mayor and Council serve as the Board of Directors for the city, legislating policy, receiving input from the electorate and acting in the best interests of the citizens. The Mayor shall implement the policies of the governing body.

Condition

The Council did not take official action to approve some City expenditures, for example:

1. In a December 14, 2000 letter to the Mayor, a Councilor expressed concern that the City did not bring a host agreement for the landfill to the governing body for discussion. The Councilor was aware that negotiations were ongoing since July 2000 and was concerned about the expense that City residents would have to bear without a host agreement. In a February 13, 2001 letter to the Mayor and Council, the City attorney stated the landfill would begin to charge the City for all waste, including sludge from the sewer plant, at a cost in excess of \$10,000 per month because the City failed to negotiate a host agreement.
2. In a May 17, 2001 letter to the Assistant Attorney General, Councilors complained that the Mayor expended City funds without Council approval. They claimed the Mayor paid himself and two other Councilors for travel and per diem without proper documentation to back up the expenses. The Council had not allotted for these expenses in the budget. When the Council approved the fiscal year 2001 budget at the Mayor's request, the Council approved a budget that did not include money for travel or training for the governing body. In addition, the

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Councilors complained that the Mayor spent public funds on public works projects without submitting those projects to the Council and paid legal fees to the former City attorney without Council approval. In addition, the letter indicated the Mayor allowed a carnival to operate on City property without prior Council approval. This jeopardized the City insurance since the existing insurance policy did not have a provision for carnivals.

3. After repeated verbal attempts to review the check register, Councilors at an August 21, 2001 meeting addressed a letter that had been sent to the Mayor requesting that the check register be available for Council review. The Mayor stated that some Councilors reviewed checks regularly. As of the week of September 10, 2001, all Councilors began receiving the check register. However, the governing body does not take action to approve expenditures at their meetings.
4. In a December 16, 2002 letter to the plaintiffs, the City attorney discussed arbitration with the plaintiffs in a legal case. Arbitration costs and settlement would likely have financial implications impacting City expenditures, but the Mayor and City attorney did not bring this matter to the Council for discussion.
5. On February 18, 2003, the Mayor chartered a bus for \$1,500 to transport citizens to Santa Fe for a legislative meeting. The Mayor did not seek prior approval for the expenditure or invite the Councilors. According to the Finance Officer, the Mayor spoke with several Councilors about the bus and received their input. The City believed that chartering the bus for the whole community was beneficial to the residents of the City to show support for a bill. The Mayor understood that the Councilors approved the budget and that he used monies from the executive department to pay for the bus. The Councilors indicated they must approve all expenditures. The City paid the invoice from "professional services (lawyer)" instead of "convention and travel".
6. In an April 22, 2003 letter to the Dona Ana County Commission, the Mayor offered to assume the County's \$6 million utility system revenue debt. The Mayor did not seek Council approval before sending the letter to the Dona Ana County Commissioners.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 9 – Noncompliance with Budget

Criteria

Section 6-6-2 NMSA 1978, *Local government division; powers and duties*, states the local government division of DFA has the power and duty to:

1. Require each local public body to furnish and file with the division, on or before June 1 of each year, a proposed budget for the next fiscal year;
2. Certify a final budget for each local public body to the appropriate governing body prior to the first Monday in September of each year;
3. Upon the approval of the secretary of the DFA, authorize the transfer of funds from one budget item to another when the transfer is requested and a need meriting the transfer and the transfer is not prohibited by law. In case of a need necessitating the expenditure for an item not provided for in the budget, upon approval of the secretary of the DFA, the budget may be revised to authorize the expenditures;
4. With written approval of the secretary of the DFA, increase the total budget of any local public body in the event the local public body undertakes an activity, service, project or construction program which was not contemplated at the time the final budget was adopted and approved and which activity, service, project or construction program will produce sufficient revenue to cover the increase in the budget or the local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget; provided, however, that the attorney general shall review legal questions identified by the secretary of the DFA arising in connection with such budget increase requests; and
5. Supervise the disbursement of funds to the end that expenditures will not be made in excess of budgeted items or for items not budgeted and that there will not be illegal expenditures.

Section 6-6-3 NMSA 1978, *Local public bodies; duties*, states that every local public body shall conform to the rules and regulations adopted by the local government division. Section 6-6-5 *Record of approved budget* states that upon receipt of any budget approved by the local government division, the local public body shall cause such budget to be made a part of the minutes of such body. Section 6-6-6 *Approved budgets; claims or warrants in excess of budget; liability* states that when any budget for a local public body has been approved and received by a local public body, it is binding upon all officials and governing authorities, and no governing authority or official shall allow or approve claims in excess thereof.

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Condition

In an August 16, 2000 letter to the Mayor and Council, DFA requested the City submit the final budget for Fiscal Year 2001. The governing body approved the final budget on September 5, 2000. DFA certified the budget on October 20, 2000.

The Mayor approved and paid a different higher hourly rate to a police sergeant than the hourly rate approved by the governing body in the Fiscal Year 2001 budget. In addition, on December 18, 2001, DFA informed the City that the governing body did not approve the final DFA-approved Fiscal Year 2001 budget in a public meeting.

