

City of New York

OFFICE OF THE COMPTROLLER

Scott M. Stringer
COMPTROLLER



MANAGEMENT AUDIT

Marjorie Landa

Deputy Comptroller for Audit

Audit Report on the Department of
Citywide Administrative Services'
Oversight of CareFusion 211, Inc. to
Provide COVID-19 Ventilators

MG21-056A

June 30, 2021

<http://comptroller.nyc.gov>



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

June 30, 2021

To the Residents of the City of New York:

My office has audited the Department of Citywide Administrative Services (DCAS) to determine whether DCAS: (1) complied with the requirements of applicable emergency procurement requirements, including the Mayor's Emergency Executive Order 101, Mayor's Office of Contract Services' (MOCS) guidance and DCAS' internal COVID-19 procurement procedures in its awarding of the COVID-19 emergency contract to CareFusion; and (2) had an adequate structure in place to monitor and evaluate the vendor's performance for the duration of the contract. We audit entities such as DCAS as a means of increasing accountability and ensuring that City programs operate in the best interest of the public.

The audit found that DCAS complied with the expedited emergency procurement requirements established by the Mayor's Emergency Executive Order 101, MOCS' guidance, and DCAS' internal COVID-19 procurement procedures in its award of the COVID-19 emergency contract to CareFusion for the provision of ventilators. However, DCAS did not provide evidence that it adequately oversaw CareFusion's delivery of the ventilators as required by its contract.

To address these issues, the audit makes three recommendations, specifically that DCAS should (1) ensure that it has established systems, and that it effectively uses those systems, to enable it to monitor the vendor's performance, as well as the receipt, timeliness, and quality of the vendor's delivery of goods and services in connection with all of its contracts at the time performance of those contracts commences; (2) ensure that it acquires, reviews, and retains evidence of the delivery of goods and services that fully conform to contract terms to support payments made; and (3) consider enhancing the enforcement provisions in its contracts to include measures, such as liquidated damages, to better ensure that the contract terms are met prior to payment, especially in instances where there is prepayment for the goods or services.

The results of the audit have been discussed with DCAS officials throughout the audit, and their comments have been considered in preparing this report.

If you have any questions concerning this report, please e-mail my Audit Bureau at audit@comptroller.nyc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott M. Stringer".

Scott M. Stringer

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
Audit Findings and Conclusion	2
Audit Recommendations.....	2
Agency Response.....	2
AUDIT REPORT	4
Background	4
Objective.....	5
Scope and Methodology Statement.....	5
Discussion of Audit Results with DCAS	5
FINDINGS AND RECOMMENDATIONS.....	8
DCAS' Award of a COVID-19 Emergency Contract to CareFusion Complied with Mayor's Emergency Executive Orders and with MOCS' Guidance.....	8
DCAS Did Not Adequately Enforce CareFusion's Performance of the Contract.....	9
Recommendations	11
DETAILED SCOPE AND METHODOLOGY.....	13
ADDENDUM	

**THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
MANAGEMENT AUDIT**

**Audit Report on the Department of Citywide
Administrative Services' Oversight of CareFusion
211, Inc. to Provide COVID-19 Ventilators**

MG21-056A

EXECUTIVE SUMMARY

The mission of the Department of Citywide Administrative Services (DCAS) is to provide value-added and effective shared services to support the operations of New York City (City) government. In furtherance of this mission, DCAS has established a centralized purchasing process through which it procures more than \$1 billion in supplies and equipment each year on behalf of City agencies. The goal of this centralized purchasing is to ensure that products and services are obtained at the lowest net costs and meet the highest standards.

As part of the City's efforts to combat the threat of COVID-19, and with the approval of the Mayor's Office of Contract Services (MOCS), on April 22, 2020, DCAS entered into a contract pursuant to an expedited emergency procedure with CareFusion 211, Inc. (CareFusion), a medical instruments and equipment manufacturing company, to provide the City with 2,000 ventilators and associated parts (collectively referred to herein as ventilators), by August 31, 2020.¹ According to the terms of the contract, the 2,000 ventilators were to be delivered to the City on the following three dates: 500 ventilators by June 30, 2020; 750 ventilators by July 31, 2020; and 750 ventilators by August 31, 2020.

The total cost of the contract with CareFusion was \$61,824,800. In accordance with the terms of the contract, DCAS agreed to make a prepayment of \$15,456,200 (25 percent of the contract amount) that was to be applied to the delivery of the first 500 ventilators.

On October 27, 2020, DCAS notified CareFusion of its intent to terminate the contract for cause, citing CareFusion's failure to deliver the total number of ventilators by the final date agreed upon in the contract (August 31, 2020).

¹ The contract additionally references software, trolleys, baskets, and other items as associated/related ventilator parts.

Audit Findings and Conclusion

DCAS complied with the expedited emergency procurement requirements established by the Mayor's Emergency Executive Order (EEO) 101, MOCS' guidance, and DCAS' internal COVID-19 procurement procedures in its award of the COVID-19 emergency contract to CareFusion for the provision of ventilators. However, DCAS did not provide evidence that it adequately oversaw CareFusion's delivery of the ventilators as required by its contract. CareFusion missed the first two delivery dates entirely and 122 of the 522 ventilators that CareFusion ultimately supplied were delivered after the August 31, 2020 deadline for final delivery of all the contracted ventilators. Notably, the contract provided for a highly unusual prepayment of 25 percent of the purchase price prior to the delivery, which eliminated a significant motivation for the vendor to make prompt delivery. To date, CareFusion has not delivered 1,478 of the 2,000 ventilators due under the contract. In addition, DCAS did not take adequate steps to obtain evidence that the ventilators delivered were in proper working order.

Failure to properly monitor the timeliness and quality of vendor performance increases the risk that deficiencies will not be promptly identified, which can prevent the City from getting the goods and services for which it is paying. Further, when the goods in question are critical lifesaving equipment, failure to monitor the timeliness of the vendor's performance increases the risk to public health and safety due to the City not having the equipment when needed.

