



State of New Mexico
OFFICE OF THE STATE AUDITOR

Domingo P. Martinez, CGFM
State Auditor

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Deputy State Auditor

March 14, 2006

Mr. Brian D. Haines, County Manager
and Members of the County Commission
Dona Ana County
180 West Amador Avenue
Las Cruces, NM 88001-1202

Dear Mr. Haines and Members of the County Commission:

The Office of the State Auditor (Office) conducted an audit of financial practices pertaining to Dona Ana County to determine if proper procedures were followed. The Audit Act (Section 12-6-3 NMSA 1978) gives the State Auditor the authority to perform special audits of the financial affairs and transactions of an agency, in whole or in part, in situations deemed necessary. The Office of the State Auditor conducted interviews and reviewed County policies and practices, financial reports, data and transactions.

On November 19, 2004, the Office sent Third Judicial District Attorney Susana Martinez the Dona Ana County special audit report concerning irregularities found during the said audit. This Office is required by the provisions of §12-6-6, *NMSA 1978* of the Audit Act to forward to the proper prosecuting official those reports or matters revealed during a financial examination that appear to involve allegations of criminal wrongdoing in connection with public monies. On July 5, 2005, this Office was informed that District Attorney Martinez referred the special audit to District Attorney Henry Valdez. On October 17, 2005, the Office was informed District Attorney Valdez forwarded the report to the State Police to investigate the findings. The Office met with the State Police on October 28, 2005. Nothing transpired since then. On January 20, 2006, the Office informed District Attorney Valdez that while we do not wish to interfere with or inhibit any official work regarding this audit, we believe that it is equally important for the Office to make its findings public, in carrying out our constitutional and statutory mandates. Therefore, we proposed to release the audit report for public dissemination and consumption, in accord with the procedures set forth in §12-6-6, *NMSA 1978* if we did not hear from the district attorney within fifteen days of January 20, 2006. We did not receive anything that requested we delay the release of the report any longer.

On February 24, 2006, the Office provided the County with a confidential, draft copy of the report. The Office asked the County to respond only to the B-Section findings.

In a letter dated March 9, 2006, County management provided the Office with responses to the B-Section findings (findings labeled B-04-04 through B-04-14). We incorporated those responses into the enclosed report.

As indicated in the report, we are recommending that A-Section findings (findings labeled A-04-01 through A-04-03) be turned over to a prosecuting authority for further investigation. Therefore, the Office did not solicit responses from the County for these findings. Should the prosecuting agency notify our Office that it is declining to prosecute, we will provide the County an opportunity to respond to the A-Section findings and any other matters in the report as deemed necessary. At that time, the Office will consider those responses for inclusion and may reissue the report.

Please be aware that the attached report is not a public record. The report does not become a public record until 10 days after the attached report is provided to the County. That date is March 28, 2006. The County can ask for a waiver of that 10-day waiting period, but must do so in writing addressed to the State Auditor.


DOMINGO P. MARTINEZ, CGFM
STATE AUDITOR

Enclosure-March 14, 2006 Audit Report

Cc: Honorable Henry R. Valdez
John M. Paternoster



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and Members of the Board of County Commissioners
Dona Ana County
180 West Amador Avenue
Las Cruces, New Mexico 88001-1202

Dear Mr. Haines:

The Office of the State Auditor ("Office" or "OSA") conducted a special audit of alleged improprieties involving financial affairs and selected financial transactions at Dona Ana County ("DAC" or "County"). The following sections provide an overview of the audit, the audit scope and methodology, background, audit results, and findings and recommendations.

OVERVIEW

The Office became aware of allegations of internal control weaknesses and financial improprieties through several complaints to our Office by concerned citizens. The complainants reported that the Board of County Commissioners ("BOCC") and the DAC violated the ordinance and resolution under which bonds were issued for water and wastewater systems in Santa Teresa, New Mexico, and improperly procured the services of an architectural firm. The complainants also reported possible violations with the purchase of land for the new county complex, contract violations pertaining to the detention center and violations in the handling of solid waste fees. Based on the allegations, the Office conducted a special audit.

The Audit Act (Section 12-6-3 NMSA 1978) gives the Office the authority to perform special audits of the financial affairs of an agency, in whole or in part, in situations deemed necessary.

SCOPE AND METHODOLOGY

1. We met with the BOCC, the DAC County Manager, Director of Financial Services and other employees to validate alleged improprieties.

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2. We reviewed selected DAC financial records from July 1, 2001 to June 30, 2004, board minutes, pertinent ordinances and resolutions, the DAC's Purchasing Manual, and Human Resources Manual.
3. We judgmentally selected financial transactions for review.

BACKGROUND

On March 18, 2004, the OSA sent a letter to the DAC's contract auditor regarding the allegations. Due to the response provided by the DAC's contract auditor, the OSA released the financial audit report. However, allegations and additional information continued to surface; and on May 3, 2004, our Office sent the DAC a letter informing them of our intent to conduct a special audit.

SUMMARY OF AUDIT FINDINGS

Based on procedures performed and evidence examined with regard to financial improprieties, internal controls necessary to prevent and discourage fraud were not evident. In an environment where there is a lack of adequate controls, opportunities for fraud exist. There is opportunity for people to use their positions for personal enrichment through the deliberate misuse or misapplication of the organization's resources or assets.

Based on procedures performed and evidence examined, we recommend the following matters be turned over to the proper prosecutorial authority having jurisdiction to completely investigate these conditions. These are identified as Section A Findings:

1. The DAC set up a loan agreement with landowners to repay the Series 1999 Bonds issued under Ordinance No. 185-99 and Resolution No. 99-80. Bond repayment per the official offering statement was to be made from pledged revenues defined in County Ordinance No. 185-99. We recommend this matter be turned over to the proper prosecutorial authority having jurisdiction to completely investigate this condition. We also recommend the DAC comply with ordinances and resolutions.
2. The DAC improperly used Series 1999 Bond proceeds to pay expenses that were not allowed. The purpose for the bond was a Santa Teresa water and wastewater system. Some proceeds were used for other water and wastewater purposes. We recommend this matter be turned over to the proper prosecutorial authority having jurisdiction to completely investigate this condition. We also recommend the DAC repay the bond fund for all inappropriate payments and implement controls to prevent recurrence.

3. The BOCC and the DAC may have intentionally violated the Procurement Code in procuring the services of an architectural firm for the new county complex. We recommend this matter be turned over to the proper prosecutorial authority having jurisdiction to completely investigate this condition. We also recommend the County Commissioners and County Manager follow applicable state statutes and policies and procedures. We recommend the County negotiate with final bidders.

Findings we recommend not be turned over to the proper prosecutorial authority, but require a response from the County are identified as Section B Findings. Section B Findings are summarized below:

4. The OSA found several instances of behavior unbecoming to public officials and employees. We recommend the DAC comply with state statute and the DAC Code of Conduct. We recommend the BOCC and DAC promote an atmosphere where fraudulent activity can be reported openly.
- 5/6. The DAC purchased land for the new county complex that is adjacent to the City of Las Cruces. The DAC did not get land appraisals from a licensed appraiser for the land purchased for the new county complex. The DAC did not enforce the criteria on the Request for Information when it selected the land site. We recommend the DAC staff fully research legal issues affecting decisions made by the BOCC and that measures are taken that ensure that the interests of the County's taxpayers are protected.
7. The DAC did not have key land acquisition documentation. We recommend the County ensure it possesses key documents.
8. The DAC failed to properly approve and enforce County Detention Center contracts. We recommend the DAC execute contracts in accordance with state statutes and county policies. We recommend the DAC properly review contracts for completeness.
9. The DAC does not abide by the Procurement Code in procuring the services of bond attorneys. We recommend the DAC follow the Procurement Code and DAC policies in procuring services provided to the County.
10. The DAC uses private property to store county equipment without written agreements. In exchange, the DAC restores the property to its original condition. We recommend the DAC develop policies and procedures for this activity. The policies and procedures should ensure that safeguards exist to preclude abuse or misappropriation of assets.
11. The DAC did not bill for solid waste fees from March 2003 through January 2004 as required by County ordinance. We recommend that DAC staff research legal issues prior to implementing decisions of the BOCC.
12. The DAC incorrectly assessed flood levy fees. The error resulted in an overcharge to taxpayers. The BOCC was not aware of the overcharge. We recommend the DAC ensure that tax assessments are properly tested and that matters affecting the County budget be reported to the BOCC.