On April 3, 2001 and June 27, 2001, the governing body approved resolutions to increase the budgets of various funds for expenditures already spent. The City did not obtain DFA approval for the budget increases before expending funds.

In a May 17, 2001 letter to the Assistant Attorney General, Councilors complained the Mayor submitted the City's Fiscal Year 2001 final budget without the proper corrections as the Council directed. The budget was to reflect salary adjustments for police and maintenance workers and no budget for a special fund to pay the ECO contract.

The governing body did not adopt the Fiscal Year 2002 budget prior to June 1. DFA allowed a one-week extension for a special workshop to adopt the budget. On July 19, 2001, DFA held a public hearing to approve the Fiscal Year 2002 budget. In addition, the governing body did not adopt the final budget until October 16, 2001. DFA certified the final budget on November 29, 2001.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 10 – Violation of Anti-Donation Clause

Criteria

Article IV, Section 27 of the Constitution of New Mexico, *Extra or increased compensation for officers, contractors, etc.*, states that no law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution.

An Attorney General opinion (No. 57-308) states that retroactive salary increases violate this section of the constitution. Another Attorney General opinion (No. 62-28) states that

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if illegal retroactive salary increases have in fact been made, the public moneys so paid should be recovered back from the recipients thereof.

Attorney General opinions (Nos. 79-2 and 79-7) define donation as a gift, an allocation or appropriation of something of value, without consideration. In *State ex rel. Callaway v. Axtell* (74 N.M. 339, 393 P.2d 451 (1964)), money disbursed illegally must be paid back. - Public moneys are trust funds belonging to the people, and must be reimbursed by the recipient if they are paid out illegally by a public official, even though in good faith; and this is particularly true in a case involving a donation or gratuity.

Article IX, Section 14, of the New Mexico Constitution, the "*Anti-Donation Clause*," states neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation. The City does not have the authority to award a bonus because that would be giving extra compensation to a public servant after the services are rendered and a contract made.

Attorney General opinion No. 60-160 states that the power to make a gift is not included in the powers of municipalities. Municipal corporations are creatures of statute; they have only the powers with which they are invested by the statutes creating them. Powers of cities and towns are set out in this section. No power to make a gift of any kind is mentioned.

Condition

The minutes for the December 17, 1998 meeting indicate the Council approved salary increases for City personnel for bonuses ranging from \$100 to \$500. The minutes for the December 18, 2001 meeting indicate the Council approved a one-time merit increase for all City employees of \$200 for the year 2001. At the December 18, 2001 meeting, the Council again approved \$200 for all employees as a holiday incentive or holiday gift.

The April 17, 2001 minutes indicate that someone asked if ECO Resources used City vehicles. ECO management responded that it was common for ECO to use public works department vehicles. The Council re-visited the vehicle issue at a June 5, 2001 meeting. ECO management stated the ECO contract specified the right to use City vehicles. The Mayor indicated there was no problem using the vehicles. The ECO contract did not have a provision for using City vehicles.

At a June 18, 2002 meeting, the governing body discussed that a former Councilor used the City van to transport senior citizens for a private senior citizens' residence. The Council voiced concerns about the liability to the City and took possession of the van.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 11 – Nepotism and Residency

Criteria

Article V, Section 13 of the New Mexico Constitution requires municipal governing body members to be residents of the political subdivision from which they are elected. Doubt concerning residency is to be resolved in favor of permanency of residence in the precinct wherein one casts his ballot.

Section 3-12-1.1 NMSA 1978, *Election of members of governing bodies; requiring residency*, states if any member of the governing body permanently removes his residence from or maintains no residence in the district from which he was elected, he shall be deemed to have resigned.

Section 10-1-10 NMSA 1978, *Nepotism prohibited; exception*, states it shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment; provided, that this act shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of \$600 or less a year, nor shall it apply to persons employed as teachers in the public schools.

An Attorney General opinion (No. 82-8) states a member of the governing body of a municipality is an "elected public officer" for purposes of the statutory prohibition against nepotism. The brother of a member of the governing body of a mayor-council municipality may be employed as an assistant municipal clerk if the council member abstains from voting to approve his brother's employment.

City Personnel Rules and Regulations Section 3-5-20, *Employment of Relative of City Employee*, states that it is a rule of the City to avoid the practice or appearance of nepotism in employment. For purposes of this rule, relative includes spouse, child, parent, brother, sister, son-in-law, daughter-in-law, parent-in-law, brother-in-law, sister-in-law or first cousin. No person shall be hired in any capacity if related by blood or marriage to the Mayor or Councilors.

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City Personnel Rules and Regulations Section 3-15-1, *Violations*, states:

- A. Any employee of the City who by himself or with others, violates any provisions of these Rules and Regulations is subject to suspension or dismissal, in addition to any other penalty imposed for such violation.
- B. Any member of the governing body, including the Mayor and the Councilors who violates any of the provisions of these Rules and Regulations will be subject to the penalties imposed under New Mexico statutes.