Audit Recommendations

To address the issues raised by this audit, we make the following three recommendations:

- DCAS should ensure that it has systems in place, and that it effectively uses those systems, to enable it to monitor the vendor's performance, as well as the receipt, timeliness, and quality of the vendor's delivery of goods and services in connection with all of its contracts at the time performance of those contracts commences.
- DCAS should ensure that it acquires, reviews, and retains evidence of the delivery of goods and services that fully conform to contract terms to support payments made.
- DCAS should consider enhancing the enforcement provisions in its contracts to include measures, such as liquidated damages, to better ensure that the contract terms are met prior to payment, especially in instances where there is prepayment for the goods or services.

Agency Response

In its response, DCAS appears to generally agree with the audit's three recommendations and contends that the agency's current practices are consistent with those recommendations. DCAS, however, does not indicate when its current practices were implemented. As reflected in the findings of this audit, we did not find them to be in place in connection with DCAS' oversight of its contract with CareFusion.

DCAS also strongly objects to the audit's findings and contends overall that the audit report is "unbalanced and inaccurate." However, in doing so, DCAS repeatedly misstates audit findings and argues at length against positions that the audit does not take. After carefully reviewing DCAS' arguments, we found them to be without merit. DCAS fails to provide credible evidence challenging the deficiencies identified in this audit; namely, (1) that DCAS did not provide evidence

that it adequately oversaw CareFusion's delivery of ventilators as required by its contract; and (2) that DCAS did not take adequate steps to obtain evidence that the ventilators delivered were in proper working order. Consequently, we find no basis to change any of the report's findings or conclusions.

AUDIT REPORT

Background

The mission of DCAS is to provide value-added and effective shared services to support the operations of City government. In furtherance of its mission, DCAS has established a centralized purchasing process through which it procures more than \$1 billion in supplies and equipment each year on behalf of City agencies. The goal of this centralized purchasing process is to ensure that products and services are obtained at the lowest net costs and meet the highest standards.

The City Policy Procurement Board (PPB) Rules apply to the procurement of goods and services by City agencies. Among other things, these rules are designed to promote competition and safeguard the integrity of the procurement process. On March 12, 2020, the Mayor of New York City declared a state of emergency in response to the threat posed by COVID-19.² In connection with that declaration, the Mayor issued EEO 101 on March 17, 2020, which, among other things, suspended certain laws and regulations that govern the City's procurement of goods and services, specifically as they pertained to the procurement of emergency contracts entered into during a state of emergency.³ Among the rules suspended were the requirements that City agencies (1) obtain prior approval from the Comptroller and the City Law Department before entering into a contract; (2) hold public hearings; and (3) use a competitive sealed bidding process where it would otherwise be required. Following the Mayor's issuance of EEO 101, on March 18, 2020, MOCS issued guidance to City agencies that detailed the extent to which existing procurement laws and rules should be followed for COVID-19 emergency purchases.

As part of the City's efforts to combat the threat of COVID-19, and with the approval of MOCS, on April 22, 2020, DCAS entered into a contract with CareFusion, a medical instruments and equipment manufacturing company, to provide the City with 2,000 ventilators by August 31, 2020. According to the terms of the contract, 2,000 ventilators were to be delivered to the City on the following three dates: 500 ventilators by June 30, 2020; 750 ventilators by July 31, 2020; and 750 ventilators by August 31, 2020.

On August 24, 2020, after CareFusion missed the first two delivery dates, and just seven days before the final date specified in the contract for delivery of all 2,000 ventilators, DCAS delegated its responsibility for the receipt and inspection of the ventilators purchased from CareFusion to the City's emergency management agency, NYC Emergency Management (NYCEM).⁴ NYCEM had previously entered into a three-year, \$9.4 million contract with Agiliti, a third-party logistics vendor, for the receipt, inspection, and storage of ventilators for the City. Pursuant to that contract, Agiliti was responsible for coordinating the initial delivery of the ventilators supplied to the City from various vendors, overseeing the inspections of the ventilators, storing the ventilators in a secure storage location, and deploying the ventilators.⁵ DCAS remained responsible for overseeing the contract and authorizing payments to CareFusion.

² Emergency Executive Order 98.

³ Among the laws and rules suspended were Title 9 of the Rules of the City of New York (Procurement Policy Board Rules), Chapter 13 of the New York City Charter, and Sections 6-101 through 6-107.1, 6-108.1 through 6-121, and 6-124 through 6-129 of the New York City Administrative Code.

⁴ DCAS explained that the reason for the delegation was the "public necessity involving the unique complexities of inspection and verification of software components."

⁵ The contract between NYCEM and Agiliti provided that Agiliti would maintain and store a stockpile of ventilators. Included in the contract is NYCEM's Agency Head Determination, which states that Agiliti had "significant and deep experience with medical stockpile fleet management to support the City's COVID-19 response."

The total cost of the contract with CareFusion was \$61,824,800. In accordance with the terms of the contract, DCAS agreed to make a prepayment of \$15,456,200 (25 percent of the contract amount) that was to be applied to the delivery of the first 500 ventilators.

On October 27, 2020, DCAS notified CareFusion of its intent to terminate the contract for cause, citing CareFusion's failure to deliver the total number of ventilators by the final date agreed upon in the contract (August 31, 2020). As of the date DCAS sent the notice to CareFusion of its intent to terminate the contract, the vendor had delivered only 522 of the 2,000 ventilators it was obligated to provide under the contract and received a total of \$16,091,955 in payments from DCAS.

Objective

The objective of this audit was to determine whether DCAS (1) complied with the requirements of applicable emergency procurement requirements, including the Mayor's Emergency Executive Order, MOCS' guidance, and DCAS' internal COVID-19 procurement procedures in its awarding of the COVID-19 emergency contract to CareFusion; and (2) had an adequate structure in place to monitor and evaluate the vendor's performance for the duration of the contract.

Scope and Methodology Statement

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93 of the New York City Charter.

The audit scope is April 1, 2020 to April 26, 2021, the last date that DCAS provided information pertaining to the ventilators. Please refer to the Detailed Scope and Methodology section at the end of this report for the specific audit procedures and detailed tests that were conducted.