13. The BOCC violated the Open Meetings Act. We recommend the BOCC seek training from the State Attorney General and follow the Act in conducting meetings.
14. The DAC made incorrect payments to a water association for \$1,203.09 and to its contract auditor for \$4,107.16. The water association has not reimbursed the County the overpayment. The contract auditor reimbursed the County its overpayment on May 12, 2004. The president of the water association is on the BOCC. We recommend the DAC take more care in the handling of payments and that such payments are checked against contracts and purchase documents.

FINDINGS AND RECOMMENDATIONS

The following findings are separated into two sections. Section A findings are those that we recommend be turned over to a prosecutorial authority having jurisdiction to fully investigate the findings. Section B findings are those that we are recommending be turned over to the County for corrective action.

SECTION A FINDINGS

Finding A-04-01 VIOLATION OF BOND COVENANTS—BOND REPAYMENT

Condition: After the County authorized the issuance and sale of \$6,000,000 in bonds in 1999, the County subsequently entered into a separate Agreement with landowners to pay for the principal and interest due on the bonds. The landowners' guarantee that is addressed in both the Agreement and a subsequent Amended Agreement, in effect created a loan arrangement with landowners. The County is to repay the landowners any amounts provided by the landowners plus three percent interest. Such an arrangement was not provided for in either the Ordinance or Resolution the County had adopted for issuing the bonds. County records show that Paseo del Notre Limited Partnership provided the County \$269,474.39 on May 1, 2003 and the Verde Group (Verde Realty MLP) provided the County \$270,799.39 on April 9, 2004. These payments were recorded in the Gross Receipts Tax Fund. The County makes transfers out of the Gross Receipts Tax Fund to the Debt Service Fund to repay the principal and interest on the \$6,000,000 bonds. Pledged revenues as defined by County Ordinance No. 185-99 are not being used by the County to pay the principal and interest of the \$6,000,000 bond issue.

Criteria: The issuance and repayment of the bonds must comply with the Ordinance, Resolution, and official offering statement authorizing the bonds.

County Ordinance No. 185-99, adopted and approved October 13, 1999, authorized the issuance of \$6,000,000 Doña Ana County Water System/Gross Receipts Tax Revenue Bonds for the purpose of: "purchasing, constructing or otherwise acquiring, water and

wastewater systems including the acquisition of water rights and related facilities... The bonds will be payable and collectible **solely from the pledged revenues**” [emphasis added].

The Board made a finding that “**Pledged Revenues** [emphasis added] may lawfully be pledged to secure the payment and redemption of the Bonds.”

Pledged revenues are defined as, “collectively, the Project Revenues and the Equalization Gross Receipts Tax Revenues.” Project Revenues are defined as, the net revenues of the System which are pledged to the payment of the Bonds....” Equalization Revenues are revenues received by the County from the New Mexico Department of Taxation and Revenue.

County Ordinance No. 185-99 stipulated that “the Bonds shall not...be considered or held to be a general obligation of the County, and each of the Bonds shall recite that it is payable and collectible solely out of the Pledged Revenues....”

According to final disclosure document (Official Statement) relating to the issuance and sale of the bonds, “The Bonds are to be issued pursuant to County Ordinance No. 185-99 adopted by the County Commission on October 13, 1999 (the “Ordinance”) and County Resolution No. 99-80 adopted by the County Commission on November 9, 1999 (the “Sale Resolution”).

Section 21 of the Ordinance contained the following:

“**There shall be charged against all users rates and amounts** [emphasis added], which shall be increased from time to time if necessary, reasonable and competitive in the System’s service area, **sufficient to produce revenues to pay the annual operation and maintenance expenses and 120% of the combined average annual principal and interest requirements** [emphasis added] on all outstanding Parity Bonds and other parity obligations payable from the Pledged Revenues.”

Cause: Soon after the Ordinance and Resolution were adopted, an Agreement was signed by the County and two private partnerships. The Managing Director of Paseo Del Norte Limited Partnership (Fairfax Properties, Inc.—General Partner) signed the Agreement on November 2, 1999; the President of Santa Teresa Limited Partnership (Santa Teresa Airpark, Inc.) signed the Agreement on November 3, 1999; and the County Manager signed the Agreement on November 9, 1999. According to this Agreement, “The Utility System Revenue shall be the primary source of payment of the Revenue Bonds. **The second source of payment of the Revenue Bonds shall be the Land Owners’ guarantee** [emphasis added] and the third will be the proceeds of the County’s [equalization] tax” This added a new source of bond repayment that was not in the Ordinance and Resolution that authorized the bonds.

An Amended and Restated Agreement was signed by the County Manager on November 24, 1999; the President of Santa Teresa Limited Partnership (Santa Teresa Airpark, Inc.) on December 14, 1999; and by the Managing Director of Paseo Del Norte Limited Partnership (Fairfax Properties, Inc.—General Partner) on December 31, 1999. According to the Amended and Restated Agreement, “The Utility System Gross Revenues shall be the primary source of payment of the Revenue Bonds. **The other source of payment of the Revenue Bonds shall be the Land Owners’ guarantee** [emphasis added] and the proceeds of the County’s [equalization] tax”

In its Official Statement, the County had anticipated the following Santa Teresa combined commercial and residential customer base:

- 12 customers in 2001 providing an income of \$306,110;
- 425 customers in 2002 providing an income of \$2,568,550;
- 455 customers in 2003 providing an income of \$1,263,100;
- 688 customers in 2004 providing an income of \$2,414,170; and
- 810 customers in 2005 providing an income of \$2,273,455.

These numbers were to alleviate or lessen the need for County taxpayers to pay for Santa Teresa water and wastewater, but the numbers did not materialize.

Effect: For the County’s taxpayers, the real cost of paying for the Santa Teresa water and wastewater Series 1999 Bonds principal and interest payments are not be the amounts that are shown in bond documents. The principal and interest payments are to be paid with Santa Teresa water and wastewater user fees and the Equalization Gross Receipts Tax. However, if the landowner’s provide the County funds to pay the principal and interest, the County will be required to repay the landowners the amount borrowed, plus three percent interest. Bond purchasers, bond ratings and county budgets can be adversely affected. Doña Ana County taxpayers may need to bear the cost of repaying the landowners, even though the ordinance requires bond repayment to come from the Santa Teresa residents who benefit from the bond proceeds.

Recommendation: We recommend this matter be turned over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

Finding A-04-02 IMPROPER BOND EXPENITURES

Condition: The County inappropriately expended bond proceeds. County Ordinance No. 185-99, adopted and approved October 13, 1999, authorized the issuance of \$6,000,000 Doña Ana County Water System/Gross Receipts Tax Revenue Bonds for the purpose of purchasing, constructing or otherwise acquiring, water and wastewater systems for Santa Teresa, New Mexico. However, the County made payments using Series 1999 bond proceeds for projects other than Santa Teresa water and wastewater systems. Improper projects, number of expenditures, payment dates and amounts are shown below.