Condition

The former Clerk-Treasurer is the brother of a former Councilor. In a June 17, 1996 letter to the former Mayor, the City attorney stated that statutes prohibit employment of the brother of a Councilor as the Clerk-Treasurer, unless the remainder of the Council approves the appointment. The Councilor related to the appointee must abstain from voting on the appointment. The attorney said the illegally appointed employee is prohibited from being paid a salary. The Mayor refused to remove the former Clerk-Treasurer, although the subsequent Council voted in March 1998 and again in March 2000 to remove him. At an April 18, 2000 meeting, the Council appointed a new Clerk-Treasurer, but the individual never worked at the City and the former Clerk-Treasurer continued on the City payroll until May 13, 2000 when the Council appointed the current Clerk-Treasurer. At a June 18, 2002 meeting, a citizen questioned how the former Clerk-Treasurer could continue to work and be compensated after his termination. The former Clerk-Treasurer replied the compensation was due to a settlement having been made. The payroll records show a lump sum payment of \$3,789 made on May 26, 2000 and a paycheck of \$495.63 for 40 hours on June 2, 2000. The minutes do not indicate approval of a settlement agreement.

A Councilor reported that two Councilors do not reside in the City. They reside in Santa Teresa and Las Cruces. At a May 3, 2001 meeting, one Councilor explained that her spouse had a home in Santa Teresa, but her residency was in the City. The Mayor stated residency is established after five months. The Councilor is married to the Fire Chief, which also violates the nepotism policy. The Councilor does not abstain from voting on budget and salary issues for the fire department. Two current and one former Councilor filed a complaint with the Secretary of State requesting an investigation. The Councilors provided a videotape supporting their allegation of improper councilor residency status to the Secretary of State.

In a September 10, 2001 letter to the Mayor and Council, DFA recommended the City revise its policy regarding signature authorization and require a second signature on checks written to persons having the authority to sign checks. DFA further recommended the City ensure it has a nepotism and conflict of interest policy. In a September 17, 2001 response, the Mayor indicated the addition of an individual to replace the signature of the Mayor or City clerk, when an issue directly involved their department. The response also

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stated the Council was drafting a code of ethics. As of December 17, 2002, the Council had not drafted a code of ethics.

Recommendation

We recommend that the Secretary of DFA suspend the City's Mayor and Governing Council of their duties and take charge of the City. We also recommend turning this matter over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding No. 12 – Published Ordinance and Resolutions Not Approved; Ordinance is Incomplete

Criteria

Section 3-17-3 NMSA 1978, *Notice of publication of certain proposed ordinances*, states:

1. Notice by publication of the title and subject matter of any ordinance proposed for adoption by the governing body of any municipality must take place at least two weeks prior to consideration of final action upon the ordinance in open session of the governing body, except that this section shall not apply to ordinances dealing with an emergency declared by the chairman of the governing body or the mayor, as the case may be, to be an immediate danger to the public health, safety and welfare of the municipality. It is sufficient defense to any suit or prosecution to show that no notice by publication was made.
2. Notice of the proposed ordinance shall be published one time as a legal advertisement in a newspaper of general circulation in the municipality.
3. Copies of a proposed ordinance shall be available to interested persons during normal and regular business hours of the municipal clerk upon request and payment of a reasonable charge, beginning with the date of publication and continuing to the date of consideration by the municipality's elected commission.

According to Section 3-17-4 NMSA 1978, *Ordinances; roll call vote; adoption*, within three days after the adoption of an ordinance, the mayor shall validate the ordinance or resolution by endorsing "Approved" upon the ordinance and signing the ordinance.

Section 3-17-5 NMSA 1978, *Proof of ordinance; authentication; publication; effective date; codification*, states an ordinance shall be recorded in a book kept for that purpose, shall be authenticated by the signature of the presiding officer of the governing body and the municipal clerk and shall bear the seal of the municipality. The ordinance shall be published one time either in its entirety or by title and a general summary of the subject matter contained in the ordinance, whichever the governing body elects to do.

Finding No. 14 – Compensation Not Reported

Criteria

According to Federal Tax Regulation §1.6041-1, *Return of information as to payments of \$600 or more*, fees and other forms of compensation for services rendered aggregating \$600 or more are to be reported. Internal Revenue Service (IRS) Forms 1096 and IRS Forms 1099 are used to report this compensation.

Condition

The City does not have a mechanism to ensure vendors paid \$600 or more receive IRS Forms 1099. The City assigns a vendor identification number to each vendor. The City also uses a miscellaneous vendor number for vendors that the City does not pay very often. During our expenditure review, we noted that the vendor list contained numerous duplicate vendors. In addition, the miscellaneous vendor list contained several duplicate vendors. We noted several vendors on the miscellaneous vendor list that did not receive IRS Forms 1099 as required.

Recommendation

Issue IRS Forms 1099 to vendors and seek IRS guidance on reporting vendor income.

Finding No. 15 – Unreported Income for Vehicle Use

Criteria

Code of Federal Regulations Title 26, Chapter I, Part 1, Section 1.61-21, *Taxation of Fringe Benefits*, requires that personal use of City vehicles be included as part of an employee's compensation. Personal use includes the value of commuting to and from work, even if the employee takes the vehicle home for the convenience of the employer. IRS requirements for record keeping of business miles include keeping a log of the following: a) date, b) beginning and ending mileage, c) destination, d) business purpose, e) personal use mileage, and f) commuting.

