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Assessing the Effectiveness of the MTA All-Agency Contractor Evaluation (ACE) Program

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OVERVIEW

Given the stark economic circumstances currently eroding the power of the Metropolitan Transportation Authority and constituent agencies (MTA) to maintain and expand its aging transportation infrastructure, there is a pressing need to improve the efficiency and effectiveness of the Authority's capital expenditures. To this end, the Office of the MTA Inspector General (OIG) has examined MTA efforts to screen vendors with poor performance histories – a potentially significant cost savings tool – when selecting contractors for future capital projects.

Since 1988, when the MTA adopted OIG recommendations to require past performance assessments of its prospective contractors, the Authority's ability to actually identify problem vendors has produced decidedly mixed results. During the first ten years of the program, the MTA lacked a workable system for evaluating the performance of capital contractors and consultants. Finally, in 1998, the MTA initiated its All-Agency Contractor Evaluation (ACE) system designed to achieve the following goals:

- To establish an effective, objective, and fair evaluation system that will enable agency managers to track contractor performance throughout the life of capital projects;
- To accurately and promptly identify those vendors who do not meet contractual requirements, in order to protect the Authority's interests and initiate timely steps to improve contractor performance; and
- To immediately disseminate among the MTA's constituent agencies the names of unsatisfactory vendors before such vendors can receive additional contract awards.

The results of this audit are being released simultaneously in two separate OIG reports. In this report, we reviewed three aspects of ACE operations between 2006 and 2008 related to capital contracts awarded by four constituent agencies. First, we examined the *accuracy* of past performance assessments of contractors working for New York City Transit (NYC Transit), the MTA's largest constituent agency. Second, we reviewed the *timeliness* of performance assessments prepared by NYC Transit, as well as the Long Island Rail Road (LIRR), Metro-North Railroad (MNR) and Bridges & Tunnels (B&T). Finally, we explored the possibility of expanding the current ACE program to evaluate the performance of subcontractors who perform most of the actual construction work for the MTA.

In an accompanying report, MTA/OIG #2009-15, entitled “Program Design Deficiencies in the MTA All-Agency Contractor Evaluation (ACE) Program,” we assess the effectiveness of five additional ACE program areas: performance evaluations after contract closings; ACE training for agency evaluators; adequacy of current ACE evaluation forms; default ratings of Satisfactory for agency contractors; and criteria for Final Evaluation rating periods.

Findings

While acknowledging that ACE represents a technical advancement over past MTA rating methods, we find that several aspects of the agencies’ application of the system are deficient and limit ACE’s ability to meet the contractor evaluation goals set by the Authority.

1. Accuracy Problems Found at NYC Transit

In examining the data compiled by the ACE system, our review found that MTA agency evaluators rarely issued less than “Satisfactory” ratings of contractors. Of the 2,579 interim and final performance evaluations entered on ACE by the four agencies between 2006 and 2008, only 114 (4.4 percent) rated the contractors’ performance as “Marginal” and even fewer, 19 (0.7 percent), rated the performance as “Unsatisfactory.” Past reports by MTA Audit Services (the Authority’s own internal auditor) suggest, however, that poor contractor performance is not always accurately captured on ACE.

We analyzed three recent projects at one of the agencies, NYC Transit, to assess whether significant contractor performance problems identified during our review were accurately captured by the ACE system. Our case studies showed that:

- A single contractor with poor work performance on two on-going capital projects was not rated as Unsatisfactory in either instance because managers did not want to risk losing the contractor’s participation in future NYC Transit projects.
- A NYC Transit manager changed an Unsatisfactory rating to a rating of Satisfactory solely because the evaluator failed to provide the contractor with written notification of work performance problems. Notably, the manager expressed no disagreement with the Unsatisfactory rating itself. Indeed, most of the managers we interviewed expressed their belief that in these circumstances they have no choice but to upgrade Unsatisfactory ratings regardless of merit.

Our interviews with managers responsible for implementing NYC Transit’s capital program provided an explanation for these deficiencies: an institutional reluctance, for a variety of reasons, to rate contractors’ work as Unsatisfactory, even when such ratings are the most appropriate.

One particularly disturbing reason given by many of these managers is that they felt pressure to upgrade ratings of Unsatisfactory to prevent important agency contractors from being precluded from bidding on future work – even though under the rules such ratings do not

automatically preclude such bidding. In these cases, the managers sometimes allowed what they perceived to be agency “business decisions” to override their true assessments of contractor performance. By doing so, though, they effectively usurped the power and duty of MTA’s General Counsel, Executive Director and Board to adequately review and properly accept or reject contract awards in the future.

2. Untimely Entry of ACE Evaluations

While the four agencies we reviewed did not always enter contractor evaluations on time, delays were most pronounced at the LIRR where more than half of all contractor ratings were filed late. Because of such delays, background checks on vendors seeking additional MTA contracts did not contain the most current information on contractor performance, as shown in another of our case studies:

- LIRR waited more than nine months after identifying a vendor as Unsatisfactory before entering that rating on ACE. During this inappropriate delay, three other agencies awarded the same contractor five additional contracts totaling almost \$25 million without being aware of the vendor’s concurrent performance problems.

3. Exclusion of Subcontractor Evaluations from the ACE Database

Our review noted a limitation of the ACE system – current MTA ACE Guidelines do not require agencies to evaluate subcontractors even though such vendors perform some 70 to 80 percent of the work involved in capital contracts. We believe that the absence of subcontractor evaluations unduly weakens the agencies’ ability to address on-going subcontractor work problems on current contracts and to screen such poor performing vendors from participating in future MTA contracts. This problem is highlighted in the last of our case studies:

- LIRR approved the use of a subcontractor without being aware that the same vendor had recently defaulted on a multi-million dollar station rehabilitation project while under contract to NYC Transit.

Notably, after reviewing a preliminary draft, the MTA did not dispute the major findings contained in this report.