Discussion of Audit Results with DCAS

The matters covered in this report were discussed with DCAS officials during and at the conclusion of this audit. A preliminary draft report was sent to DCAS and discussed at an exit conference held on May 21, 2021. On June 1, 2021, we submitted a draft report to DCAS with a request for written comments. We received a written response from DCAS on June 15, 2021.

In its response, DCAS appears to generally agree with the audit's three recommendations and contends that the agency's current practices are consistent with those recommendations. DCAS, however, does not indicate when its current practices were implemented. As reflected in the audit report, we did not find them to be in place in connection with DCAS' oversight of its contract with CareFusion.

DCAS also strongly objects to the audit's findings and contends overall that the audit report is "unbalanced and inaccurate." In doing so, DCAS simultaneously acknowledges the "critical . . . mission" the City Comptroller's audits have in "ensuring the appropriate stewardship of public funds" and at the same time refuses to accept this examination of the agency's actions to help ensure that public dollars are spent prudently, even in the midst of a dire public health emergency.

Such an examination takes nothing from the exigent circumstances the City found itself in when the pandemic hit. However, it is contrary to DCAS' public purpose for the agency to refuse to examine its own actions to determine how it might have done things better and to help improve its actions going forward.

The agency's objections to the audit's findings are based, in large part, on three arguments. First, DCAS contends that the report does not acknowledge the emergency situation that the City faced. However, this is simply not the case. As DCAS notes, the Comptroller readily granted an emergency waiver to enable DCAS to move quickly with the vital purchases of ventilators from CareFusion. In addition, throughout the audit, the auditors repeatedly accommodated DCAS' needs as it continued to engage in critical emergency actions. However, the unprecedented emergency situation faced by the City is, in fact, all the more reason for DCAS to have exercised due diligence and for this audit to have been conducted. During this emergency, certain procurement procedures intended to help ensure the integrity of the procurement process were suspended so that critical goods and services could be obtained as quickly as possible. Unfortunately, under these circumstances, the City is all the more vulnerable to unscrupulous vendors that might seek to take advantage of the City's urgent needs.⁶ Accordingly, it is critical that City agencies consider the ways they could minimize risks of fraud by exercising due diligence, creating mitigating controls to compensate for those less stringent requirements, and carefully monitoring its contracts. DCAS is not exempt from this responsibility because there was a dire emergency.

Second, DCAS emphasizes that the CareFusion contract met all legal requirements and that the contract prepayment was approved by the Comptroller as if that establishes the propriety of all aspects of the contract. However, while the audit specifically found that DCAS adhered to emergency procurement requirements, that finding does not constitute the full scope of the audit. Rather, the audit's objectives also included a review to determine if DCAS had "an adequate structure in place to monitor and evaluate the vendor's performance for the duration of the contract." In this regard, the audit found that the agency failed to provide evidence that it adequately oversaw CareFusion's delivery of ventilators as required by its contract. DCAS has provided no evidence to contradict this finding.

In support of its argument that it met all applicable emergency procurement requirements, DCAS also cites the Comptroller's Office issuance of a waiver that authorized a partial prepayment to CareFusion. However, in doing so, DCAS' characterization of the waiver is not wholly accurate. To begin with, the waiver was not issued pursuant to the Comptroller's "contract review authority," but rather was a waiver of Comptroller's Directive #24, which generally requires the receipt of goods prior to payment. Moreover, we note that the terms of the waiver reference a prepayment of 10 percent of the contract amount, not the 25 percent that DCAS actually paid CareFusion. Further, the report makes no argument that the prepayment was improper. However, our office's approval of a prepayment to CareFusion—one that even DCAS acknowledges in its response was "unprecedented"—was not an "endorsement" of the City's decision to prepay CareFusion ahead of delivery, nor was it intended to convey to DCAS that it had no responsibility to implement mitigating controls to compensate for the risks associated with prepayment.

Third, DCAS attempts to minimize the audit's findings by arguing that it received every ventilator it paid for and that it did monitor CareFusion's performance. We certainly agree that the receipt of all the goods the City paid for is positive, but that alone does not obviate the need for this

⁶ See *Nothing Gained: Report of the Comptroller's Investigation of the City's \$8.26 Million Payment to Global Medical Supply Group*, April 2021.

inquiry. Among other things, we note that the emergency procurement procedures were utilized because time was of the essence and DCAS contracted with CareFusion to provide 2,000 ventilators on an expedited basis, presumably upon terms appropriate for expedited delivery, to meet the immediate emergency needs for this life-saving equipment to help combat the COVID-19 pandemic. However, CareFusion delivered only 522 of those ventilators and none of the 522 were delivered on time.

In addition, with regard to DCAS' claim that every ventilator for which it paid CareFusion was in working order, we note in this report that DCAS has provided no evidence that it verified that to be the case, such as by obtaining the inspection reports from NYCEM before it rendered the final payment to CareFusion. Further, DCAS provides no evidence to support its claim that "it knew on June 30 and July 31 that delivery was delayed." In fact, DCAS provided no evidence that it reached out to CareFusion prior to September 2020, *after the third deadline was missed*. Additionally, as indicated in this report, DCAS did not even enter into an agreement with NYCEM to inspect and store the ventilators until August 24, 2020—a week before the final delivery of the ventilators was due and almost two months after CareFusion was contracted to start delivering ventilators.

Finally, in making its objections to the audit findings, DCAS misrepresents the findings and argues against positions that the audit does not take. Among other things, DCAS states in its response that "[t]he report implies that DCAS should have cancelled the contract when the first delivery date was missed." However, no such argument is made, either explicitly or implicitly, in this report. Further, DCAS incorrectly states that the report failed "to recognize that the City received all 500 ventilators for which it prepaid." Nowhere in the report do we state or imply that DCAS paid for ventilators it did not receive.

In conclusion, after carefully reviewing DCAS' arguments, we found them to be without merit. DCAS fails to provide credible evidence to challenge the deficiencies identified in this audit; namely, that the agency (1) did not provide evidence that it adequately oversaw CareFusion's delivery of ventilators as required by its contract, and (2) did not take adequate steps to obtain evidence that the ventilators delivered were in proper working order. Consequently, we have no basis to change any of the report's findings or conclusions.