Personnel Rules and Regulations Section 3-2-3, *Personnel Duties of the Clerk*, states the Clerk shall recommend to the Mayor and Council such new or revised personnel rules and regulations dealing with reimbursement for travel and related expenses as deemed desirable.

Personnel Rules and Regulations Section 3-3-3, *Mayor, Councilors and Municipal Judge*, states the Mayor, Councilors and Municipal Judge are elected public officials and may not serve as an employee in the classified or exempt service during the terms for which they have been elected and are not subject to these Rules and Regulations.

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Personnel Rules and Regulations Section 3-6-16, *City Vehicle Usage*, states:

- A. It is the policy of the City to provide city vehicles as required for the efficient operation of City business. City vehicles shall not be for personal use except as authorized by the Mayor in writing in advance of the use.
- B. City owned vehicles shall not be taken outside the City limits unless they have prior written permission signed by the Mayor.
- C. Employees who regularly use City vehicles will be assigned specific vehicles. During business hours when the assigned vehicle is not in use, it should be made available to other City employees who may require the use of it.
- D. Except when an employee is required to be on stand-by or on call, use of a vehicle after normal working hours is prohibited unless otherwise approved by the Mayor. Department Directors shall be responsible for assuring that vehicle usage is not abused.
- E. Abuse of a City owned vehicle by an employee might result in the loss of assignment or withdrawal of authorization to operate the vehicle and possible dismissal of the employee from service in the City, depending upon the severity of the abuse.

Vehicles bought with governmental funds should carry governmental license plates unless they are undercover vehicles such as police cars.

Condition

The April 6, 1999 minutes indicate a citizen complained that the City was using the senior citizen van for purposes other than to transport senior citizens. The Mayor told staff not to lend the senior citizen van to any individual, and if an individual takes the vehicle outside the City, the Mayor's approval is necessary, per the City's Personnel Rules and Regulations.

In a May 17, 2001 letter to the Assistant Attorney General, Councilors complained that the Mayor used a vehicle for personal use and not for City business only. The City purchased the vehicle using police fund monies for the police department's use.

The June 19, 2001 minutes indicate the Council postponed the formation of a committee to create a City ordinance regarding use of City vehicles. The Council moved that the Clerk-Treasurer provide copies of the personnel ordinance to the Council. The ordinance contains language on the use of City vehicles. On July 3, 2001, the governing body considered a motion to form a committee to create an ordinance on the use of City vehicles. The motion failed.

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In a September 10, 2001 letter to the Mayor and Council, DFA recommended the City develop a policy regarding the use of City vehicles. In a September 17, 2001 response, the Mayor provided a copy of the vehicle policy. The policy only covered employee use of City vehicles.

A Councilor voiced concerns over the Mayor's unauthorized use of City vehicles. The Mayor responded that he used the vehicles to undertake the functions and responsibilities of the Mayor. At a June 18, 2002 meeting, the governing body stated the City needed a policy for the governing body's use of City vehicles. The Mayor suggested the City contact the City attorney for recommendations on a policy. The City has not brought a policy to the Council for approval.

Recommendation

Personal use of vehicles is additional compensation and should be reported on W-2 forms.

Finding No. 16 – No Records Retention Policy

Criteria

Section 3-10-8 NMSA 1978, *Officers; delivery of records*, states that any officer who vacates his office shall forthwith deliver to his successor all money, records, property or other things in his charge and belonging to the municipality.

City Resolution No. 99-11, *A Resolution Approving and Establishing a Records Management Program for the City of Sunland Park, New Mexico*, states the City hereby adopts the Records Retention and Disposition Schedules as developed by the Records Management Division of the State Records Center and Archives, as a guide to records retention.

Condition

The Clerk-Treasurer stated that the City does not have a written records retention policy. The March 2, 1999 minutes indicate the Council approved a resolution establishing a records management program. According to a City Councilor, the Clerk-Treasurer uses a personal laptop for City related business. The City needs to ensure the City related information on the personal laptop is the property of the City, the City protects the information and the City ensures the information will be passed on to a successor should the Clerk-Treasurer vacate office.



Recommendation

The City should adopt a formal records retention policy that includes the retention of minutes of official meetings.

Finding No. 17 – Employee Evaluations Not Performed

Criteria

City Personnel Rules and Regulations Section 3-5-22.E, *Performance Evaluation*, states the performance of probationary employees shall be appraised on a quarterly basis. Permanent employees shall be evaluated annually prior to July 1 of each year. Section 3-5-22.H, states all performance appraisal reports and addendum, if any, shall be distributed to the employee, Department Director, Council and to the Clerk for the employee's permanent file.

City Personnel Rules and Regulations Section 3-15-1, *Violations*, states:

- A. Any employee of the City who by himself or with others, violates any provisions of these Rules and Regulations is subject to suspension or dismissal, in addition to any other penalty imposed for such violation.
- B. Any member of the governing body, including the Mayor and the Councilors who violates any of the provisions of these Rules and Regulations will be subject to the penalties imposed under New Mexico statutes.