Recommendations

We believe that the ACE evaluation deficiencies noted in this report seriously diminish the system's usefulness as a management tool to correct poor performance and to screen high-risk vendors seeking MTA contract awards. To address these concerns and better utilize ACE in identifying poor performing contractors, we make seven recommendations which are summarized below:

- MTA agencies should institute spot-checks of contractor evaluations entered on the ACE system to ensure that the evaluations accurately identify unsatisfactory performance whenever it occurs.
- MTA All-Agency Guidelines should explicitly prohibit the upgrading of Overall Unsatisfactory ratings when contractor notification requirements have not been met. Instead, evaluations should be entered on the ACE system as "Unsatisfactory Under Review" until the contractors have been formally notified of alleged performance problems and afforded the opportunity to respond to such issues. This preliminary evaluation should be available to all agencies within the MTA when they are considering awarding a contract to this vendor.
- The MTA should require its Independent Engineering Consultant, currently responsible for monitoring the largest capital construction projects, to identify any inconsistencies between evaluations entered on the ACE system and the consultant's own observations of contractor performance.
- The MTA should direct any ACE evaluators who believe they have been inappropriately directed or pressured by agency officials to upgrade or exclude Unsatisfactory contractor performance ratings from the ACE system, to report such conduct to the MTA Chief Compliance Officer, and to the OIG for further investigation.
- ACE Administrators should identify managers who consistently violate MTA requirements for prompt filing of ACE evaluations,¹ and report them to their agencies' chief capital program officers for review and appropriate corrective action.
- MTA agencies should assign ACE Administrator responsibilities to agency officials dedicated to and held responsible for properly monitoring contractor evaluations.
- The MTA should promptly initiate a process for evaluating subcontractors who perform substantial construction work for the agencies and for including such evaluations on the ACE system.

¹ For the purposes of this report, evaluations of contractor performance that are logged on the ACE system are referred to as "ACE evaluations" and the agency managers who performed the evaluation are referred to as "ACE evaluators."

In its response to this report, the MTA accepted a number of the audit's recommendations without reservation. For example, the Authority agreed to explicitly prohibit the upgrading of Overall Unsatisfactory ratings when contractor notification requirements have not been met; to amend current All-Agency Guidelines to require spot-checks of ACE evaluations by both agency managers and its Independent Engineering Consultant; and to more clearly define the monitoring role of ACE Administrators in overseeing the evaluation process and in expediting the submittal and data entry of contractor ratings.

However, the MTA did express reservations about two of our recommendations: disseminating preliminary ratings of contractors among its agencies and requiring evaluations of subcontractors. As to the dissemination of preliminary ratings, the Authority raised "due process" concerns. To ensure that the agencies are properly informed, however, we believe the Authority must expedite the evaluation process, particularly when contractor performance is rated Unsatisfactory, and find a way to share these ratings in a manner that is reasonable and fair. And as to the evaluation of subcontractors, we believe that the Authority's technical legal concern and its asserted issues involving implementation and due process are unfounded. We note that such subcontractor evaluations are performed routinely by other public authorities in the metropolitan area (e.g., the Port Authority of New York and New Jersey and the New York City School Construction Authority).

While the MTA did agree to reconsider its views and past practices regarding these two issues, we remain concerned that the solutions it proposes simply do not go far enough to achieve the goals of our recommendations. For example, regarding subcontractor evaluations, the Authority proposes adopting for use by all four agencies, a long-standing NYC Transit procedure that requires managers to file special evaluation reports whenever the performance of subcontractors is found to be unsatisfactory. We note, however, that between 2005 and 2009, NYC Transit has not filed even a single subcontractor evaluation report, despite agreeing with the recommendations that it do so made in a 2006 report by MTA Audit Services.

Contemporaneously with our ACE audit, we are also spearheading an ongoing initiative with the MTA agencies to streamline the contractor responsibility process and standardize and improve vendor screening techniques used throughout the Authority. The responsibility process evaluates contractors' past performance, integrity and other indicators of their ability to meet contract requirements. A credible and time-sensitive ACE system will be essential to this objective and, indeed, furthers the effectiveness and credibility of the process.

Conclusion

To ensure that all critical MTA transportation decisions are based on accurate data and sound assumptions, and that they conform to all regulatory goals and guidelines, it is essential that the Authority's processes for its policy making and business decisions are fully supportable and transparent.

Externally, transparency provides the New York State Executive and Legislative branches, as well as the OIG and the riding public in general, with the ability to examine the MTA's rationale

for capital and operating expenditures and to determine if the billions of dollars in federal, state, and city aid currently employed by the Authority are being wisely invested to meet the transportation needs of the New York metropolitan area.

Internally, transparency plays an equally important role by providing the MTA Board and the MTA Executive Staff with the breadth and depth of information necessary to make informed decisions regarding the award of capital program contracts. However, this transparency is lost when evaluations are deficient or late, and when vendors are overrated. The loss of transparency, in turn, weakens the ability of the MTA in general and its constituent agencies in particular to identify contractors who have had performance problems on current contracts, to demand improvement by these contractors, and to log recalcitrant vendors on the ACE database so that they can be properly screened before receiving additional contract awards.

It is troubling that the reporting problems identified here apparently resulted, in part, from an institutional reluctance to rate contractor work as Unsatisfactory even when that rating is most appropriate. It is even more troubling that top managers permitted, encouraged or actually directed evaluators to overrate performance.

We start from the premise that permitting, encouraging or directing evaluators to misrepresent contractor performance is shortsighted, counterproductive and wrong. Although such actions may not have been intended to mislead the MTA Board and executive staff that review and approve awards of future contracts to such vendors, those actions foster that result.

It seems clear, given the case studies discussed in this report and the broader picture developed from our interviews with agency project officials, ACE Administrators and the MTA Office of Construction Oversight, that the ACE system's potential for holding contractors accountable for poor work and providing greater transparency in the contractor selection process has been thwarted. While we did not specifically assess the accuracy of contractor evaluations at LIRR, MNR, and B&T, we believe deficiencies in the internal controls governing all agencies' use of ACE place the entire system at risk for significant inaccuracies.

By examining the findings made in this report and adopting its recommendations, the MTA can make the ACE system more effective, objective, and fair. By doing so, the MTA will be better equipped to promptly detect contractor performance problems; to initiate remedial actions to improve the quality and timeliness of the work; and to share evaluation data among the constituent agencies to prevent future contract awards to those vendors who fail to perform in a satisfactory manner.

BACKGROUND

Principles of Responsibility Determination

As a best procurement practice in awarding capital construction contracts, many federal, state and local agencies require pre-award background checks on prospective contractors to obtain reasonable assurances that the vendors will be capable of achieving the contracts' quality, safety, and scheduling requirements. Typically, these background checks seek to elicit information in the following areas:²

- Past Performance Issues – To determine whether prospective contractors have had poor performance records on prior government contracts, agencies look for evidence of unsatisfactory work evaluations, early termination from prior contracts for cause (default), assessments of penalty payments against contractors for contract violations (liquidated damages), and instances where surety companies have had to complete contracts after the original contractors proved incapable of completing the work.
- Integrity Issues – To judge the responsibility of prospective contractors, agencies check for evidence of past integrity problems including, but not limited to, criminal convictions, pending criminal charges, ethical violations, tax delinquencies, and integrity-related debarment by federal, state or local governments.