The full text of DCAS' response is included as an addendum to this report.

FINDINGS AND RECOMMENDATIONS

DCAS complied with the reduced competitive procurement requirements established by the Mayor's Emergency Executive Order 101, MOCS' guidance, and DCAS' COVID-19 procurement process in its award of the COVID-19 emergency contract to CareFusion for the provision of ventilators.

However, DCAS did not provide evidence that it adequately oversaw CareFusion's delivery of ventilators as required by its contract. CareFusion missed the first two delivery dates entirely and 122 of the 522 ventilators that CareFusion ultimately supplied were delivered after the August 31, 2020 deadline for final delivery of all the contracted ventilators. To date, CareFusion has not delivered 1,478 of the 2,000 ventilators due under the contract. In particular, DCAS did not demonstrate that it had an adequate structure in place to ensure that the ventilators were delivered on time. The contract provided for a highly unusual prepayment of 25 percent of the purchase price prior to the delivery which eliminated a significant motivation for the vendor to make prompt delivery. Nonetheless, the contract did not include any enhanced enforcement provisions to compensate for agreeing to partial prepayment. Furthermore, DCAS did not take adequate steps to obtain evidence that the ventilators delivered were in proper working order. According to the February 22, 2021 equipment tracking worksheet, the 522 ventilators that were delivered were also inspected and deemed patient-ready. However, DCAS did not provide any evidence that it obtained the inspection reports from NYCEM to corroborate this assertion. In total, DCAS paid \$16,091,955 for the 522 ventilators that it received from CareFusion; \$15,456,200 as a prepayment for 500 ventilators upon entering the contract; and \$635,755 for the delivery of an additional 22 ventilators.

Failure to properly monitor the timeliness and quality of vendor performance increases the risk that deficiencies will not be promptly identified, which can prevent the City from getting the goods and services for which it is paying. Further, when the goods in question are critical lifesaving equipment, failure to monitor the timeliness of the vendor's performance increases the risk to public health and safety due to the City not having the equipment when needed. These issues are discussed in more detail below.

DCAS' Award of a COVID-19 Emergency Contract to CareFusion Complied with Mayor's Emergency Executive Orders and with MOCS' Guidance

According to the MOCS' guidance, agencies desiring to initiate a COVID-19 related emergency contract or procurement action must conduct the following steps:

- Notify MOCS and the Law Department of their intent to initiate a covered contract;
- Prepare a written agency head determination, which includes past performance history, for the covered contract or procurement action. The determination must contain a statement that the contract or action is necessary to respond to the COVID-19 emergency and the basis for the determination for the goods or services sought; and
- Publish a notice of contract award (for contracts exceeding the small purchase limit) within 15 days after registration of the contract, or as soon as practicable thereafter.

We found evidence indicating that DCAS followed MOCS' guidance for COVID-19 related emergency procurements in awarding the aforementioned contract to CareFusion. Specifically, we saw evidence that DCAS: informed MOCS and the Law Department of its intent to initiate the contract; conducted a review of the vendor's past performance; prepared an agency head determination that the contract was necessary to respond to the COVID-19 emergency; and published the notice of contract award in the City Record Online.

In addition, we also found evidence that DCAS followed its own COVID-19 procurement process and conducted a responsibility review, which included a review of CareFusion's history, background, liens, and past issues, including court cases. According to its review of the vendor, DCAS found past issues with the vendor, including a \$40 million settlement with the federal government in 2014 of a False Claims Act lawsuit alleging the payment of kickbacks. However, DCAS determined that the issues had been resolved with that settlement. The Agency Chief Contracting Officer's (ACCO's) determination stated that "despite the adverse information found regarding the vendor, the vendor appears to have taken corrective action and is therefore found responsible."

DCAS did not, however, demonstrate that, either in the contract itself or in connection with DCAS' internal contract oversight processes, it had a structure in place to ensure timely delivery of the ventilators. This is particularly of concern given the prompt delivery dates required by the contract and the fact that DCAS had agreed to prepay 25 percent of the total contract price prior to the delivery of a single ventilator, which eliminated a significant motivation for the vendor to make timely deliveries. Further, subsequent to the delivery of the ventilators, DCAS did not obtain sufficient evidence, such as inspection reports, that would have provided the agency with assurance that the ventilators provided by CareFusion were in proper working order. Finally, with regard to the additional 22 ventilators received for which there had not been prepayment, DCAS did not obtain sufficient evidence, such as inspection reports, that would have provided the agency with assurance that the ventilators provided by CareFusion were in proper working order before authorizing the payment to the vendor for them. These issues are discussed in more detail below.

DCAS Did Not Adequately Enforce CareFusion's Performance of the Contract

The audit found that DCAS did not demonstrate that it had an adequate structure in place to ensure that goods were delivered timely and in satisfactory condition and, as a result, did not adequately enforce CareFusion's performance of the contract. While DCAS entered into an agreement with NYCEM for the receipt and inspection of the ventilators purchased from CareFusion, it did not do so until August 24, 2020, after 850 ventilators that should have been delivered had not been, and just a week before the remaining ventilators were due. At that time, only 400 ventilators had been delivered but they were received after the dates specified in the contract. DCAS had sole responsibility for ensuring their receipt and inspection along with the rest of the first 1,250 due under the contract. Moreover, even after it entered into the agreement with NYCEM, DCAS, as the contracting agency, retained responsibility for ensuring that CareFusion complied with contract terms before authorizing the final payment to the vendor. This responsibility includes obtaining sufficient evidence that the ventilators provided by CareFusion were in proper working order.

On August 9, 2020, Agiliti (on behalf of NYCEM) began providing DCAS with an equipment tracker worksheet on a bi-weekly basis. These equipment tracker worksheets detailed the ventilators

delivered by CareFusion to Agiliti's storage facility.⁷ Since the ventilators were not delivered directly to DCAS, DCAS stated that it used the worksheets to track the deliveries of the ventilators. DCAS provided us with 23 equipment tracker worksheets, the most recent one dated February 22, 2021, on which it itemized the deliveries. However, DCAS was not able to demonstrate that it effectively used the worksheets.