Condition

The City has not performed annual employee evaluations. In most cases, the City has not performed the annual employee evaluation for two years.

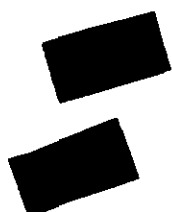
Recommendation

The City should perform employee evaluations in accordance with its personnel rules and regulations.

Finding No. 18 – Lack of an Organizational Chart

Criteria

City Personnel Rules and Regulations Section 3-2-2.B, *Chain of Command*, states the Department Directors referred to in the Personnel Rules and Regulations are those persons designated on the staffing organizational chart, as adopted from time to time by the City Council, and which is by reference incorporated herein. The organizational chart is available to all employees by contacting the Clerk-Treasurer. Section 3-8-7,



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Reorganization, states all reorganization must be approved by the Mayor with the approval of the Council. Following any reorganization the Clerk shall update the organizational chart in a timely manner.

City Personnel Rules and Regulations Section 3-15-1, *Violations*, states:

- A. Any employee of the City who by himself or with others, violates any provisions of these Rules and Regulations is subject to suspension or dismissal, in addition to any other penalty imposed for such violation.
- B. Any member of the governing body, including the Mayor and the Councilors who violates any of the provisions of these Rules and Regulations will be subject to the penalties imposed under New Mexico statutes.

Condition

The City did not have a staffing organizational chart.

Recommendation

The City should have a staffing organizational chart in accordance with its personnel rules and regulations.

Because the above procedures do not constitute an audit conducted in accordance with auditing standards generally accepted in the United States of America, we do not express an opinion on any of the accounts of the City. Had we performed additional procedures or had we conducted an audit of the financial statements of the City in accordance with auditing standards generally accepted in the United States of America, other matters might have come to our attention that would have been reported to you. This report only relates to the procedures specified above and does not extend to any financial statements of the City taken as a whole.

Office of the State Auditor

OFFICE OF THE STATE AUDITOR

In chronological order, events that occurred regarding the \$2 million loan are as follows:

Date	Activity
08/16/96	The City filed a petition to condemn certain STSC assets to construct, reconstruct and improve public water and sewer utilities for public purposes. The petition did not mention problems with contamination of the aquifer. <i>[Auditor Note: The STSC assets were part of the Chapter 11 Bankruptcy filed January 26, 1996 in the Phyllis Crowder Bankruptcy Estate, later converted to a Chapter 7 Bankruptcy Trustee. The courts entered a final judgment on the STSC assets. Dona Ana County and others filed an appeal, staying the payment of the judgment. The Court of Appeals ruled in the City's favor in June, 2003.]</i>
04/16/98	Minutes indicated that the County wanted to provide its own utility system to Santa Teresa.
06/01/98	The governing body adopted a resolution of intent to issue \$7.5 to \$10 million in water and sewer revenue bonds. The bonds would provide bridge financing in anticipation of permanent financing in the form of grants and loans from the Binational Economic Cooperative Commission. The City did not have minutes for this meeting.
08/28/98	The governing body approved the transfer of a dispenser liquor license to Jack Pickel at the port of entry.
09/18/98	Minutes indicated discussion of an ECO proposal that included a grant to the City to purchase STSC. The Mayor indicated there were no other funding sources available. Minutes indicated Santa Teresa residents would need to adopt the City utility rate structure.
12/03/98	The governing body authorized the Mayor and attorney to pursue revenue bonds to purchase STSC and water rights.
05/10/99	The governing body disapproved the County Memorandum of Understanding (MOU) for joint City-County ownership and operation of STSC.
06/19/99	The governing body reaffirmed the August 16, 1996 authority to condemn STSC assets. They discussed the City's plan to acquire 2,500 acre-feet a year (afy) water rights on completion of the condemnation and the City's \$1.8 million grant from ECO.
02/07/00	In the Findings of Fact, the Court determined that 2,500 afy of water rights were included in the assets the City sought to condemn.
05/23/00	A jury trial set the value of the STSC assets at \$2 million.
06/08/00	Minutes indicated discussion of a Joint Powers Agreement (JPA) with the County for a joint utility system and the City's use of water and wastewater revenues to repay bonds.
08/08/00	The governing body authorized the Mayor to request a one-week extension from the bankruptcy judge to negotiate further for a regional JPA.