Once background checks are completed, the information is examined by agency procurement officials in a process called *responsibility determination*. Should the officials conclude that adverse background information constitutes a significant risk to the completion of the contract, the prospective contractor is designated as non-responsible and denied award of the contract despite having submitted the lowest bid for the job.

Evaluating MTA Contractor Performance

The MTA first adopted responsibility determination procedures in 1988 in response to a recommendation and considerable input from the OIG.³ The Authority's original All-Agency Contractor Responsibility Guidelines (Responsibility Guidelines) required each agency to conduct background checks on vendors seeking contracts equal to or greater than \$250,000 to ensure that the lowest bidding contractors⁴ had the experience and integrity to perform their

² Aside from past performance and integrity issues, procurement officials also examine prospective contractors' business records and consult with independent financial evaluation services to identify inadequacies in company finances, equipment, facilities, personnel and expertise that could potentially limit its ability to meet contract requirements. It should be noted, however, that in this review of the ACE system we focus exclusively on past performance issues, rather than on those related to vendor integrity or financial capacity.

³ As per recommendation #5 contained in MTA/IG Report #86-3, "An Investigation into the Background of C&S Transit Corporation, its Principle Owners and its Performance in Transit Authority and Metro-North Commuter Railroad Contracts."

⁴ The MTA's Contractor Responsibility Guidelines also require background checks on prospective contractors chosen through 'Request for Proposal' and 'Sole-Source' contract awards.

assigned tasks.⁵ The Responsibility Guidelines also required the agencies to create a master contractor performance database for use in MTA responsibility determinations.

In the formulation of an all-agency contractor evaluation system, the MTA, in concert with the agencies' top capital program management and procurement officials, sought to achieve two important management objectives:

- To promptly identify contractor performance problems related to on-going capital projects and initiate appropriate discussions with the contractor to address such concerns; and
- To disseminate overall Unsatisfactory performance ratings among the various constituent agencies to allow such vendors to be screened from future contract awards.

In 1992, the MTA developed the Construction Oversight Contractor Performance Evaluation System or COCOPEs which required capital project managers to periodically evaluate vendors under contract to its constituent agencies.⁶ By compiling a database of such evaluations, COCOPEs was designed to identify prospective contractors with histories of unsatisfactory work performance with the MTA.

Numerous system problems and implementation weaknesses, however, prevented COCOPEs from meeting the Guideline's objectives. These deficiencies were identified in a report released by MTA Audit Services in 1995.⁷ Among its findings, the report noted that agencies did not prepare final evaluations for the majority of contracts awarded and those that were prepared were not submitted on a timely basis. As such, the report concluded that COCOPEs was incapable of providing meaningful data for the agencies' responsibility determinations. In summing up its findings, the MTA Audit Services report stated:

...unless a firm commitment is given by the agencies to maintain the system as was intended, we would recommend that serious consideration be given to scrap the COCOPEs system.

⁵ Public Authorities Law §1265-a which requires that certain purchase and public works contracts be awarded by the MTA to the "lowest responsible bidder," does not contain or refer to any definition of "responsible bidder."

⁶ Previously, in 1988, the MTA developed the Contractor Performance Evaluation System (COPEs) which recorded evaluations on aspects of contractor performance at the conclusion of the contract. Because COPEs did not evaluate performance throughout the contract period or provide an overall evaluation at the conclusion of the work, the MTA created COCOPEs to augment its contractor database.

⁷ MTA Audit Services Report #23-95, "Review of Construction Oversight Contractor Performance Evaluation System (COCOPEs)."

ACE Guidelines

After experiencing almost ten years of problems in establishing a credible contractor performance database, the MTA adopted guidelines for its new ACE program (ACE Guidelines) in 1998 which produced the following improvements in the evaluation of contractors:

1. Controls over Agency Compliance

ACE required capital project managers to prepare interim evaluations of contractor performance every six months after contract award and to issue a final evaluation at the conclusion of the work. To ensure that all evaluations were actually entered on the system, each agency appointed an ACE Administrator charged with monitoring compliance.

2. Standards for Rating Contractor Performance

ACE established a uniform contractor evaluation process for all MTA agencies. Under this system, evaluators were required to assess and rate four separate performance indicators – quality, management, safety⁸ and scheduling. As to each indicator, evaluators had three rating options:

- Satisfactory** - for performance that consistently meets or exceeds contractual requirements;
- Marginal** - for performance that occasionally fails to meet contractual requirements; and
- Unsatisfactory** - for performance that frequently fails to meet contractual requirements.

In addition to rating each performance indicator, evaluators provide an overall performance rating for interim and final evaluations. ACE requires evaluators to issue overall Unsatisfactory ratings (Overall U) whenever two or more performance indicators in the same evaluation receive an Unsatisfactory rating or when the contractor is terminated for default.⁹

3. Due Process for Contractors

According to ACE procedures, evaluators must notify contractors of the deficiencies in their performance in writing and give them time to correct the problems. If after the allotted time for remedy the contractor still fails to cure, the evaluator must notify the contractor before entering an Overall U rating on ACE. Such notifications must be in writing, identify the basis for the Unsatisfactory evaluation and offer the contractor the right to appeal. To emphasize the importance of contractor notification to the evaluation system, the ACE

⁸ ACE captures safety issues within a performance indicator entitled “Safety, Property Protection, and System Operation Impact.”

⁹ The ACE Guidelines created somewhat different standards for consultant contractors, requiring only two performance indicators (quality and management) to be evaluated.

Guidelines state:

Failure to achieve this effective communication will negate the evaluator's ability to rate the contractor.

While this notification requirement ensured that contractors were afforded appropriate due process in the event of Unsatisfactory performance ratings, it also allowed the MTA to achieve another important goal of the ACE system – to provide the agencies with a management tool to induce contractors to improve their current performance. Indeed, the ACE Guidelines stipulate that if quality, scheduling, management, and safety problems are corrected before the end of the six-month rating period, project managers may enter Marginal or Satisfactory performance evaluations as appropriate on ACE for that period.