Montana Vista Connection

No. of Expenditures	Date	Expenditure Amount
1	12/28/2001	\$38,000.00
	Total Paid	\$38,000.00

Mgt Colonias Project

No. of Expenditures	Date	Expenditure Amount
1	5/24/2002	\$6,247.51
2	5/24/2002	11,083.75
3	5/24/2002	10,776.03
4	5/24/2002	6,584.18
	Total Paid	\$34,691.47

San Miguel Water System

No. of Expenditures	Date	Expenditure Amount
1	4/19/2002	\$1,700.47
2	9/6/2002	2,619.32
3	10/11/2002	1,054.07
4	12/9/2002	2,138.83
5	1/31/2003	61.27
6	4/25/2003	472.15
	Total Paid	\$8,046.11

Southern Doña Ana County Service Area

No. of Expenditures	Date	Expenditure Amount
1	12/21/2001	\$16,525.80
2	12/21/2001	8,210.31
3	12/21/2001	8,732.92
4	12/21/2001	14,216.12
5	3/15/2002	15,563.64
6	3/15/2002	5,153.80
7	3/15/2002	11,206.52
8	3/15/2002	2,647.37
9	5/17/2002	530.66
10	5/17/2002	2,121.61

No. of Expenditures	Date	Expenditure Amount
11	5/17/2002	17,246.89
12	5/17/2002	11,245.75
13	5/17/2002	15,391.74
14	8/23/2002	6,791.59
15	9/13/2002	579.57
16	9/13/2002	6,275.94
17	9/20/2002	1,487.17
18	9/20/2002	9,686.63
19	10/25/2002	9,463.55
	Total Paid	\$163,077.58

The single \$38,000 payment on December 28, 2001, that the County paid to a developer in Anthony, New Mexico, was approved by the County Manager who did not have authority to approve payments over \$35,000.

Criteria: Section 4-62-2 NMSA 1978 (*Use of proceeds of bond issue*) states, "It is unlawful to divert, use or expend any money received from the issuance of bonds for any purpose other than the purpose for which the bonds were issued." Ordinance No. 185-99 restricted allowable expenditures to the Santa Teresa water and wastewater system. Section 27 of Ordinance No. 185-99 provided that the County covenants that it apply the proceeds of the Bonds to the governmental purpose of the borrowing. The BOCC, not the County Manager, was required to approve payments greater than \$35,000.

Cause: Management controls were insufficient to prevent payments for purposes not meeting the purpose for which the bonds were issued and allowing payment for an expenditure that exceeded the County Manager's payment authority.

Effect: Bond proceeds were used inappropriately. The bond's tax-exempt status could be in jeopardy for expenditures not in compliance with the purpose for which the bonds were issued.

Recommendation: We recommend this matter be turned over to the proper prosecutorial authority having jurisdiction to completely investigate this condition. It should be noted that the County has made some reimbursements to the bond fund for payments of expenses that are not for Santa Teresa water and wastewater systems.

Finding A-04-03 PROCUREMENT CODE VIOLATED IN AWARDING ARCHITECTURAL CONTRACT

Condition: The County did not follow the Procurement Code or County policies in awarding an architectural contract for the proposed new county building.

- The Request for Proposals (RFP) included the criteria as required by the Procurement Code. The evaluation team reviewed and ranked the proposals using the RFP criteria. However, the BOCC ranked the proposals after the evaluation team completed its ranking, but did not use the RFP criteria.
- Each Commissioner used his own criteria to evaluate the proposals. The County's central purchasing office notified the County Manager such a selection process that did not use the RFP criteria would violate the Procurement Code.
- The criteria used by the members of the BOCC were not documented. According to the Purchasing Director, this was the first time that the BOCC took it upon themselves to evaluate the proposals.
- The County did not maintain BOCC paper ballots used to select the contractor in the procurement file.
- The BOCC awarded the contract to the bidder that was ranked fourth (last place) by the evaluation committee.
- The County did not negotiate the contract with the selected bidder.

A timeline of relevant actions follows:

On December 20, 2002, the former County Manager instructed the Purchasing Director via e-mail to go out for RFP with the intent to evaluate and recommend a bid by March 1, 2003. The e-mail shows the Commissioners directed the former County Manager to treat this as a priority. The former Director of Financial Services, now the current County Manager, is a cc on the e-mail and the e-mail shows that he will be part of the team that puts the RFP packet together.

The Notice for Proposal is dated February 25, 2003, and shows that a mandatory pre-proposal conference will be held on March 14, 2003.

Documents show that all four finalists ranked by the evaluation committee were represented at the pre-proposal conference. The documents show that one County Commissioner was also present.

On March 31, 2003, the Purchasing Director sent an e-mail to employees selected as part of the evaluation committee. The e-mail shows that a notice of the meeting was set for April 3, 2003. The supervisor of a member selected for the evaluation committee responded to the Purchasing Director, via e-mail, informing her that she would have to discuss the Purchasing Director's selection of one of her subordinates to the evaluation committee with the then Director of Financial Services. The evaluation committee included the Purchasing Director, Sheriff, Public Information Officer, General Services Director, Assessor, an employee of the Planning Department and an employee of the Flood Commission.

On April 28, 2003, the Purchasing Director instructs the BOCC and County Manager via an inter-departmental memo that they must use criteria as stated in the RFP to evaluate the proposals.

An undated e-mail from the Purchasing Director to the County Manager shows that the Purchasing Director provided the County Manager the list of the four vendors who submitted proposals. The e-mail shows that the Purchasing Director advised the County Manager that the Procurement Code does not allow for the selection of a contractor based on a random selection.

The Purchasing Summary Sheet shows that seven members of the evaluation committee evaluated and ranked the four bidders on April 3, 2003. The document shows that the number one ranked bidder received 641 points, the number two bidder received 629 points, the number three bidder received 615 points and the number four bidder received 576 points.

On May 13, 2003, the minutes of the BOCC show that the County Manager informed the Commissioners, "the selection for this business today I felt was substantial enough and significant enough to have the Board actually do the evaluation of the various vendors that responded to the proposal." The minutes show that the County Manager then proceeded to hand out the paper ballots to the Commissioners. The paper ballots were handed back to the County Manager after the vote. The County Manager read, aloud, that one bidder received three votes and another bidder received two votes. The selected bidder is a company in Albuquerque.

On May 24, 2003, the County notified the contractor of the BOCC selection.

On June 12, 2003, the County and the selected bidder entered into a contract for architectural services. The Purchase Order for these services is dated August 6, 2003 for \$159,750.

Criteria: Section 13-1-29C NMSA 1978 (*Rules of Construction; Purpose*) 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 to maintaining a procurement system of quality and integrity.

Section 13-1-120C NMSA 1978 (*Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection process*) provides that the local selection committee shall select, ranked in the order of their qualifications...after considering the following criteria together with any criteria, except price, established by the using agency authorizing the project:

(1) specialized design and technical competence of the business...(2) capacity and capability of the business... (3) past record of performance on contracts with government agencies...(4) proximity to or familiarity with the area in which the project is located; (5) the amount of design work that will be produced by a New Mexico business within this state; (6) the volume of work previously done for the entity requesting proposals which is not seventy-five percent complete with respect to basic professional design services...

Section 13-1-120D NMSA 1978 (*Competitive sealed qualifications-based proposal; architects; engineers; landscape architects; surveyors; selection process*) states, after an award has been made, the appropriate selection committee's final ranking and evaluation scores for all proposals shall become public information.

Section 13-1-181 NMSA 1978 (*Remedies prior to execution of contract*) provides that if prior to the execution of a valid, written contract by all parties and necessary approval authorities, a central purchasing office makes a determination that a solicitation or proposal award of the proposed is in violation of law, then the solicitation or proposal award shall be cancelled.

Section 13-1-96 NMSA 1978 (*Civil Penalty*) states, any person, firm or corporation that knowingly violates any provision of the Procurement Code [13-1-28 NMSA 1978] is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each procurement violation of any provision of the Procurement Code. The attorney general or the district attorney in the jurisdiction in which the violation occurs is empowered to bring a civil action for the enforcement of any provision of the Procurement Code...

The County's Purchasing Manual states, all procurement for Dona Ana County is performed by a Central Purchasing Body designated by the County Manager. The Purchasing Department is the office designated to conduct all purchasing for Dona Ana County. All purchases exceeding \$5,000 require formal sealed bid or proposal procedures specified by State Regulations and shall be processed and executed by the Purchase Office, through formal advertising or negotiation procedures.

The RFP shows that proposals will be evaluated on the criteria set forth in the RFP by an evaluation committee. The RFP shows the agency's designee will negotiate the contract with the highest qualified bidder.