Date	Activity
09/25/00	The judge required the City to pay compound interest to STSC because of the August 16, 1996 resolution.
10/03/00	The governing body accepted the Trustee's counteroffer to take possession of STSC assets within 45 days. The condemnation agreement required the City to pay \$8,000 per month for 180 days, then \$13,000 thereafter, until the \$2 million judgment amount was paid. The governing body also approved the MOU with the County for a regional water and sewer utility. The City paid \$72,000 to STSC in interest payments.
10/04/00	In a letter to the Mayor, bond counsel questioned whether an election was needed to issue bonds and if PRC approval was required. The City attorney opined that an election was not necessary and PRC did not have jurisdiction. Bond counsel continued to advise the City that it must take issuance of bonds to an election.
10/06/00	In a letter to bond counsel, the City attorney indicated one of the primary reasons for condemning the STSC assets was the continued unlawful discharge of untreated effluent by that sewer plant into the City's aquifer.
10/30/00	The City attorney advised the Mayor and Council that the regional water and sewer utility would require the County to amend its bond terms. The County bond would retain first lien priority.
11/08/00	The Court entered the condemnation judgment for the City to take possession on November 24, 2000. The Court granted the City the right to immediately enter, occupy and operate STSC. ECO filed a complaint requesting the City pay for the condemnation before taking possession of STSC. The City and STSC agreed to amend the agreement to change the date of possession to December 15, 2000.
11/27/00	In a letter to the Mayor and Council, the City attorney suggested the City negotiate with ECO because the Trustee wanted to sell STSC to a third party and the City did not qualify for USDA Rural Utility Service (RUS) funding because utility revenues were used to secure \$500,000 of a proposed \$2.8 million RUS loan. The City already had \$900,000 in RUS loans be paid from utility revenues.
12/05/00	RUS informed the City that RUS would not approve the funding if the transfer of assets to the regional utility affected the water and wastewater rates of City residents.
12/14/00	In a letter to the Mayor, a Councilor expressed concerns with the City's preparation to take over the STSC and City utilities. The Councilor also asked why the City had not repaired Well No. 6, as the governing body previously approved the repair.

Date	Activity
12/14/00	In a letter to the City attorney, a consulting attorney questioned the legality of the ECO grant. The attorney stated there appeared to be no express sanction for such a transaction in the constitution or statutes, and there were due process concerns. The grant represented an unsecured indebtedness of the City, to be repaid out of management fees the City would pay to ECO.
12/19/00	The governing body approved the bond service agreement and bond ordinance related to RUS requirements and to the \$2.8 million grant and loan. The City attorney was to clarify whether the City owned the property.
12/23/00	The governing body approved a moratorium of City Ordinance 8-3-5 to set outside City water and sewer rates to allow a one-rate structure for all utility customers. The Mayor indicated he was committed to create one rate structure for inside and outside residents. The City began charging STSC customers at City rates.
02/13/01	In a letter to the Mayor and Council, the attorney indicated the City had not acted to obtain bonds and failed to compile necessary financial information.
02/19/01	In a letter to the Mayor, the City attorney stated the City published and posted an ordinance approving the ECO grant to acquire STSC assets, without prior Council approval.
02/20/01	In a letter to the City attorney, the attorney representing the intervenors stated the ordinance and ECO grant were illegal. The New Mexico Board of Finance confirmed that the constitution does not allow a municipality to borrow funds from a private entity.
02/26/01	In a letter to a Councilor, bond counsel questioned the legality of the ECO grant. Counsel concluded that financing of the City's acquisition of STSC assets under the proposed ordinance and contract was not within the powers of the City and would be void if attempted.
02/27/01	The governing body approved the ordinance declaring intent to obtain a \$2 million grant from ECO to acquire STSC.
03/05/01	A court order allowed the PRC case to go forward because the City would not own STSC until the City paid for the STSC assets. The PRC declared void, the rate increase imposed on STSC customers. ECO credited the overpaid amounts to Santa Teresa residents.
04/18/01	In a letter of conditions, RUS approved a \$2,156,000 loan on April 18, 2001. The conditions indicated the City would arrange for interim financing, if legally permissible.
04/27/01	In a USDA Rural Development Project Announcement, RUS approved a \$2,156,000 Rural Development Fund loan to acquire STSC.
04/30/01	Minutes indicate the governing body approved the RUS loan resolution to acquire STSC.
05/07/01	The City published notices of consideration of an ordinance of intent to borrow \$2 million as interim financing. The notary publics' dates on the notices were May 16 and June 5, 2001.

Date	Activity
05/17/01	In a letter to the Attorney General's Office, a Councilor and the Mayor Pro-Tem complained that the Mayor refused to allow the City engineer to pursue work that the Council had approved and directed, with reference to establishing a JPA with the County. In addition, the letter stated the City was currently seeking funds for a condemnation and the Mayor was engaging in negotiations without Council knowledge or approval.
05/21/01	The governing body approved an ordinance declaring intent to borrow \$2 million as interim financing and repay the interim financing with an RUS loan. The ordinance stated the City must pay the Trustee on May 24, 2001. The ordinance further stated that if RUS did not fund the loan, the City would secure the loan with a pledge of all utility revenues generated by the City. The City published the notice of the ordinance on May 30, 2001.
05/23/01	The Mayor accepted a Wells Fargo proposal for a \$2 million tax-exempt note-purchase program loan for six months, ending November 23, 2001, at 4%, secured by the RUS loan or a pledge of all utility revenues. In a letter to Wells Fargo, the City attorney stated the City's performance of the terms of the Note would not violate any laws or regulations. The City deposited the Wells Fargo \$2 million loan proceeds in the Third Judicial District Court registry.
05/26/01	The governing body approved an ordinance to issue and sell up to \$2,156,000 of revenue bonds to finance costs incurred in acquiring STSC assets. The City was to use utility revenues to pay the principal and interest on the bonds. The ordinance stated that the condemnation court awarded possession of the STSC assets to the City. The Mayor did not sign the ordinance.
06/13/01	In a letter to the Mayor, DFA sought information on the legal authority of the City to incur debt of \$2 million from Wells Fargo and sources the City was contemplating to repay the debt. DFA indicated the laws governing municipalities did not appear to allow general borrowing authority without issuance of bonds. DFA also stated the City did not submit a request to approve an increase in the City's budget for these funds. The City attorney responded to DFA that the RUS loan terms specifically authorized interim financing. The RUS loan terms stated that the City would arrange for interim financing, if legally permissible. The RUS loan terms also required evidence of title to property and water rights.
06/27/01	The minutes indicate the governing body approved a resolution requesting a budget increase to pay \$80,000 in interest payments on the STSC assets acquisition loan. The City had not received authority to increase its budget for this expenditure.