Revised Responsibility Guidelines

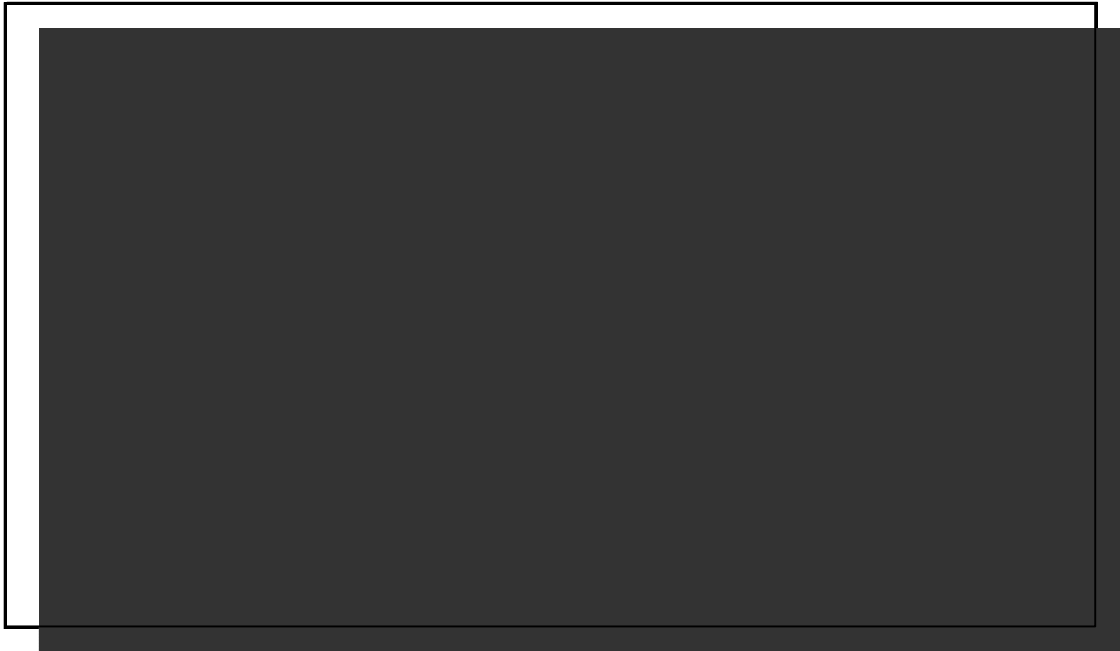
In 1997, before introducing the ACE Guidelines, the MTA revised its Responsibility Guidelines to strengthen agency requirements for using the evaluation data during subsequent responsibility determinations. Agency procurement officials were now required to consider a contractor's past Overall U rating on the ACE system to be Significant Adverse Information (SAI) when judging the same vendor's fitness for future contract awards. SAI data refers to substantive past performance problems that would place the MTA at risk if such issues were repeated under current contracts. To assure fairness to those contractors who improved their work performance, the Responsibility Guideline revisions limited the length of time that past Unsatisfactory ACE ratings could inhibit vendors' ability to obtain additional contracts. Specifically, the Responsibility Guidelines do not require Overall U ratings on interim evaluations to be considered as SAI after subsequent ratings on the same contract indicate that performance problems have been corrected. In addition, Overall U ratings on final evaluations cease to be considered as SAI three years after being entered on ACE.

While the revised Responsibility Guidelines do not specifically prohibit contract awards to vendors with existing Overall U ratings, those Guidelines do require the agencies to obtain extraordinary authorization before awarding contracts to such vendors. Thus, awards to contractors with SAI must be approved by the agency president and the MTA Executive Director in consultation with the MTA General Counsel. If the contract in question requires MTA Board approval, the agencies must also include the SAI data as an informational item in the contract's staff summary submitted for the Board's review.

Recent Results of ACE Evaluations

In examining the data compiled by the ACE system between 2006 and 2008, our review found that MTA agency evaluators rarely issued Unsatisfactory ratings of contractors. Of the 2,579 interim and final performance evaluations entered on ACE by the four agencies, only 19 or 0.7 percent received Overall U ratings, as shown in Table 1.

TABLE 1:
Overall Contractor Ratings Entered on the ACE System (2006-2008)



As a result, agency responsibility determinations rarely discover Unsatisfactory ratings when ACE is used as part of the background checks for vendors seeking additional contract awards. Indeed, while NYC Transit, LIRR, MNR, and B&T conducted responsibility determinations for 325 contracts equal to or greater than \$250,000 during our 2006-2008 audit period, the screening process did not detect a single Overall U rating on ACE related to prior work performed by the prospective contractors.¹⁰

Agency officials offered several possible explanations for the near total absence of Unsatisfactory ratings on ACE. Many project managers we interviewed stated that the agencies' warnings of possible suspension of contract payments and assessment of liquidated damages have motivated poor performing contractors to cure their work difficulties. Further, a senior MTA official asserted that the improved vendor-tracking tools provided by the ACE system over the past ten years have gradually led to a general improvement in contractor performance throughout the Authority.

Past audit reports, however, suggest an additional explanation for the infrequency of Unsatisfactory ratings – inaccurate contractor evaluations. In 2001 and again in 2006, MTA Audit Services cited incidents where contractors with Unsatisfactory performance records (i.e., those found in contract default, replaced by surety companies before the conclusion of the work,

¹⁰ The 19 contractors who received Unsatisfactory ratings between 2006 and 2008 were not flagged during 2006-2008 responsibility determinations for either of two reasons: first, because they were not the lowest bidders for contracts and thus there was no need for screening; and second, because their Unsatisfactory interim rating was replaced by a higher rating on a subsequent interim or final evaluation.

or found in violation of agency safety standards) did not receive an Overall U rating from the agencies' ACE evaluators.

While the agencies previously agreed to MTA Audit Service's recommendations for improving the ACE system, OIG conducted more recent tests to see if the accuracy problems had indeed been resolved. In that regard, we focused our review on the contractor evaluation process employed by NYC Transit, the largest MTA constituent agency. Our audit findings are explained in the following sections of this report. Notably, after reviewing a preliminary draft, the MTA did not dispute the major findings in this report.