Cause: The OSA interviewed the County Manager, and he stated the County Commissioners did not want staff to rank the bidders. The County Manager stated he discussed the matter with the County Commission Chairman. The County Manager stated he provided the County Commissioners with RFP packets, which included the criteria needed to make the selection. He cannot recall what happened to the paper ballots after the vote. The Purchasing Director told the OSA she requested the ballots

from the County Manager in order to close the file. The County Manager told her the ballots were the Commissioners' records.

The OSA interviewed four of five County Commissioners. The fifth County Commissioner twice did not show for scheduled interviews with OSA auditors. One Commissioner interviewed said he was familiar with, but not an authority on, the Procurement Code. The other Commissioners also said they were familiar with the Procurement Code. All four Commissioners said they were familiar with the County's purchasing policies and procedures. Three of the four County Commissioners stated they are not aware of any fraudulent activity at the County. The one Commissioner who said that there was fraud said there has been and still is, and it is related to politics and personal agendas.

The first County Commissioner interviewed stated that the County Manager decided that the County Commissioners were doing the rankings. He knew that the evaluation committee had ranked the proposals but said he was unaware of the results. He could not recall how the decision of the BOCC to do the evaluations was carried out. He stated that the County Manager instructed him on how to evaluate the proposals. In evaluating the proposals, the County Commissioner stated he did not know what criteria the committee used to evaluate the proposals, but that he is a principal in an engineering company and knows how to evaluate proposals and that he might still have the criteria he used to evaluate other previous proposals. However, the County Commissioner did not provide the OSA with the documented criteria used during the evaluations. He stated he ranked the bidders 1, 2, 3, and 4. He stated that negotiations with the top contenders did not take place because there were only four candidates and he discussed it with the County Manager and the County Commission Chairman and they said the selected bidder could do it. He stated the BOCC used a secret paper ballot because the County Manager told them to. The County Manager provided him the paper ballot and he returned the paper ballot to the County Manager.

The second County Commissioner interviewed stated he does not recall having seen the results of the evaluation committee. The BOCC decided to do the evaluations when there were four candidates and he received a telephone call from the County Manager stating he would be receiving an RFP with evaluation sheets. He stated the BOCC decided to do its own evaluation when they were told by management that there were four candidates. He stated the BOCC decided to do its own evaluation because of the size of the project. He could not recall who provided him with instructions on how to evaluate the proposals, but he read in a newspaper that it was the County Manager. He stated he did not receive RFP packets, just the four proposals. In evaluating the proposals, he stated he didn't recall using any criteria, then added that he used his own which included projects completed, accounting, checks and balances, reporting progress and amount. He stated that being on the Board of the Association of Counties he knows some of the commissioners of other counties, and mentioned a specific Bernalillo County

Commissioner. He stated he heard nothing negative about the selected bidder. He stated he talked to the Bernalillo County Commissioner, but not until the selected bidder had been chosen. He stated he never saw the BOCC's evaluation against the RFP criteria documented. He saw four names on the ballot and checked off his choice. He stated he doesn't know if negotiations with the top contenders took place. He stated the voting took place in an open meeting. He stated the County Manager or the Public Information Officer provided him the paper ballot. He returned his ballot to the same person.

The third County Commissioner interviewed stated he did not know that an evaluation committee had evaluated and ranked the proposals until after the BOCC ranked them. He found out through someone in the community. He stated he doesn't know when or why the BOCC decided to do its own evaluation, but believes the motivation was pre-selection. He stated two County Commissioners knew that the evaluation committee's evaluation existed, but didn't like the committee's selection. He stated he never received instructions on how to evaluate the proposals. He stated he came in to the county building a week prior to the meeting. The County Manager's secretary handed him the proposals and told him to look them over and to be prepared. He stated he did review the RFP packets. He stated the Bernalillo County Commissioner called prior to the vote and asked him to vote for the selected bidder. In evaluating the proposals, he stated he used his own criteria. He stated the BOCC did not negotiate with the top contenders; the other three bidders were not contacted. He stated he does not know why the BOCC used a secret ballot, it was not his decision. He would have preferred to vote in public. He stated he did not sign the ballot. The ballot was a blank piece of paper without any names on it. He wrote in his choice. The County Manager provided him the ballot and he returned it to the same person.

The fourth County Commissioner interviewed stated he became aware that an evaluation committee had ranked the four bidders through a newspaper article—long after the BOCC ranked them. He stated he could not recall when or why the BOCC decided to do its own evaluation. He stated that the BOCC did not use the recommendation of the evaluation committee because the BOCC wanted the best group, it was important to get the right architect. He could not recall who provided him with instructions on how to evaluate the proposals or who provided him with the RFP packet. He could not recall if he evaluated the RFP packet. In evaluating the proposals, he stated he did not use the RFP criteria. He called various people throughout the week to obtain information about the four companies. He also talked to individuals in the different firms. He stated no one called him to recommend any of the companies. He looked at the bidders' past experience doing similar government projects and completion of projects on time and successfully. He stated the evaluation against the RFP criteria was not documented. He stated there were no negotiations with the top contenders prior to selection, but management did after they were selected. He stated that the selected bidder was the only bidder qualified. He stated that the BOCC did not use a secret ballot, but that it was a paper ballot. He stated he signed his name to it. He stated staff handed him the ballots and he passed out the

ballots, collected them and turned them into the County Clerk for public record. The names of the bidders were pre-printed on the ballot, but he could not recall the order. He had to rank the one selected. He stated the BOCC has voted this way before, but not often.

Effect: The most qualified bidder may not have been selected given that each County Commissioner used his own criteria to evaluate the bidders. County officials may be subject to civil penalties. The County may have put itself at risk for possible lawsuits from the losing bidders. The County may have tainted its integrity by not following applicable state statutes and County procedures in awarding a County project. Negotiating with a vendor after the vendor has been selected weakens the County's bargaining position.

Recommendation: We recommend this matter be turned over to the proper prosecutorial authority having jurisdiction to completely investigate this condition.

SECTION B FINDINGS

We conducted a special audit of alleged improprieties involving financial affairs and selected financial transactions. The procedures we performed do not extend to any of the financial statements of the County or the financial statements of the County taken as a whole. Had we performed additional procedures or had we conducted an audit of the financial statements of the County 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. Internal control weaknesses, however, did come to our attention during our testing of alleged improprieties involving financial affairs and transactions that we believe also need to be included in this report so that the County can take corrective action. Section B findings address internal control weaknesses.

Finding B-04-04 UNETHICAL BEHAVIOR BY COUNTY OFFICIALS

Condition: The OSA reviewed and investigated several allegations of unethical behavior at the County. The former Director of Planning & Community Development informed the OSA that while employed at the County, a County Commissioner approached two employees under his supervision asking them to make a negative recommendation on a subdivision application. The former director reported the incident to management and the County Manager conducted an investigation. The report, dated December 31, 2003, states that the Commissioner did indicate to staff that he did not expect a favorable recommendation. However, according to the report, at no point did staff feel they were being directed to provide a negative recommendation nor did they feel pressured to provide such a recommendation. The OSA contacted the two employees, and after

getting approval from the County's legal department, they agreed to respond to our inquiries. One employee told the OSA that the Commissioner approached him and told him he did not want to see a positive recommendation on a zoning issue affecting 180 lots. The employee stated he reported the incident to his supervisor, the former director. The second employee stated he received a telephone call from the Commissioner telling him to disapprove a subdivision-zoning request. The employee stated he explained the proper procedures to the Commissioner. The Commissioner responded with an "okay" and hung up the telephone.

There are also County documents that show that this same County Commissioner has asked the County to maintain an irrigation ditch that serves property owned by the County Commissioner.