Our review of the February 22, 2021 worksheet revealed that as of that date, almost six months after the August 31, 2020 deadline for delivering all of the ventilators, 1,478 (74 percent) of the 2,000 ventilators had still not been delivered. Further, our review of the worksheet revealed that none of the ventilators that CareFusion *did* supply were delivered on time:

- The first 400 ventilators were delivered on August 5, 2020, more than a month after the June 30, 2020 deadline.
- 122 ventilators were delivered on September 9, 2020, more than two months after the June 30, 2020 deadline for 100 of them and more than a month after the deadline for the next 750. At this point, all 2,000 ventilators should have been delivered.

Additionally, we found that DCAS did not obtain sufficient evidence that the ventilators provided by CareFusion were in proper working order before authorizing final payment to the vendor.⁸ DCAS' agreement with NYCEM states that "[s]igned adequate proof of receiving and inspection certification shall be made available to DCAS Office of Citywide Procurement in order to monitor the vendor progress and facilitate appropriate payment." According to the February 22, 2021 equipment tracker worksheet, the 522 ventilators that were delivered were also inspected and deemed patient-ready.⁹ However, DCAS provided no evidence that it obtained the inspection reports from NYCEM to corroborate this assertion. Reviewing the inspection certificates and verifying that the items were received and inspected before authorizing the final payment would have allowed DCAS to ensure that the ventilators they had paid for—a total of \$16,091,955—were in working condition. Instead, DCAS paid for the ventilators, both the first 500 that were covered by the prepayment and the additional 22 that were also delivered, without obtaining corroborating evidence that the ventilators were properly functioning. Subsequent to the delivery of the ventilators, DCAS should have obtained inspection reports as evidence that the ventilators provided by CareFusion were in proper working order.

During the course of the audit, we requested that DCAS keep us apprised of ventilator deliveries made by CareFusion. On November 20, 2020, DCAS informed us of its intent to terminate the contract with CareFusion. On April 26, 2021, DCAS provided us with a copy of a Notice of Default, Termination of Contract for Cause and Opportunity to be Heard, dated October 27, 2020.

When a vendor's progress in complying with its contract to deliver goods (or services) is not adequately monitored, and when that vendor is paid before goods and services are provided and determined to be in satisfactory operating condition, there is an increased risk that deficiencies in that vendor's performance will not be identified in a timely manner. Further, when the goods in question concern critical lifesaving equipment, failure to monitor a vendor's progress also increases the City's vulnerability of not having such equipment when needed.

⁷ The equipment tracker worksheet lists the items ordered, provided a description of them, the quantity ordered, the date received, and the total quantity received to date. It also includes the list of ventilators by serial numbers that are considered "patient-ready."

⁸ Although the City effectively prepaid for the first 500 ventilators and so could not have obtained evidence that they were in good working order before finalizing payment, the balance of the ventilators could have and should have been checked before payment was authorized by DCAS.

⁹ Equipment that is in patient-ready condition is equipment that has been cleaned, inspected, functionally tested and passes specifications for patient-ready state.

Recommendations

1. DCAS should ensure that it has systems in place, and that it effectively uses those systems, to enable it to monitor the vendor's performance, as well as the receipt, timeliness, and quality of the vendor's delivery of goods and services in connection with all of its contracts at the time performance of those contracts commences.

DCAS Response: From its response, it appears that DCAS agrees with this recommendation and contends that its current practices are as follows:

- “DCAS rolled out its Warehouse Management System (WMS) in early April 2020, which provided it with the ability to track delivery schedules, contract documentation, and vendor delivery records in one centralized system. DCAS aggregated receiving information on all contracts on which any 3PL [third-party logistics] was accepting delivery. DCAS set up daily meetings with each 3PL to ensure that records were aligned and that all information was being captured.
- DCAS's WMS system is being used by all procurement, quality assurance, data, and warehouse staff. Each is responsible for data entry and upkeep within the system. DCAS also centrally maintains a calendar of all planned and committed deliveries based on contract terms and vendor shipping appointments.
- DCAS continues to ensure that all contracts are maintained centrally and that all deliveries are accompanied with the correct and corresponding receiving and inspection documentation.”

Auditor Comment: We found no evidence that DCAS utilized the system and processes described above in its monitoring of the CareFusion contract. During the audit, we asked what, if any, system DCAS used to track the delivery of ventilators. DCAS never mentioned WMS in its response and instead responded that it “receives a separate Excel spreadsheet, filled out with line level detail, twice a week from Agiliti.” Consequently, we are unable to confirm DCAS' new claim that the WMS system was used for its tracking of ventilators received from CareFusion.

In addition, DCAS' claim that it maintains inspection documentation related to all contracts is belied by the fact that it was unable to provide us with a single inspection report and repeatedly directed us to NYCEM or Agiliti to obtain those records. Nonetheless, we urge DCAS to fully implement this recommendation and utilize the WMS system and process described above for all of its contracts.

2. DCAS should ensure that it acquires, reviews, and retains evidence of the delivery of goods and services that fully conform to contract terms to support payments made.

DCAS Response: From its response, it appears that DCAS agrees with this recommendation and contends that its current practices are as follows:

- “DCAS maintains all bills of lading (BOLs), receiving reports, inspection records, and receipts on dock (RODs) for all items received on DCAS contracts. DCAS maintained a rigorous process for inspecting all goods procured throughout COVID based on CDC and DOHMH guidelines, as well

as the contract specifications. Payments are tied to proper receipt and inspection of goods received, which is verified by DCAS staff across multiple units.

- DCAS's WMS system is being used by all procurement, quality assurance, data, and warehouse staff. Each party is responsible for data entry and upkeep within the system.”

Auditor Comment: As we indicate in this report, we found no evidence that DCAS obtained the above-mentioned inspection documents in its monitoring of the CareFusion contract. In addition, as stated above, DCAS did not mention its WMS system during the course of this audit in connection to tracking the delivery of ventilators, so we are unable to confirm that it was used by DCAS during the audit scope period.