SECTION I: ACCURACY PROBLEMS IN ACE RATINGS FOUND AT NYC TRANSIT

NYC Transit's Capital Program Management department (CPM) has five separate program divisions (Station Rehabilitation, Signals & Systems, Infrastructure & Facilities, Buses, and On-Call Projects) that manage projects related to the maintenance and/or expansion of specific capital areas. Within each of these divisions, responsibility for capital projects is divided among a three-level management structure:

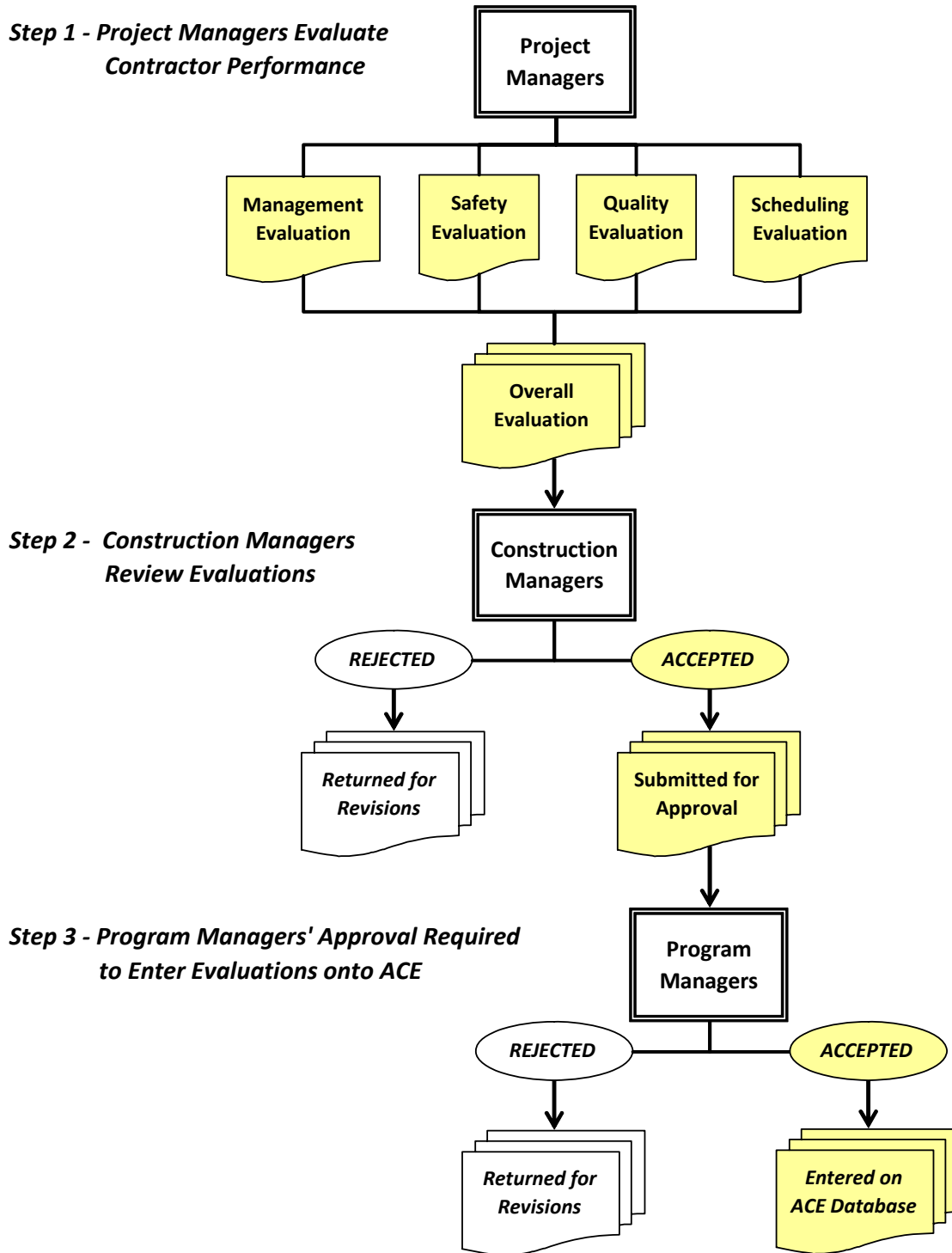
- **Project Managers** – Also referred to as resident engineers, project managers have day-to-day responsibility for managing capital projects. Currently, CPM employs 110 project managers throughout the five divisions.
- **Construction Managers** – CPM assigns 35 construction managers to supervise and review the work of the project managers.
- **Program Managers** – Each division employs one to three program managers, (10 in total) who supervise construction managers and generally oversee the progress of capital projects.

Above this three-level hierarchy are **Program Officers** who oversee all managers within each division and report directly to CPM's Senior Vice President/Chief Engineer.

When preparing the required interim and final evaluations for the ACE system, project managers act as evaluators of contractor performance. ACE Guidelines require that evaluations must first be reviewed and approved by construction managers and program managers before being entered onto the ACE database. A flow chart of CPM's process for drafting, reviewing and approving contractor evaluations for ACE appears on the following page.

Flow Chart:

NYCT-CPM Process for Drafting, Reviewing and Approving Evaluations for ACE

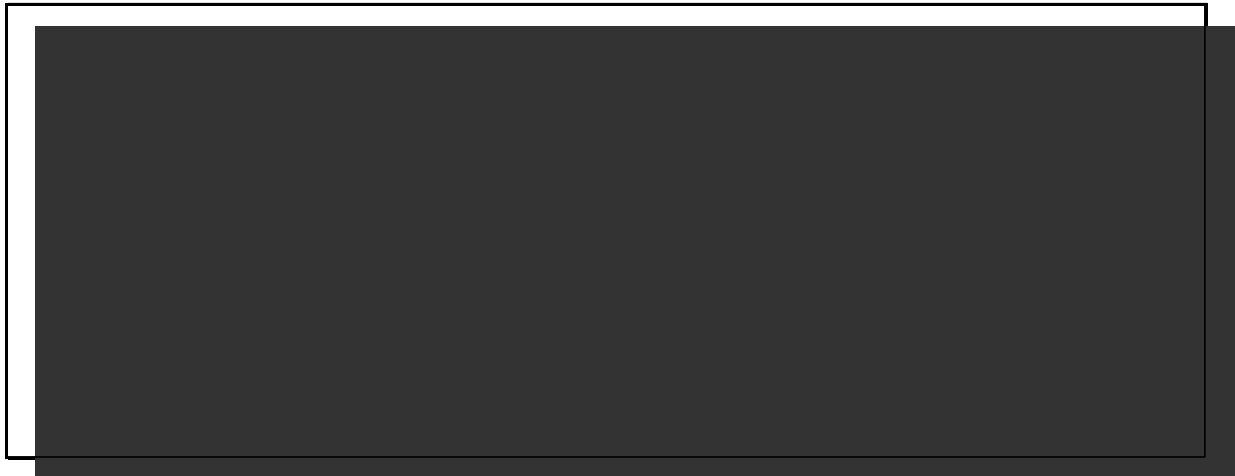


Between 2006 and 2008, project managers at NYC Transit CPM entered 1,059 interim and final performance evaluations on ACE related to 309 contracts that were active during this period (see Table 1). To ascertain the accuracy of CPM’s ratings, we obtained independent assessments of contractor performance outside the ACE system and then compared these results to the ratings project managers had given the same contractors. These assessments came from the following two sources:

- Reports from the MTA’s Independent Engineering Consultant
In order to ensure that large capital construction projects meet contract objectives, the MTA Headquarters’ Office of Construction Oversight (OCO) employs an Independent Engineering Consultant (IEC) to periodically review the progress of the work, assess the performance of the contractors involved, and report its findings to the Capital Program Oversight Committee of the MTA Board.
- CPM Quality and Scheduling Units
Apart from the project managers’ reviews of contractor performance, CPM employs its own engineering inspection units to assess whether contractor performance meets the quality and scheduling specifications established in the contracts. CPM’s Quality and Scheduling units issue periodic reports on their findings which are distributed to managers within each program division.

Our review focused on the following three contracts shown in Table 2, each of which had received Unsatisfactory performance comments from these independent sources:

TABLE 2:
NYC Transit Contracts Selected for OIG Case Reviews



These three cases do not represent a random sample of CPM contracts. Rather, we chose to focus on these contracts because they contained unambiguous evidence of poor performance from assessments outside the ACE system. This targeted and objective approach was used to test whether project managers were accurately identifying contractor performance. We note that these case studies reflect problems consistently identified throughout our interviews with various agency project officials, ACE Administrators, and with individuals from the MTA Office of Construction Oversight.¹¹

Unsatisfactory Ratings Changed Because of Internal “Business Decisions”

Two of the contracts we reviewed were performed by Siemens, AG (Siemens), one of CPM’s most important contractors for the development and installation of new technology equipment linking NYC Transit’s signal and communications infrastructure to the Rail Control Center.¹² In addition to the ATS-A and PACIS projects reviewed for this report, Siemens also received multi-million dollar contracts involving the Communication Based Train Control (CBTC) system and the SONET ATM Communication Network System.¹³

According to the IEC, Siemens’ work performance on both the ATS-A and PACIS contracts exhibited unsatisfactory characteristics in 2006 and 2007, particularly with regard to the poor quality of signal equipment provided, consistent failures in meeting scheduled milestones, and problems in the contractor’s overall management of the projects.

The following case study highlights Siemens’ performance problems on the ATS-A contract during this period, as identified by the IEC:

¹¹ In total, we examined the accuracy of evaluations for four contracts during our audit. The ACE evaluations for the fourth contract (# A35871-4 “Myrtle/Wyckoff Station Rehabilitation”) agreed with IEC assessments. For more details on our testing methodology, see Appendix A of this report.

¹² The Rail Control Center is the nerve-center of NYC Transit’s operations. Its around-the-clock work team monitors train movement throughout the entire system.

¹³ The MTA plans to upgrade the entire NYC Transit system with communication-based train control (CBTC) technology that will control the speed and starting and stopping of subway trains. In addition, the Authority will use fiber-optic cable to connect the Synchronous Optical Network (SONET) that utilizes an Asynchronous Transfer Mode (ATM) protocol to allow rapid transfer of large quantities of electronic data through the subway system.

Case Study #1

Contractor: Siemens, AG
Contract: ATS-A (#S-32333)
Evaluation Period: 2nd Half of 2006

IEC reports for this evaluation period identified numerous problems with the quality of equipment being installed by the contractor, including the following:

- *“Reliability issues on both remote workstations and [automatic vehicle identification] AVI systems continue to be a problem. The AVI readers continue to perform with inconsistency and certain locations have experienced repeated failures.”*
- *“Because of systemic failures that occurred during phase one of the [field testing], six areas of concern are being analyzed for corrective action. These areas of concern are the following: remote consoles, communication issues, system failover, system burn in period, core functional variances, and operational readiness.”*
- *“The current configuration management process used by the contractor to track software changes does not provide a clear trail on the modifications made.”*
- *“The ATS-A network recently experienced several system failures while performing the [field testing]. ... In one instance, the ATS network was inoperable for approximately 10 minutes. ... The contractor had no initial answer to why the system failed and why the failover process (switch to standby computer) didn’t initiate a proper failover response. ... Testing will continue in the monitoring stage until the contractor provides a formal response on the cause of the failure.”*

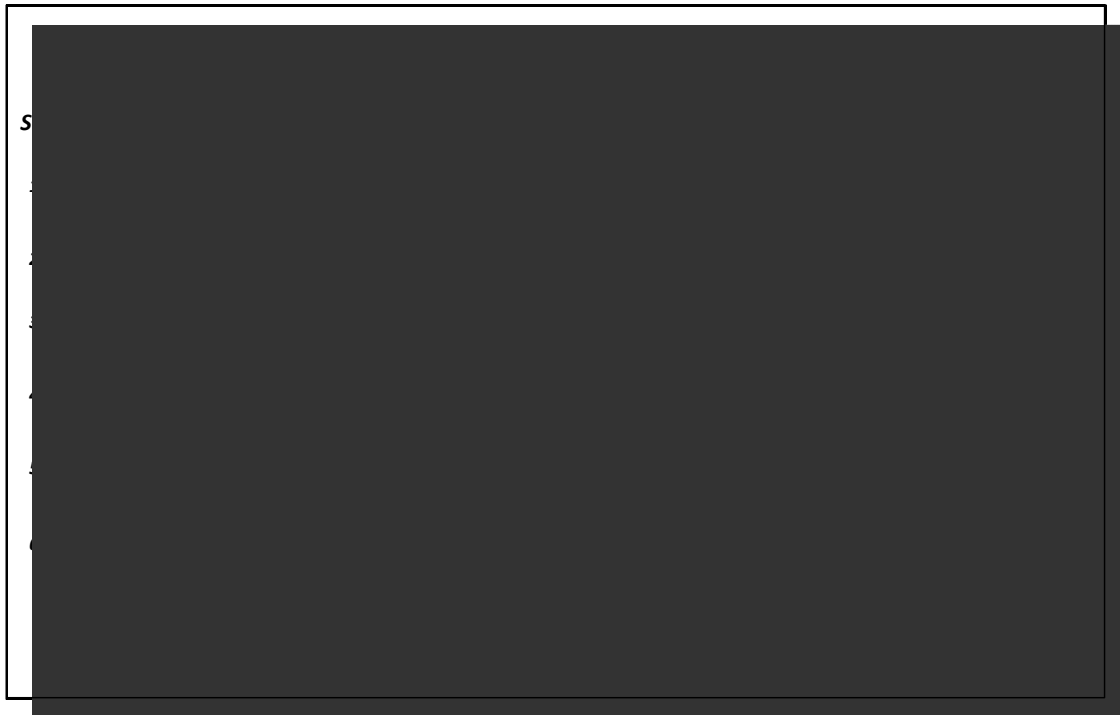
The IEC’s unsatisfactory reviews of the ATS-A contract were supported by reports from CPM’s own Scheduling Unit which corroborated that the problem cited by the IEC delayed the field testing for more than six months. These performance problems, however, were not mirrored on the ACE system, which listed the contractor’s overall performance as Marginal.