Through various interviews of County employees, the OSA learned that an employee of the Purchasing Department was approached by the County Manager regarding sealed bids for the construction of the new county complex. The OSA contacted the employee and he stated that the County Manager asked him how the County could get around the Procurement Code if the lowest bidder was a contractor the County did not wish to contract with. The employee stated he told the County Manager the County would have to justify the reason and show that the lowest bidder was somehow "low-balling" the County. The employee stated that the company the County Manager did not want to give the award to did not bid on the job; therefore, the lowest bidder would be the one recommended to the BOCC. During this same conversation, the employee stated that it had been inferred to him by the Director of Financial Services that he should do everything necessary to please the Commissioners even if it is illegal or immoral. He stated he submitted his complaint to the County Risk Manager. The OSA requested a copy of the complaint from the County; the complaint is dated April 27, 2004. The County did not provide any investigative report with the complaint.

Criteria: Resolution No. 2001-46 states, The Board of County Commissioners employs both a County Manager and an Assistant County Manager to handle the day-to-day business and general management of the County. The Board members and other elected officials shall communicate their questions and concerns relating to County operations through County management and shall not direct any action that is not supported by approved policy or Board action.

Resolution No. 2001-46 states, County officials, employees and agents shall conduct themselves in a manner that justifies the confidence placed in them by the people of Dona Ana County and the State of New Mexico, at all times maintaining the highest degree of integrity and discharging their public responsibilities ethically.

Resolution No. 2001-46 states, Violations of the Code of Conduct alleged against elected or appointed officials may be reported to the County Chairman, County Manager, County

Risk Manager or County Attorney, who in turn will ensure a prompt, objective and thorough investigation by one of the County's Internal Affairs Investigators or by another investigator, as may be appropriate under the circumstances.

Cause: The County Commissioner and County staff did not adhere to the County's Code of Ethics.

Effect: The County may be taking actions that are not in the best interest to the County. County leaders set the tone for ethical behavior of the organization. County employees may not be provided due process when the investigation is not conducted by an internal affairs investigator.

Recommendation: We recommend the County comply with its Code of Ethics and that complaints are investigated by an independent party. We recommend that the County include in its policies that unethical behavior and fraudulent activities be reported openly without negative repercussions to those making the reports.

DAC response: Management denies this finding, more specifically denying the allegations on which the finding is based. Resolution 2001-46 addresses a Code of Proper Conduct for elected and appointed County officials. This Code of Conduct provides for the Board of County Commissioners to review the code at least every four years and this review was performed in 2005.

Doña Ana County management vigorously adhered to the 2001-46 County Code of Conduct and now to the updated 2005-29 Code of Conduct. Additionally, the County follows the guidelines in Section 800 [Work Ethics] Standards of Conduct of the DAC Merit System Ordinance Establishing Human Resources Policies. Any allegation of wrongdoing, be it unethical behavior or fraudulent activity, by an appointed officer or elected official is reported to the appropriate investigative body without negative repercussion to those making the report.

Finding B-04-05 LAND APPRAISALS NOT OBTAINED

Condition: The County failed to obtain land appraisals from a licensed appraiser for the two pieces of land purchased for the new county complex. On May 12, 2004, the OSA requested to see the appraisals for the two pieces of land. On June 3, 2004, the County provided the OSA with a copy of an inter-departmental memorandum from the General Services Director to the County Manager which states, "The attached spreadsheet and comments, while not put in this form, formally, prior to this date, were informally done prior to the closing of the property and was the basis of our assessment." The date of the memorandum is June 3, 2004. The attachment to the memorandum is a viability report and not appraisals of the two pieces of land.

The County paid Gary and Jante Schlothauer \$686,123.06 on December 5, 2003 for 19.585 acres of land. The County paid Dos Amigos \$373,715.71 on October 31, 2003 for 4.47 acres of land. According to County records, the full value of the 19.585 acres is \$19,600 in total and the full value of the adjacent 4.47 acres is \$217,100 in total. During its board meeting on August 12, 2003, the BOCC approved Gross Receipts Tax Revenue Bond Ordinance No. 209-03 for Dona Ana County Gross Receipts Tax Bonds not to exceed \$7,850,000 to pay for land and facilities for the administrative facilities project. The BOCC approved the purchase of the land during its board meeting on October 28, 2003.

Criteria: The agreement for the sale and purchase of real property between the County and the Schlothauers states that the agreement is subject to and contingent upon the County having the property appraised. The agreement states that the County will pay for the appraisal.

County Resolution No. 2001-46, Dona Ana County Code of Conduct states, the BOCC has sworn to promote the application of sound fiscal management in the use of public funds entrusted to them.

Cause: The County failed to get appraisals.

Effect: The County does not know if the amount paid for the property is prudent. The best possible price may not have been obtained.

Recommendation: We recommend the County take measures that ensure that the County follows good business practices that are in the best interest of the County and its taxpayers.

DAC response: Management concurs with this finding. The County now has a system in place to ensure that no real property is sold or purchased without obtaining an appraisal.

Finding B-04-06 NONCOMPLIANCE WITH LAND PURCHASED FOR NEW COUNTY COMPLEX

Condition: The County provided the criteria necessary to purchase land for the new county complex in its Request for Information (RFI). The County accepted and bought a piece of land that is 4.47 acres. The information packet for the 19.585 acres of land purchased by the County did not contain a site map, certificate of zoning or phase I environmental report.

The County purchased 19.585 acres of land to build the new county complex. The land is located outside the Las Cruces city limits. The OSA interviewed four Commissioners regarding the purchase of the land. According to the first Commissioner interviewed, the

land selected was based on a recommendation from the architect and the County Manager. The second Commissioner interviewed stated the land selected was cheaper than other properties. The third Commissioner stated that two Commissioners and the County Manager made the decision. He stated the RFI kept out bidders because the requirements were lifted arbitrarily. The fourth Commissioner stated he did not get involved in the negotiations. He stated all Commissioners went on their own to see the sites and then the BOCC voted on it.

Criteria: The County, in seeking proposals, specified the minimum size of eight acres. The RFI required that the proposals include a site map, certificate of zoning, and phase I environmental report.

Section 4-34-4 NMSA 1978 (*Removal to new county seat; neglect of officer; misdemeanor; penalty*) states ... the county commissioners shall cause all the county records, county offices and property pertaining thereto, and all county prisoners, to be removed to the new county seat. Any county commissioner or other county officer who shall neglect or refuse to carry out any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in a sum not less than five hundred [(\$500)] nor more than one thousand dollars [(\$1,000)], which fine may be collected by a suit on his official bond and shall be paid over to the county treasurer for the general county fund.

Section 4-44-34 NMSA 1978 (*Officers to keep office at county seat*) states, all county officers of the various counties in New Mexico shall establish and maintain their offices and headquarters for the transaction of the business of their respective offices at the county seat of their respective counties and shall there keep all the books, papers and official records pertaining to their respective offices; provided, that such be provided for such officers at the expense of the respective counties.

The County Clerk provided the OSA with two documents, one is dated January 14, 1882 and the other is dated January 21, 1882, that show that the Council and the House of Representatives in Santa Fe passed an act entitled "Locating the County Seat of Dona Ana County at Las Cruces". The act provided that the county seat and offices be removed from Mesilla to Las Cruces.

The National Association of Counties recognizes Las Cruces as the County Seat.

Section 3 of Article 10 of the New Mexico Constitution states, "No county seat, where there are county buildings, shall be removed unless three-fifths of the votes cast by qualified electors on the question of removal at an election called and held as now or hereafter provided by law, be in favor of such removal.

Cause: The County failed to enforce the specifications in the RFI.

Three County Commissioners stated they were told by legal staff that as long as the land was adjacent to the city limits of Las Cruces it was okay to build. The County legal staff does not acknowledge that Las Cruces is the County Seat because it is not written in statute. The Request for Information (RFI) allows the land to be located within or adjacent to Las Cruces. According to the Purchasing Director, the Purchasing Department wrote the RFI with guidance from the County legal staff.

Effect: The County may have excluded other bidders because it acquired nonconforming property. The County purchased land that could have unknown costly future ramifications; for example, zoning costs and environmental clean up costs.

The County may have repercussions to deal with should the community voice an objection to the selection process. Several County personnel said the City may, but has not, annexed this property. County officials may be susceptible to fines.