Nonetheless, we urge DCAS to fully implement this recommendation and utilize the process described in its response for all of its contracts.

3. DCAS should consider enhancing the enforcement provisions in its contracts to include measures, such as liquidated damages, to better ensure that the contract terms are met prior to payment, especially in instances where there is prepayment for the goods or services.

DCAS Response: From its response, it appears that DCAS generally agrees with this recommendation. It states the following:

- “DCAS, in partnership with the City’s Law Department, Office of Management and Budget, and Mayor’s Office for Contract Services established a prepayment committee and review process for all contracting proposals that had prepayment components.
- Due to the global supply chain’s volatility and the lack of federal intervention to ensure adequate supplies were made available to states and municipalities, DCAS had to contract independently with vendors across the globe for life-saving ventilators and equipment. DCAS had to ensure, first and foremost, that it acquired all items critical to the safety and well-being of New Yorkers. The City was in desperate need of PPE, ventilators, and testing supplies. It would have been irresponsible for DCAS to terminate a contract for ventilators while they were still needed to combat COVID and other vendors may not be able to supply them any faster.
- DCAS, in consultation with the City’s Law Department and the Mayor’s Office for Contract Services, continues to add safeguards to its contracts concerning delivery timeliness, quality assurance testing and packaging details to ensure that vendors are consistent and held responsible when issues arise. Whether a liquidated damages clause is feasible and obtainable in negotiations under catastrophic market conditions cannot be predicted.

Auditor Comment: We urge DCAS to continue to explore ways to enhance its ability to enforce contract terms and thereby protect the City’s interest in light of the risk of a vendor failing to deliver needed goods or services during an emergency.

DETAILED SCOPE AND METHODOLOGY

The audit scope was from April 1, 2020 to April 26, 2021, the last date that we received information from DCAS with regards to the ventilators.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the responsibilities of the City Comptroller as set forth in Chapter 5, §93 of the New York City Charter.

To obtain an understanding of the City's general procurement process, we reviewed the Procurement Policy Board (PPB) Rules and the NYC Administrative Code relating to contracts. To gain understanding of the revised requirements for purchases relating to COVID-19 emergency purchases, we reviewed EEO 98, EEO 100, and EEO 101, all issued by the Mayor of NYC.

To determine whether DCAS had adequate controls and whether it complied with requirements in awarding the COVID-19 emergency contract to CareFusion, we conducted a virtual walkthrough meeting of the process with the Assistant Commissioner, Chief Contracting Officer, Agency Chief Contracting Officer, and Deputy Director of Audits and Accounts. We also reviewed supporting documents and responses provided by DCAS to ascertain whether the agency fulfilled the requirements in the MOCS guidelines and DCAS' COVID-19 Procurement Process.

To determine whether DCAS has an adequate structure in place to monitor and evaluate CareFusion's performance and whether CareFusion complied with the contract terms, we reviewed the contract between DCAS and CareFusion, as well as supporting documents such as invoices, packing slips, and equipment tracker worksheets. We also reviewed DCAS' agreement with NYCEM, as well as NYCEM's contract with Agiliti to obtain an understanding of the responsibilities involved with the receipt and review of the ventilators. Further, to determine whether accurate payments were processed, we compared the unit prices quoted in the contract to those noted in the invoices for each of the 522 ventilators that were delivered. To determine whether DCAS ensured that the ventilators delivered were in working condition, we requested copies of inspection reports.

The results of the above tests provide a reasonable basis to assess and support our findings and conclusions about DCAS' contract with CareFusion.



Lisette Camilo
Commissioner

**RESPONSE OF THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES (DCAS) TO THE
COMPTROLLER’S AUDIT REPORT ON DCAS’S OVERSIGHT OF CAREFUSION 211, INC. TO PROVIDE
COVID-19 VENTILATORS**

I. INTRODUCTION: THE REPORT IS UNBALANCED AND INACCURATE

The NYC Comptroller’s Office has a vital role to play in ensuring the appropriate stewardship of public funds. Its Charter authority to audit the performance of contracts and the expenditure of City funds is critical to that mission. It is therefore essential that its reporting on the audits it administers is balanced, comprehensive and accurate. This audit report fails to meet those basic expectations because it omits or erroneously states important facts and fails to place in proper context the transaction that it purports to recount and critique.

First, the report gives short shrift to the dire emergency that the City and DCAS faced in the early months of the pandemic: **when the City contracted with CareFusion in April 2020, at least 900 City residents were dying every day from COVID-19** and the number of deaths would continue to grow.¹

Second, the report glosses over the obvious: **in its intrepid pursuit of lifesaving equipment, the Department of Citywide Administrative Services (DCAS) complied with every legal obligation.**

Third, the report fails to note the most salient fact: **the City did not lose a single dollar in this transaction. It has obtained every ventilator -- in working order -- for which it paid CareFusion.**

II. THE CITY SUCCESSFULLY PROCURED CRITICALLY NEEDED VENTILATORS

A. The City Faced an Unprecedented Need to Prepay for Lifesaving Equipment

The City of New York was the first major American city hit by the pandemic. Its first case of laboratory-confirmed COVID-19 was diagnosed on February 29, 2020. In a matter of a few, harrowing weeks, City hospitals were overwhelmed by the exponentially growing numbers of patients in need of intensive care – typically with ventilators -- for a deadly and highly transmissible disease. The federal government was missing in action, providing no leadership and little support. Governments across the world were competing for scarce supplies. There were enormous backlogs in manufacturing of ventilators and PPE. Global supply chains were collapsing.

The City had a moral obligation to use every legally permissible option to obtain large quantities of ventilators, personal protective equipment, and other essential supplies to save every life possible. In

¹ As of June 14, 2021, 33,322 New Yorkers have died because of COVID-19 and more than 100,000 have been hospitalized. See New York City Department of Health and Mental Hygiene, “COVID-19: Data,” at <https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page> (Last visited June 15, 2021).

large part through DCAS's efforts, the City developed an extremely effective emergency procurement strategy during COVID-19. Due to the extreme shortage and high demand for lifesaving equipment throughout the world, the prepayment of all or part of the costs of a procurement was critical to ensuring the City's bids would be competitive. Without prepayment, the City would not have been able to secure ventilators. While the City's use of prepayments was unprecedented, the growing death toll compelled the City to respond with extraordinary measures.