The project manager, construction manager, and program manager responsible for this evaluation did not contradict the unsatisfactory work assessments made by the IEC and CPM’s

Scheduling Unit. Indeed, with regard to the Scheduling Performance portion of the ATS-A evaluation, the project manager noted, and the construction and program managers confirmed, that the project manager had rated Siemens' performance as Unsatisfactory in all six scheduling subcategories.

Nevertheless, the construction and program managers said they had been directed by their Program Officer, the top official in the Signals & Systems Division, not to give Siemens an Overall U rating. According to these managers, the Program Officer justified this judgment as a "business decision" (i.e., an action taken to further the business interests of NYC Transit) needed to ensure Siemens' ability to participate in future high tech signal and communications projects planned by the agency. Consequently, these managers stated, the Program Officer directed that they change the Overall Rating for Scheduling performance to Marginal, as shown in Table 3:

TABLE 3:
Scheduling Rating for Siemens on the ATS-A Contract – Second Half of 2006
(Excerpt from ACE Evaluation Form)



Although the Program Officer left employment at NYC Transit prior to the start of our audit, we interviewed him about the assertions made by the three managers. He stated that he did not recall directing the managers to upgrade the rating in this particular contract, but confirmed that managers factored in their belief that a rating of Unsatisfactory would preclude a contractor from future bids. Indeed, he indicated that he shared that belief, and that he was not aware that the MTA General Counsel, Executive Director and Board had the authority to approve contractors for future bids despite prior Unsatisfactory ratings or other Significant Adverse Information.

Our review revealed that similar performance deficiencies occurred during the evaluation of the PACIS contract, by which time the Program Officer involved in Case Study #1 above had left the agency. At the end of 2006, the project manager rated Siemens' performance as Overall U for the period and threatened to default the vendor from the contract. In order to maintain its role on the project, Siemens entered into an agreement with CPM to cure all performance weaknesses cited by the project manager. By the 2nd half of 2007, however, the IEC reported that serious scheduling and quality problems continued to plague the job, as shown:

Case Study #2

Contractor: Siemens, AG
Contract: PACIS (#W-32658)
Evaluation Period: 2nd Half of 2007

The IEC reported during this period that:

- *“[IEC] reviewed several schedule submittals leading up to the approvable version and found that Siemens was working to a ‘good enough’ level rather than to meet the contract specifications ... The delay in getting an approvable schedule was unwarranted given the amount of time elapsed between cure letter (June 06) and agreement (Jan 07) and approvable submittal (Jun 07).”*
- *“Project Management: The agreement has two clauses with action items with dates shown. Both have been missed by 3 or more months. These include the approved CPM schedule and a payment milestone schedule. The percent complete figure ... (based on payments to contractor) has not changed for 15 months.”*
- *“As part of the Agreement, [Siemens] was granted a no-cost time extension to January 2009 and the liquidated damages clause in the original contract was not affected. It has a \$7000/day cost subject to a not to exceed amount. It is not clear at this time if the reimbursement costs contained in the Agreement and any liquidated damages if collected, will cover NYCT costs.”*

Despite the vendor's continued performance problems, the project manager, construction manager, and program manager for the PACIS contract (different from those in the ATS-A contract described above) rated Siemens' overall performance as Marginal during the second half of 2007. While the managers told us that this rating was based on their own "judgment call," our review indicates that their rating reflects a "business decision" to continue Siemens' participation in future NYC Transit contracts.

Unsatisfactory Rating Changed Because of Insufficient Due Process for Contractors

The third contract we reviewed was managed within CPM's Station Rehabilitation Division and involved a \$6.4 million project awarded to Roadway Contracting Inc. (RCI) to install three elevators at NYC Transit's 168th Street subway station. According to the IEC, RCI's work on this contract exhibited performance problems during the first half of 2006, as shown in the following case study:

Case Study #3

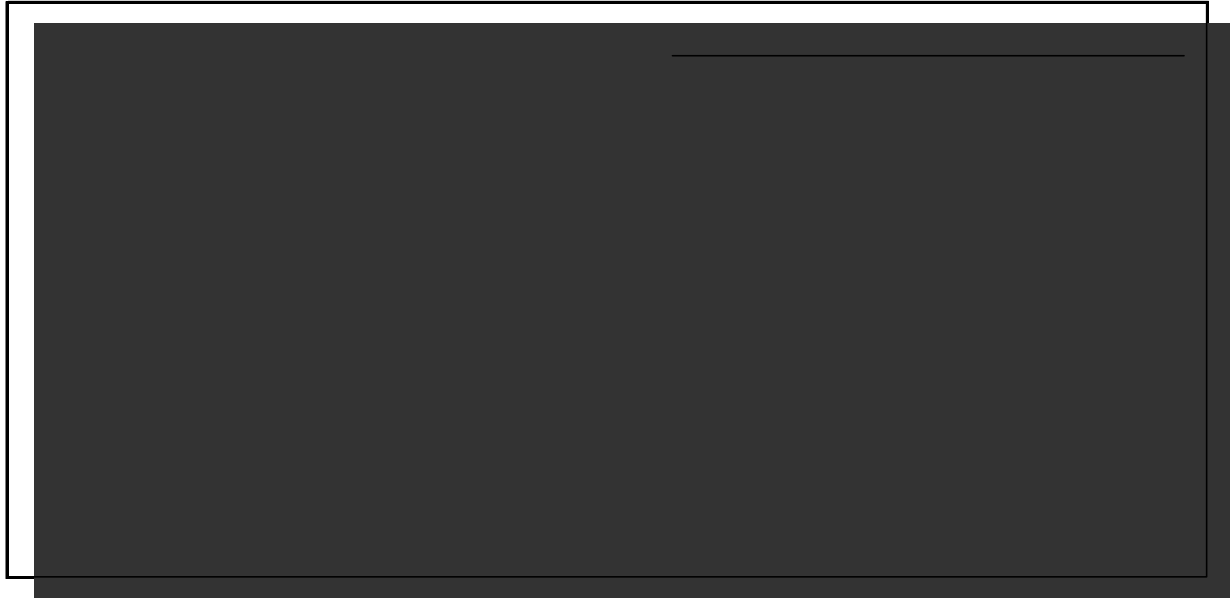
Contractor: RCI
Contract: 168th Street Rehab (#A-35931)
Evaluation Period: 1st Half of 2006