Date	Activity
07/11/01	In a follow-up letter to DFA, the City attorney stated the interim loan principal was in the Third Judicial District Court registry because the County filed a notice of appeal of the condemnation judgment and PRC approval of revenue bonds was pending. In addition, if DFA were to hold that the City lacked authority for the interim loan, the City's default would result in abandonment of the condemnation. The City attorney recognized that DFA and the City did not agree on interpretation of the Bateman Act and if the interim loan was deemed to be void, Section 6-6-15 NMSA 1978 would permit the repayment of that obligation when the permanent RUS loan was funded.
07/17/01	Minutes indicated the Mayor asked ECO and City Finance to combine reporting of the STSC and City utility accounts and integrate the funds as of August 1. The Mayor explained that the Court finalized the condemnation. The City again began charging City rates to Santa Teresa residents in August 2001.
07/17/01	The governing body approved an increase in the budget to reflect the interest the City owed on the \$2 million loan. The City had not received authority to increase its budget for this expenditure.
07/23/01	DFA approved a budget increase for the interest on the loan and the attorney determined no further DFA approval was necessary.
07/26/01	<p>DFA stated they did not believe the City possessed sufficient and specific statutory authority to borrow funds from a private entity for acquisition of a utility for the following reasons:</p> <ol style="list-style-type: none"> 1. An Attorney General Opinion dated April 27, 1999 held that once a municipality owns [emphasis added] a utility, no election is required before the city may issue revenue bonds to acquire assets intended to improve or expand the utility. However, the interim loan did not involve issuance of revenue bonds. The interim loan was a separate transaction entered into prior to the issuance of bonds. 2. DFA could not find any authority that would allow a municipality to incur debt for the purchase or expansion of a public utility other than through general obligation or revenue bonds. 3. The legislature set forth the process to acquire or expand a utility, but this process does not include interim financing from private sources. Otherwise, a local government could circumvent the requirement of voter approval and the issuance of revenue bonds prior to acquisition. <p>Regardless, DFA approved the \$80,000 budget increase because the City was to repay the loan from an RUS loan and the water fund, and because the City would incur financial liability should it default on the loan. However, DFA cautioned the City that they should not construe the budget increase approval as DFA approval of this type of debt.</p>

Date	Activity
07/26/01	The City argued that Section 3-18-1(B) NMSA 1978 grants cities the authority to contract for short-term debt, and suggested DFA amend its draft letter to indicate DFA reluctantly approved the budget increase. The City also argued that the City approved the interim loan before DFA objected to the loan. According to a concerned attorney, at the time the Council approved the borrowing, it did not appear that the Council even knew of the DFA objections.
11/08/01	The City paid \$20,000 in settlement of the condemnation interest claim, but the City did not present the settlement payment to the Council for prior approval.
11/13/01	The City paid Wells Fargo \$40,000 in interest on the interim loan. The City amended the interim financing terms and extended the note to May 23, 2002.
11/14/01	In an internal memo to the Clerk-Treasurer, an employee stated Wells Fargo requested the City provide a new resolution to authorize an extension to the loan, a City attorney opinion and a letter from RUS reconfirming the RUS Letter of Conditions. RUS was holding the loan closing until the City provided evidence that no pending litigation adversely affected the purchase or the RUS lien position. The City attorney opined that governing body approval was not necessary for the loan extension.
11/21/01	The City paid Wells Fargo \$10,000 to extend the loan, but the City did not present the loan extension to the Council for prior approval.
11/30/01	In a letter to the Mayor, the City attorney indicated the intervenors in the condemnation filed a complaint against the City claiming the interim loan was not a legal loan. The City attorney stated that it was not clear that the loan would withstand the scrutiny of the court. DFA also indicated the City had no authority to make the loan.
02/01/02	The PRC ordered the City to charge STSC's former customers at the rates that had been approved by the PRC and immediately refund the difference between the rates to the STSC customers. [<i>Auditor Note: The City has not refunded the difference.</i>]
04/09/02	The governing body authorized the City engineer and ECO to give the public due notice of a rate increase.
04/16/02	The governing body approved a resolution to increase wastewater user rates to comply with RUS loan requirements, and to include other options to meet loan requirements. A Councilor asked why the City did not bring the rate increase plan to the Council for approval. The City engineer stated it was due to the timeframe in order to prevent the contractor's bid from changing and to secure the RUS funding.
05/02/02	Wells Fargo submitted a renewal proposal.