B. DCAS Met Every Legal Obligation in a Transaction Approved by the Comptroller

On April 22, 2020, DCAS contracted with CareFusion for the delivery of 2,000 ventilators. Despite the unique and catastrophic conditions the City confronted, as the report acknowledges, "DCAS complied with the reduced competitive procurement requirements established by the Mayor's Emergency Executive Order 101 and other applicable procurement laws and rules, including MOCS' guidance and DCAS' COVID-19 procurement process in its award of the COVID-19 emergency contract to CareFusion for the provision of ventilators." The report explained that the DCAS COVID-19 procurement process included a responsibility review of CareFusion's history, background, liens, and past issues, including court cases.

On March 31, 2020, the Deputy Comptroller for Accountancy, exercising the Comptroller's contract review authority under Section 5 of Comptroller's Directive # 24 (FMS Contract Document), had issued a waiver that authorized this prepayment. The waiver, a copy of which is annexed, was made "effective for all ventilator purchases made pursuant to EO 101 during the COVID-19 pandemic."² When it approved DCAS's prepayment for ventilators, the Comptroller's office surely knew, as it recounts in the report, that the prepayment "eliminated a significant motivation for the vendor to make prompt delivery." Despite that knowledge, the Comptroller endorsed the City's "determin[ation] that it is in the best interest to take the measured risk of paying this vendor ahead of delivery in exchange for securing this critically-needed equipment."

C. DCAS Secured Every CareFusion Ventilator for Which it Paid

Now, the Comptroller tendentiously takes DCAS to task because CareFusion missed delivery deadlines. CareFusion missed the first two delivery dates of June 30 and July 31, 2020. It delivered 400 ventilators on August 4, 2020 and another 122 ventilators – 22 more than the number for which the City had prepaid – on September 9, 2020. The report asserts that DCAS failed "to monitor the timeliness of the vendor's performance." That is simply not true. DCAS of course knew on June 30 and July 31 that delivery was delayed.

The report implies that DCAS should have cancelled the contract when the first delivery date was missed. At the time DCAS was working to secure ventilators, virtually every vendor in the marketplace was in backorder status. Every government that placed an order – not just the City of New York – had to get in line. In most cases, the items ordered first had to be manufactured because there simply weren't ventilators sitting idle in warehouses ready for express shipping. Companies struggled to

² On April 7, 2020, the Comptroller issued a similar waiver authorizing prepayment for all personal protective equipment made pursuant to EO 101 during the pandemic.

find space on boats and planes due to the sudden spike in demand for shipping and encountered delays getting goods through customs.

As hospitals across New York City were teeming with patients in need of these lifesaving machines, DCAS had a very practical decision to make: exercise patience to make sure the city could ultimately get all of the supplies it could, or abruptly cancel an order, and start the process again with a different vendor that may well encounter the very same delays. DCAS opted to continue to work with CareFusion and ultimately it secured 522 ventilators that New York City would not otherwise have obtained.

After CareFusion delivered all 500 ventilators for which the City prepaid, and 22 more, DCAS notified the company of its intent to cancel the contract for non-performance. By that time, the City had secured the ventilators it needed from other sources while DCAS had successfully built a broad base of vendors to ensure that no single point-of-failure would leave the City at risk. DCAS issued a final termination notice to CareFusion on December 11, 2020.³

Ultimately, because it is clear that DCAS followed every legal obligation in its effort to secure lifesaving equipment for New Yorkers, the report can only offer the flaccid suggestion that DCAS consider adding a liquidated damages clause to contracts that provide for prepayment to ensure timely delivery. It does not assess whether any vendor would have agreed to such terms under the market conditions that prevailed in April 2020 and is silent as to what DCAS should do in an emergency if a vendor will not agree to such a provision.

The report also criticizes DCAS for failing to “obtain sufficient evidence that the ventilators provided by CareFusion were in proper working order before finalizing payments to the vendor.” Only in a footnote does it acknowledge that it was impossible for DCAS to obtain such evidence before finalizing payment for 500 of the ventilators, since the City had pre-paid for them. And it erroneously implies that DCAS did not receive verification that the ventilators had been inspected and were in good working order before final payment was made.⁴ DCAS had prepaid for all but 22 of the ventilators CareFusion supplied. The 22 additional ventilators added \$635,755 to the cost of the deliverables. As the Comptroller’s Office knows from tracker sheets supplied to it, Agiliti inspected and confirmed that all 522 ventilators were patient-ready no later than January 8, 2021. DCAS did not issue the \$635,755 payment until receiving confirmation that 122 related basket arms were compatible. DCAS confirmed compatibility on January 27, 2021 and issued payment of \$635,755 on February 11, 2021.

³ DCAS previously advised the Comptroller’s Office on January 26, 2021 that issues concerning final termination of the contract was being handled by the Law Department. After issuance of the final termination notice, at CareFusion’s request, the City entered into settlement negotiations. As a result, DCAS was not at liberty to disclose the final termination until negotiations concluded unsuccessfully in May 2021 after the issuance of the Preliminary Draft Report.

⁴ Due to the highly technical nature of inspecting ventilators, DCAS delegated the responsibility to inspect the CareFusion ventilators to New York City Emergency Management, which had contracted with Agiliti, a firm that has the expertise to conduct the inspections. DCAS’ delegation of this function to NYCEM and NYCEM’s use of a subcontractor to perform inspections and certify equipment is a permitted structure under the terms of the contract. The structure was adequate to ensure that equipment purchased under the contract was provided in good working order.

To reiterate, one of the chief goals of an audit should be its objectivity and accuracy. In this instance, the report's omission of context, failure to recognize that the City received all 500 ventilators for which it prepaid, and misstatements of fact call into question the motivations of the Office of the Comptroller and do a disservice to all New Yorkers.