Recommendation: We recommend the County enforce all specifications in Requests for Information.

We recommend the County abide by constitutional and statutory requirements.

DAC response: Management denies in part with this finding and concurs in part this finding. Management concurs that it did not enforce the criteria of its Request for Information. Management has implemented a system that should prevent such failures in the future.

Management, relying on legal opinion, did not believe that the County Seat was required to be in the City of Las Cruces. However, annexation was approved by the City of Las Cruces on February 27, 2006. The County seat remains within the City limits.

Finding B-04-07 THE COUNTY COULD NOT PROVIDE KEY DOCUMENTS REGARDING LAND ACQUISITION

Condition: On July 29, 2004, the OSA requested the County to provide information on how the County negotiated the price for the land and data on how much it will cost the County to extend utilities to the 19.585 acres of land. On August 6, 2004, the County responded that the architect firm will be providing the information. The OSA did not receive this information.

During the BOCC meeting of October 28, 2003, the minutes show that a County Commissioner expressed concern with a report from Southwest Engineering, Inc.; which shows that there is ground contamination on the 4.47 acres of land and that a final determination had yet to be determined. This report is dated June 2, 1998. A County

staff member told the County Commissioner that an environmental study has been conducted and that no contaminants were found. On August 30, 2004, the OSA requested the County to provide environmental studies on the two pieces of property purchased by the County for the new county complex. On September 7, 2004, the County provided the OSA with an inter-office memorandum dated October 24, 2003 from the Environmental Services Manager to the General Services Director; which states that a preliminary environmental assessment was performed on the 19.585 acres of land and that there is no indication that the land has any environmental concerns. The assessment is not attached to the memorandum. The County attached the environmental studies performed on April 16, 1998 and June 2, 1998 on the 4.47 acres of land.

Criteria: The County should ensure it has key documents related to County land acquisition.

Cause: The County did not have key land acquisition documents.

Effect: Without the proper studies, the County does not know if it is building a new complex on contaminated land. Failure to provide requested information could imply that the County is hiding or furnishing misleading information, or does not maintain complete information.

Recommendation: We recommend the County ensure it possesses key documents.

DAC Response: Management concurs with this finding. Management has implemented a system that should prevent such failures in the future.

Finding B-04-08 DETENTION CENTER CONTRACTS NOT PROPERLY APPROVED AND ENFORCED

Condition: The County entered into the following contracts without taking the necessary measures to ensure that they were properly executed:

1. The County entered into a contract with Aramark Management Services ("Aramark") to provide maintenance and janitorial services at the County Detention Center. The period of the contract is from January 1, 2004 through June 30, 2004, but there is no evidence in the 2003 minutes that the BOCC approved this contract. The County Manager signed the contract on February 5, 2004, yet the contractor performed services in January 2004. The contract is renewable for additional annual periods beginning July 1 of each year for a total contract period not to exceed eight years and ending no later than December 31, 2011. The contract states that cost for budget year 2004 – 2005 (effective July 1, 2004 through June 30, 2005) is \$841,000, payable in 12 equal monthly installments of \$70,083.33, and is for basic services. The contract does not

address compensation for the period of January 1, 2004 through June 30, 2004. Regardless of the lack of compensation language, the County paid the contractor for January and February 2004 partly based on compensation language in the previous contract and partly based on the compensation as stated in the contract that was to become effective July 1, 2004. After February 2004, the County paid the contractor based on the compensation language stated in effect for the contract that was to become effective July 1, 2004.

2. The County signed a third amendment to the agreement between the County and Aramark, which restated the original agreement entered into on May 3, 1999, to provide maintenance and janitorial services at the County Detention Center. The amendment renewed the period of the contract from July 1, 2002 through June 30, 2003. On September 14, 2003, the County Manager signed an amendment extending the agreement for the period from July 1, 2003 through October 31, 2003. The contractor provided services in July, August and September, prior to the extension being signed by the County Manager. Evidence of this was contractor submitted invoices to the County for these services prior to the extension being signed by the County Manager. The County paid \$122,379.80 in total for services performed from July 1, 2003 through September 13, 2003. There is no evidence in the 2003 minutes that the BOCC approved the amendment extending the contract.
3. The County paid Aramark for maintenance and janitorial services performed for the months of November 2003 and December 2003 in the amount of \$76,946.47 without a contract. The extension of the old contract covered the period from July 1, 2003 through October 31, 2003 and new contract covered the period January 1, 2004 through June 30, 2004. The invoice for November 2003 is dated November 30, 2003. The invoice shows that the County received the invoice on November 25, 2003. The file does not include an invoice for December 2003.
4. The County entered into a contract with Best, Inc. for the period of August 22, 2002 through June 30, 2003 to provide food services at the County Detention Center. Aramark bought Best, Inc. and assumed the contract. The contract is renewable on an annual basis not to exceed eight years. The County amended the contract on November 26, 2002. The amendment states that renewals may not exceed four one-year extensions in total. The County renewed the contract for the period of July 1, 2003 through June 30, 2004. The County Manager signed the renewal on September 5, 2003. Aramark provided services prior to the contract renewal. The County paid the contractor \$169,069.27 for services provided from July 1, 2003 through September 4, 2003. The renewal states that the contract can be renewed annually up to eight years; however, this is a renewal and not an amendment. There is no evidence in any of the 2003 minutes that the BOCC approved the renewal.

5. The County entered into an agreement with Best, Inc. for the period from August 22, 2002 through June 30, 2003 to provide commissary services to the County at the County Detention Center. The contract is renewable on an annual basis, not to exceed eight years. The County renewed the contract from July 1, 2003 through June 30, 2004. The County Manager signed the contract renewal on September 5, 2003. According to the Accounts Payable Clerk, the contractor provided services in July and August 2003. There is no evidence in any of the 2003 minutes that the BOCC approved the renewal.

Criteria: The original contracts state that they are renewable on an annual basis **prior** to the beginning of each fiscal year (July1).

Section 13-1-158 NMSA 1978, (*Payment for purchase*) 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 certifies that the services, construction or items of tangible personal property have been received and meet specifications. Without a signed contract, certification that services rendered met contract specifications would not have been possible.

Services should not be performed prior to the approval of a contract.

The County Manager is authorized to approve and sign contracts with an annual cost of \$10,000 or less. The BOCC relies on its staff to bring all matters involving policy making decisions and/or involving expenditures of substantial County funds before it for consideration and approval.

Cause: County legal staff wrote the newest contract for the maintenance and janitorial services and did not use the template used for other contracts. County staff failed to present these contract renewals to the BOCC for approval. The County failed to ensure that contracts were approved prior to performance of services.

Effect: The County may be committing funds that have not been approved by the BOCC. Services paid for are not covered by a valid contract. Additionally, if the County does not get the services it intended, there may be no remedy without a contract.

Recommendation: We recommend County staff ensure that contracts be presented to the BOCC for consideration when the total amount is more than \$10,000 annually, and County management ensure all contracts are approved prior to services being performed. We also recommend that all contracts be properly reviewed for completeness, such as compensation during the contracts' effective dates.

DAC response: Management concurs with this finding. Management has implemented a system that should prevent such failures in the future.

Finding B-04-09 BOND ATTORNEY SERVICES NOT PROPERLY PROCURED

Condition: According to the Purchasing Director, the County does not procure the services of bond attorneys in compliance with the Procurement Code. The Procurement Code requires the central purchasing office to procure professional services having a value exceeding twenty thousand dollars (\$20,000) in accordance with competitive sealed proposals. The Bond Attorney's compensation is based on a percentage of the amount of the bonds. Bonds are issued in the millions of dollars, therefore, these services run in the hundreds of thousands of dollars. The BOCC minutes of April 8, 2003, June 10, 2003 and August 12, 2003 show that the County uses the services of a bond attorney. The minutes of April 8, 2003 and June 10, 2003 show that four of five Commissioners acknowledge receiving a campaign contribution from the bond attorney.