Date	Activity
05/13/02	A property owner gave the City notice of legal action for trespassing. The Mayor authorized the filing of a condemnation action to drill a replacement well. On May 13, 2002, the City settled a lawsuit on Well No. 8 for \$75,000. The City did not present the settlement to the Council for prior approval.
05/15/02	In a letter to the Mayor, the City attorney stated the City would move forward to renew the interim loan for another year. The RUS loan was pending final Court of Appeals action on the condemnation. There was a legal question on the City's ability to acquire the property. The attorney recommended the City include the renewal as an action item on the next meeting agenda.
05/20/02	The City paid Wells Fargo \$40,000 in interest on the interim loan. The invoice indicated the City was to refinance the loan. The Mayor accepted the Wells Fargo loan renewal proposal on May 20, 2002.
05/21/02	The minutes indicate the Mayor mentioned an interim loan pending with Wells Fargo might need action later.
05/21/02	In a letter to the Mayor, the City attorney stated the Council should approve the loan extension. Because the loan is the subject of a lawsuit, it was critical for the City to proceed with extra caution.
05/22/02	The City paid Wells Fargo \$20,000 for the interim loan renewal fee.
05/23/02	The Mayor approved an interim financing note extension for one year.
05/23/02	In a letter to Wells Fargo, the City attorney indicated the Council would authorize the interim loan extension for an additional twelve-month period at the May 28, 2002 special meeting.
05/28/02	The minutes indicate the governing body ratified the Mayor's action to renew the interim loan. A Councilor requested the City attorney clarify the legality of the loan. The City attorney responded that there was nothing to prevent the City from extending the instrument.
05/29/02	In a letter to DFA, the City attorney indicated the City had renewed the interim loan for one year. The letter also indicated the PRC approved the terms and conditions of the RUS bonds and the Third Judicial District Court dismissed the complaint that alleged the interim loan was illegal.
06/18/02	The governing body approved a bond ordinance for Joint Water and Wastewater System Improvement Revenue Bonds, Series 2002, in the amount of \$500,000, payable from net revenues derived from operation of the system. Bond counsel indicated City Ordinance 02-02 stated that if the City became unable to pay the debt service on any outstanding bonds payable from pledged revenues, including Series 2002 bonds, and was unable to increase system revenues through other means, the City was obligated to increase system rates to cover annual debt service, operation and maintenance expenses of the system, and funding of a reserve fund.

Date	Activity
07/01/02	The Court of Appeals dismissed the appeal on the interim loan because it was untimely. Because the case was consolidated with the condemnation case, this case was ongoing and the court's order was not a final decision. The renewed interim loan became due May 23, 2003.
07/16/02	In closed session, the governing body discussed potential litigation resulting from passage of County ordinances purporting to establish exclusive water and wastewater service areas. Since negotiations failed, the governing body authorized the City attorney to take whatever action necessary to protect the City's interests.
07/30/02	The governing body approved the final Fiscal Year 02-03 budget and created a line item to reflect the RUS Wells Fargo interim loan principal and interest payments.
09/05/02	In a letter to the DFA attorney, the City attorney requested the DFA attorney to issue an opinion on the County's agreement with the bankruptcy trustee to purchase all shares of STSC stock for \$350,000. DFA declined to issue an opinion.
09/18/02	The Clerk-Treasurer provided DFA the status of the interim loan. The City provided assurance that adequate financing was available to repay the loan and the RUS revenue bonds.
11/06/02	ECO purchased STSC debt on November 6, 2002 to establish standing to participate in legal proceeding against Dona Ana County's purchase of STSC stock. The U.S. Bankruptcy court denied the City and ECO's objections to the County's stock purchase because the City and ECO purchased their standing after the expiration of time to object, and because the parties did not have any interest in the STSC stock.
11/12/02	The City purchased standing by purchasing the debt of one of STSC's creditors for \$5,849. The City attorney purchased the debt with the understanding that the City would reimburse the attorney through the attorney's monthly invoices. The City did not present the transaction to the Council for approval or obtain DFA approval.
11/21/02	In a letter to DFA, the County reported that the City and ECO purchased debt of STSC creditors in order to obtain standing in a legal proceeding against the County's purchase of STSC shares of stock.
11/27/02	The PRC filed a brief stating that the City did not own the STSC utility. The City was under PRC jurisdiction because a municipality must both own and operate [emphasis added] a utility for it to fall outside PRC jurisdiction. Therefore, the City did not have an existing right to increase water and sewer rates for people who live in nearby Santa Teresa. (Title in the condemned property vests after the court clerk certifies upon judgment that the City paid the \$2 million.)
02/26/03	In a letter to DFA, the Mayor proposed to repay the Wells Fargo loan with City general fund and enterprise funds. The City planned to repay the general fund from water and wastewater revenues.