III. DCAS RESPONSE TO THE RECOMMENDATIONS

Recommendation 1:

DCAS should ensure that it has systems in place, and that it effectively uses those systems, to enable it to monitor the vendor's performance, as well as the receipt, timeliness, and quality of the vendor's delivery of goods and services in connection with all of its contracts at the time performance of those contracts commences.

Response to Recommendation 1:

- DCAS established multiple teams across the globe to inspect and verify receipt of items purchased and received during the COVID emergency. DCAS's Bureau of Quality Assurance had staff located at DCAS's Central Storehouse seven days a week for months and performed weekly and biweekly inspections at various third-party logistics' warehouses (3PLs) across multiple different states, as well. DCAS, in partnership with MOCS, also established a process for inspecting goods overseas, as part of the City's freight forwarding operation.
- DCAS rolled out its Warehouse Management System (WMS) in early April 2020, which provided it with the ability to track delivery schedules, contract documentation, and vendor delivery records in one centralized system. DCAS aggregated receiving information on all contracts on which any 3PL was accepting delivery. DCAS set up daily meetings with each 3PL to ensure that records were aligned and that all information was being captured.
- DCAS's WMS system is being used by all procurement, quality assurance, data, and warehouse staff. Each is responsible for data entry and upkeep within the system. DCAS also centrally maintains a calendar of all planned and committed deliveries based on contract terms and vendor shipping appointments.
- DCAS monitors all vendor contracting and receiving documentation in a centralized system. DCAS's Bureau of Quality Assurance has rejected more than \$8 million worth of inventory due to product quality or damages. These rejections helped to ensure that the no money was wasted on products that did not meet specifications.
- DCAS continues to ensure that all contracts are maintained centrally and that all deliveries are accompanied with the correct and corresponding receiving and inspection documentation.

Recommendation 2:

DCAS should ensure that it acquires, reviews and retains evidence of the delivery of goods and services that fully conform to contract terms to support payments made.

Response to Recommendation 2:

- DCAS maintains all bills of lading (BOLs), receiving reports, inspection records, and receipts on dock (RODs) for all items received on DCAS contracts. DCAS maintained a rigorous process for inspecting all goods procured throughout COVID based on CDC and DOHMH guidelines, as well as the contract specifications. Payments are tied to proper receipt and inspection of goods received, which is verified by DCAS staff across multiple units.
- DCAS's WMS system is being used by all procurement, quality assurance, data, and warehouse staff. Each party is responsible for data entry and upkeep within the system.

Recommendation 3:

DCAS should consider enhancing the enforcement provisions in its contracts to include measures, such as liquidated damages, to better ensure that the contract terms are met prior to payment, especially in instances where there is prepayment for the goods or service.

Response to Recommendation 3:

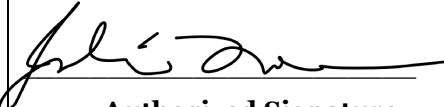
- DCAS, in partnership with the City's Law Department, Office of Management and Budget, and Mayor's Office for Contract Services established a prepayment committee and review process for all contracting proposals that had prepayment components.
- Due to the global supply chain's volatility and the lack of federal intervention to ensure adequate supplies were made available to states and municipalities, DCAS had to contract independently with vendors across the globe for life-saving ventilators and equipment. DCAS had to ensure, first and foremost, that it acquired all items critical to the safety and well-being of New Yorkers. The City was in desperate need of PPE, ventilators, and testing supplies. It would have been irresponsible for DCAS to terminate a contract for ventilators while they were still needed to combat COVID and other vendors may not be able to supply them any faster.
- DCAS, in consultation with the City's Law Department and the Mayor's Office for Contract Services, continues to add safeguards to its contracts concerning delivery timeliness, quality assurance testing and packaging details to ensure that vendors are consistent and held responsible when issues arise. Whether a liquidated damages clause is feasible and obtainable in negotiations under catastrophic market conditions cannot be predicted.



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
1 CENTRE STREET
NEW YORK, NY 10007

SCOTT M. STRINGER
COMPTROLLER

AUTHORIZATION OF WAIVER

Agency: NYC Department of Citywide Administrative Services	Waiver ID: 2020-220-856
Agency Contact: Roman Gofman	
Email Address: Rgofman@dcas.nyc.gov	Telephone: (212) 386-6283
<p>The Comptroller's Office authorizes the Waiver requested in the <i>Application for Waiver from the Requirements of the Comptroller's Internal Control and Accountability Directives</i>, submitted by the above Agency on <u>March 31, 2020</u> for an <u>emergency prepayment</u> for the Directive listed below, based on the information provided by the Agency, in the interest of the City.</p>	
New Waiver Request <input checked="" type="checkbox"/>	Waiver Renewal Request <input type="checkbox"/>
Estimated dollar value of this request: approximately \$9,100,000.00 or more.	
Directive and Section(s) or Subsection(s): Directive #24, Section 5, FMS Contract Documents	
<p>Terms and Conditions specific to this Waiver:</p> <p>This Waiver applies to a prepayment by the NYC Department of Citywide Administrative Services (DCAS) for 2,000 ventilators, which are critical life-saving equipment used in response to the COVID-19 pandemic. This payment is pursuant to the Mayor's Emergency Executive Order (EO) 101. The vendor will not secure manufacturing without the prepayment of a 10% deposit. The City has determined that it is in the best interest to take the measured risk of paying this vendor ahead of delivery in exchange for securing this critically-needed equipment.</p>	
<ol style="list-style-type: none"> 1. A copy of the application for Waiver shall be attached to and become a part of this Waiver. 2. The Agency to which this Waiver is granted shall be responsible for strict observance of the terms and conditions contained within this authorization. 	
<p>This Waiver is effective for all ventilator purchases made pursuant to EO 101 during the COVID-19 pandemic, and is subject to cancellation at any time upon notice by the Comptroller or his authorized representative.</p>	
 Authorized Signature	Deputy Comptroller for Accountancy Title
	March 31, 2020 Date