Criteria: Section 13-1-98L NMSA 1978 (*Exemptions from the procurement code*) states, the provisions of the Procurement Code shall not apply to the issuance, sale and delivery of public securities pursuant to the applicable authorizing statute, with the exception of bond attorneys and general financial consultants.

Cause: According to the Purchasing Director, the County Manager has prevented the Purchasing Department from procuring the services of bond attorneys.

Effect: The County may be awarding contracts that are not in the best interest to the County. There is the appearance that laws were not complied with in order to reward an individual for campaign contributions. There is the potential for higher costs and collusion when laws are not followed.

Recommendation: We recommend the County follow the Procurement Code in awarding government contracts.

DAC response: Management denies this finding. Legal opinion differs on whether a properly selected underwriter may or may not select Bond Counsel.

Finding B-04-10 MISUSE OF PUBLIC ASSETS

Condition: The County smoothed a private parking lot owned by a restaurant owner in La Mesa using government equipment. The County parked its heavy-duty road equipment on the restaurant premises overnight during a work project in La Mesa. The County and the owner of the parking lot do not have a written agreement for the storage of County property or for the County to provide services to the restaurant owner in exchange for the use of his property. During our review, auditors became aware that the

County uses private property throughout the County for various work projects without written agreements.

A County Commissioner during the BOCC meeting of November 12, 2003 expressed a willingness to apply public funds to private roads. Auditors inquired of the County Commissioners whether they were aware of any private roads being paved with public funds. The five County Commissioners responded in the negative.

Criteria: Section 14 of Article IX of the New Mexico Constitution (*Anti-donation clause*) does not allow public bodies to use public funds for private purposes. Chapter 67, Article 11 NMSA 1978 (*Highways*) requires the County to comply with the ordinary statutory procedures for establishing county roads.

Cause: The County does not have a policy for storing County equipment on private property or restoring private property to its original condition.

Effect: The County has liability exposure when there is no written agreement for storing county equipment on private property; for example, accidentally damaging private property or having a disagreement with the property owner. There is also the possibility that County equipment may be used to add value to property that was used for storing equipment rather than restoring the property to its original condition. The lack of adequate oversight can lead to misappropriation of assets.

Recommendation: The County Manager indicated that in the future the County would have written agreements with property owners. We recommend the BOCC establish a policy for storing equipment on private property.

DAC response: Management denies in part with this finding and concurs in part this finding. Management admits that it parked or stored equipment on private property without having executed a written agreement with the property owner. While the County repaired damage done by storing equipment on the private lot, the County did not pave or grade any other area of the private lot. The County has established a policy of obtaining a written agreement from a landowner on whose property the County wants to store or park equipment or material.

Finding B-04-11 SOLID WASTE FEES NOT BILLED

Condition: The County did not bill for solid waste fees as required by County Ordinance No. 99-184. Ordinance No. 99-184 required the County to assess property owners with a \$12.00 monthly fee for a single family or \$9.00 for a senior family. If, however, the property owners obtained the services of a private hauler, then the County assessed property owners a \$1.00 monthly fee payable through the private haulers. The Ordinance

required commercial users to use private haulers and the County assessed them a \$2.00 monthly fee.

The following provides a chronological sequence of events pertaining to the non-billing of solid waste fees:

- On February 25, 2003, the BOCC held a work session to discuss the solid waste program.
- On March 11, 2003, the BOCC passed a motion on a 3-2 vote to eliminate billing residents for solid waste collections immediately. The BOCC directed staff to proceed with trying to collect the past due accounts as required by the present Ordinance.
- On July 22, 2003, the BOCC tabled the approval to Publish Title and General Summary the Revised Solid Waste Ordinance.
- On September 9, 2003, the BOCC passed a motion on a 4-1 vote approving Intent to Publish Title and General Summary the Revised Solid Waste Ordinance to eliminate all fees.
- On October 15, 2003, the BOCC failed to pass a motion to amend the 2003-01 Solid Waste Ordinance on a 2-2 vote.
- On December 9, 2003, the BOCC passed a motion to adopt Amendment 2003-1 to the Solid Waste Ordinance on a 3-2 vote.
- On December 17, 2003, the County Clerk recorded the amended ordinance.

Based on data provided by the County, the County failed to bill property owners for approximately \$931,000 in solid waste fees for the period March 2003 when the BOCC voted to eliminate solid waste billing until the Amended Ordinance was adopted and recorded in December 2003. Additional amounts should have also been billed, but were not, from December 2003 until 30 days after being recorded, January 16, 2004.

On September 24, 2003, the County mailed out past due notices to County residents. In these notices the County notified residents that on March 11, 2003, the County Commission had voted to discontinue monthly solid waste billings to residents, but that past due balances are still owed to the County. The County also mailed out notices to private haulers on October 6, 2003 informing them that on September 9, 2003 the County Commission voted to no longer charge private haulers a system maintenance fee. The notice states that the last billing would be for August 2003.

Criteria: Section 4-37-6 NMSA 1978, (*Voting on proposed county ordinances; majority vote required for passage or repeal*) states, a proposed county ordinance shall be passed only by a majority vote of all the members of the board of county commissioners, and an existing county ordinance shall be amended or repealed in the same manner. Upon a vote of passage, amendment or repeal of any county ordinance, the yeas and nays shall be called and recorded. Section 4-37-9 NMSA 1978, (*County*

ordinances; recording and publications; effective date) states, all county ordinances, immediately after their passage, shall be recorded in a book kept for that purpose and shall be authenticated by the signature of the county clerk. No ordinance shall take effect until thirty days after the ordinance has been recorded in the book kept by the county for that purpose.

Cause: The County stopped billing residents for the services based on the passage of the motion to eliminate the billings rather than the effective date of the ordinance amendment.

Effect: According to the data provided by the County, the County could have collected approximately \$453,000 of the fees owed for the period March 2003 through December 2003. This amount is based on average fees collected prior to March 2003.

Additionally, the County disparately applied the amended ordinance to residents. Although the County continued to assess residents using a private hauler the \$1.00 fee through August 2003, the County stopped assessing other residents in March 2003.

Recommendation: We recommend that the BOCC and County staff be made aware of applicable laws prior to implementing directives.

DAC response: Management concurs with this finding. Management is currently evaluating the process for collecting these fees. Management will ensure that the BOCC is aware of all applicable laws prior to the Board's giving direction.

Finding B-04-12 FLOOD LEVY FEES INCORRECTLY ASSESSED

Condition: The County assessed property owners outside the Las Cruces city limits a flood levy tax. The assessed amount was based on taxable values, but should have been based on net taxable values (taxable value less exemptions). The flood levy tax went into effect in 1987. For the year 2003, the County overcharged those taxpayers outside city limits who claimed exemptions approximately \$34,762.

The County refunded taxpayers for overpayment, but only for 2003, with a credit adjustment in their 2004 tax bills. The County does not plan to refund taxpayers for the other years because the money has been distributed to the Flood Commission for its operating budget and taxpayers due refunds could be difficult to locate and associate with properties, especially going back to 1987. The Department of Finance Local Government Division concurred with the County Treasurer in its handling of the matter.

The four County Commissioners interviewed stated they were not informed of this overcharge to taxpayers until the OSA auditors informed them during their interviews.

All four commissioners said that they should have been told as it had an impact on County revenues and the budget.

Criteria: Section 4-50-2 NMSA 1978 (*Tax levy; county flood fund; authority to borrow*) allows the County to levy an annual tax based on net taxable value of the property.

Section 5 or Article VIII of the New Mexico Constitution, and Sections 7-37-4 and 7-37-5 NMSA 1978 provide for property tax exemptions.

County Resolution No. 86-60 and Amended Resolution No. 88-46 state that the tax is based on the net taxable value of the property.

County Resolution No. 2001-46 states, the County elected Assessor, Clerk, Sheriff and Treasurer, shall advise the BOCC on all matters concerning their respective offices.

Cause: The County calculated the tax on the “total value” rather than the “net taxable value” of the property. The County Treasurer told the OSA he informed the County Manager of the error, but feels that since he is an elected official it is not incumbent on him to inform the BOCC of such matters.

Effect: The County may have to refund taxpayers for more than one year of overcharges, and because the BOCC was not made aware of the problem, it did not budget for any payments.

Recommendation: We recommend the County verify that tax assessments are correct through computer testing. We recommend that matters that affect the County budget be reported to the BOCC.

DAC response: Management concurs with this finding. Management created a taskforce to evaluate and audit the flood levy calculation. Errors were found and corrected, and the integrity of the results was tested once more for accuracy. No additional calculation errors have been found. Management brings all material issues affecting the budget to the Board’s attention.

Finding B-04-13 OPEN MEETINGS VIOLATIONS

Condition: The OSA reviewed the BOCC minutes for the calendar year 2003. The BOCC violated the Open Meetings Act (“Act”) in approving the minutes of the following meetings:

Date of Meeting	Date Approved
01/14/03	02/11/03
01/31/03	03/11/03
02/11/03	04/04/03
02/25/03	04/22/03
03/11/03	05/13/03
03/25/03	05/27/03
04/08/03	06/10/03
04/14/03	06/10/03
04/16/03	06/10/03
04/22/03	06/24/03
05/07/03	06/24/03
05/13/03	06/24/03
05/27/03	07/08/03
06/10/03	07/08/03
06/11/03	07/08/03
06/24/03	07/08/03
08/12/03	08/26/03
08/21/03	09/09/03, 10/15/03
08/26/03	unable to locate approval of minutes
09/09/03	10/15/03
09/17/03	10/15/03
09/26/03	10/28/03
10/15/03	11/12/03
10/28/03	11/25/03
11/12/03	11/25/03
11/19/03	12/09/03
11/25/03	minutes were not approved in 12/09/03 meeting

The BOCC used paper ballots to select an architectural firm during the meeting of May 13, 2003. The minutes do not show how each commissioner voted. The County did not keep the ballots as part of the record.

Criteria: The Act states, draft minutes shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

The Act states the board, commission or other policymaking body shall keep written minutes of all its meetings. The minutes shall 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.

Cause: During the BOCC meeting of June 10, 2003, a County Commissioner stated he reviewed the Act and wondered why the BOCC was delayed in approving the minutes. The Chairman responded that they were not presented by the County Clerk.

The County Manager read that there were three votes to two votes, but did not state how each commissioner voted. The minutes show that the County Manager collected the ballots. The OSA interviewed the County Clerk employee who was present at the meeting. She stated that the County Manager did not give her the ballots.

Effect: The County, after the violation was brought up by a County Commissioner, intentionally violated the Open Meetings Act by continuing its practices of approving minutes two, three and sometimes four meetings later. The County may be susceptible to penalties for an intentional violation of the Act.

Recommendation: We recommend the County adhere to the Open Meetings Act. We recommend the County seek training from the Attorney General's Office.

DAC response: Management concurs with this finding. The County retained a court reporting agency to help the County Clerk bring current the minutes of the Board's meetings. Draft minutes are now prepared within ten working days after a meeting and submitted to the Board for approval at its next meeting where a quorum is present.

On June 14, 2005, the Board of County Commissioners corrected four violations of the Open Meetings Act that were brought to the Board's attention by the Attorney General. The Board maintains written minutes that include the date, time, and place of its meetings, 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.

Finding B-04-14 INCORRECT PAYMENTS

Condition: The OSA sampled payments to the Dona Ana Mutual Domestic Water Consumers Water Association ("DAMDWCA"). The DAMDWCA billed the County late charge penalties based on a ten percent rate. The County overpaid late payment charges in the amount of \$1,203.09.

The County paid the accounting firm Kriegel & Company Ltd. (Kriegel) \$67,294.16 on a \$63,187 contract. The accounting firm's bill to the County included gross receipts taxes on the contract plus gross receipts on the total amount. This constituted paying gross receipts tax twice. OSA records show that the audit contract between the County and

Kriegel for the fiscal year ended June 30, 2003 included a line item for gross receipts taxes in the amount of \$3,787. The accounting firm reimbursed the County the overpayment of \$4,107.16 (\$67,294.16-\$63,187.00) on May 12, 2004.

Criteria: Section 13-1-158C NMSA 1978 (*Payments for purchases*) provides that upon certification by the central purchasing office that 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** [emphasis added].

Cause: The County failed to verify that payments were proper and correct.

Effect: The County may have made similar errors in other payments to contractors.

Recommendation: We recommend the County examine its payments to DAMDWCA for any late charge overpayments and seek reimbursement for any overpayments made. We recommend the County take more care in the handling of payments and verify that payments are checked against contracts and purchase documents.

DAC response: Management concurs with this finding. Management will direct that any improper payment or overpayment be evaluated and corrected. Management has implemented a system that should prevent such failures in the future.

OTHER MATTERS

During our review, we noted the following related issues that the County should address:

OM-04-01 SALARY INCREASE NOT PROPERLY DOCUMENTED

The Human Resource policies define "temporary pay upgrade" as employee compensation for temporarily performing assigned duties or responsibilities of a higher pay grade. The OSA did not find a grade assigned to the job title "Accounting Operations Manager" on any of the forms provided by the County. On May 6, 2002, the job title "Finance Director" was changed to "Accounting Operations Manager". The Personnel Appointment and Change Request form, however, does not show a grade assignment for the new classification. The job title "Accounting Operations Manager" does not appear on the County's job class titles. The classification specification form for this new job title is still in draft form and has not been approved. Regardless of the lack of a pay grade, the County gave the Accounting Operations Manager a ten percent

temporary salary increase effective April 14, 2003. The action form does not specify what the salary grade for the Operations Manager is or what the proposed position title is. The form shows that the proposed salary grade is 48. The maximum hourly rate for grade 48 is \$28.04. The employee received an hourly rate of \$30.27 due to the ten percent temporary increase. The temporary assignment ended on March 29, 2004. We recommend the County properly document forms so that all salary increases are justified and conform to policy.

OM-04-02 INTERNAL AUDITOR INDEPENDENCE

The BOCC minutes of May 13, 2003 show that the County Manager, a Certified Public Accountant ("CPA"), advised the County Commissioners against hiring an internal auditor because that person would report directly to the Commission, therefore, creating an independence issue. The BOCC instead passed a motion to adopt the recommendation from the County Manager regarding acquiring services from an independent CPA firm at a maximum fee of \$66,000. It is not clear why the County Manager believed there would be an independence issue in hiring an internal auditor. GAO rules require internal auditors to be accountable to the head of the government entity, which in this case is the BOCC. The County is in the process of hiring an internal auditor. We recommend that County ensure that the internal auditor report directly to the BOCC.

OM-04-03 DEPARTMENT DIRECTOR TURNOVER

During the entrance interview, the OSA discussed the high rate of turnover of County director-level employees. These included the County Attorney, Emergency Management Manager, Utilities Director, Information Technologies Director, Planning Director, Human Resources, Detention Center Administrator, and Fire Marshal. The County Manager attributed the high turnover to his having raised the bar of accountability. Since the entrance conference, the OSA learned of three other departures. While these are "exempt employees", loss of knowledge can have a detrimental impact on County operations.

OM-04-04 OTHER INVESTGATIONS

The OSA is aware that other agencies are looking into County matters:

- The Internal Revenue Service is looking into the 1999 Doña Ana County bonds used to build a water and sewer system in Santa Teresa;
- The County Sheriff is investigating possible financial information recording improprieties;

- The Las Cruces Police Department is looking into allegations of the misuse of appropriations: an apparent fraudulent bill was submitted to the County's Finance Department for bookshelves that never arrived at a County library; and two County parks were built on land not owned by the County; and
- The Attorney General is looking into Open Meetings Act violations.

The results of these investigations and reviews were not available at the time the OSA completed this audit.

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 DAC. Had we performed additional procedures or had we conducted an audit of the financial statements of the DAC 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 DAC taken as a whole.

Office of the State Auditor

OFFICE OF THE STATE AUDITOR