According to IEC reports, RCI's work was marked by serious problems in the areas of scheduling and overall manpower management:

- *"...electrical work continues to be the cause of the current delays. NYCT has identified the electrical staffing levels as being inadequate and the average of 2 men per day is not sufficient to complete this project in a timely fashion."*
- *"...RCI has been slow in expediting shop drawing submittals on the job and requiring continued re-submittals prior to approvals, affecting procurement, fabrication and delivery deadlines."*
- *"...insufficient manpower levels and significant time lost due to electrical delays have impaired this project."*

The project manager's evaluation for this period, however, did not reflect these problems in any of the performance indicator ratings placed on the ACE system for this period, all of which were entered as "Satisfactory" as shown on Table 4:

TABLE 4:
Rating for RCI on the 168th Street Station Rehabilitation Contract – First Half of 2006
(Excerpt from ACE Evaluation Form)



When we inquired about the discrepancy between the IEC reports and the ACE evaluation, the construction manager acknowledged that RCI had significant performance difficulties during this period – so much so that he threatened RCI with liquidated damages unless the problems were corrected. Despite his own unfavorable assessment of the vendor, however, the construction manager ordered the project manager to re-rate RCI’s performance as Satisfactory because the project manager had failed to provide the vendor with a written notification of its performance problems – a violation of the ACE Guidelines’ requirements.

Our interviews of managers in the Signals & Systems and Station Rehabilitation program divisions confirm that such violations are not uncommon. Three of the four program managers in these two divisions (out of a total of five managers) admitted that their project managers did not always comply with the contractor notification required by ACE which, these program managers believe, leaves them no choice but to upgrade any Overall U ratings issued against the contractors. Four construction managers echoed their program managers’ assessments.

By upgrading Unsatisfactory ratings in cases where managers failed to issue the appropriate notifications to the contractors, the project officials were acting consistently with CPM’s own procedures permitting a rating of Marginal under the circumstances.

Although the ACE Guidelines do not presently require the agencies to complete the notification process and to re-evaluate the contractors (which we believe they should), we consider CPM’s upgraded-rating procedure to be ill-advised and not in conformity with the ACE Guidelines’ spirit and intent. A more appropriate remedy would be to require the agency to record the evaluation on ACE as “Unsatisfactory Under Review;” order the evaluator to notify the vendor

of its deficiencies; give the vendor time to respond; evaluate the vendor's response, if any; and then complete the evaluation on the merits. This preliminary evaluation should be available to other agencies in case they are considering awarding a contract to this vendor.

Institutional Reluctance to Issuing Overall Unsatisfactory Ratings on ACE

Our interviews with managers throughout CPM's program divisions for Signals & Systems and Station Rehabilitation as well as with the agency's ACE Administrator revealed an institutional reluctance, for a variety of reasons, to rate contractors' work as Unsatisfactory, even though such ratings were most appropriate. For example:

- Many of these managers said they felt pressure to upgrade Unsatisfactory ratings to prevent important agency contractors from being precluded from bidding on future work – even though under the rules such ratings do not automatically preclude such bidding. In these cases, the managers allowed what they perceived to be agency “business decisions” to override their true assessments of contractor performance. Such reported pressure was not limited to project managers – the ACE Administrator discussed earlier stated that he was “directed” by a former CPM Senior Vice President to change an Unsatisfactory rating that had already been entered on ACE because CPM needed the vendor to bid on another project.
- Project managers stated that they were also reluctant to give Unsatisfactory ratings because the documentation needed to support the written notifications to such vendors was “unnecessary paperwork” and burdensome.
- Construction and program managers we interviewed said that CPM placed great importance on completing semi-annual ACE evaluations on time. As such, whenever project managers failed to provide contractors with the required notifications of poor performance, they ordered the removal of Overall U ratings to ensure that the evaluations would be completed within agency deadlines.
- The majority of managers we interviewed explained that they did not use ACE to record unsatisfactory work because other tools, such as warning of possible withholding payment or assessing liquidated damages, were more effective in improving contractor performance.

We start from the premise that permitting, encouraging or directing evaluators to misrepresent contractor performance is shortsighted, counterproductive and wrong.

Most importantly, these misrepresentations violate the fundamental objectives of the ACE system – to manage contractor performance, and to timely and appropriately apprise all MTA agencies of significant adverse background information on vendors. By omitting this information, often to accomplish so-called “business decisions,” evaluators put present and future contracts at risk. As for those evaluators who complain that ACE is a less effective tool than liquidated damages, especially when they also complain about “unnecessary paperwork,” their arguments are self-defeating for at least two reasons. First, imposing liquidated damages is

an extreme measure that is likely to have a negative effect on the project's schedule or budget. Even more to the point, the agency's ability to withhold payments, assess liquidated damages or bring lawsuits depends largely on paperwork that is complete and accurate.

In short, by misrepresenting contractor evaluations, CPM evaluators and other managers seriously diminished the transparency of their contractor evaluation process; reduced or eliminated the liability of individual contractors; and effectively usurped the power and duty of MTA's General Counsel, Executive Director and Board to adequately review and properly accept or reject contract awards in the future. And as for those evaluators who believe they have been inappropriately directed or pressured by agency officials to upgrade or exclude Unsatisfactory contractor performance ratings from the ACE system, we believe the MTA should direct those evaluators to report such conduct to the OIG for further investigation.

Additionally, while we recognize that "business decisions" may represent a legitimate basis for continued use of vendors with Unsatisfactory ratings depending on the particular facts and circumstances involved, current Responsibility Guidelines require agencies to disclose their rationale for such actions in staff summary reports provided to the MTA Board when it reviews contracts requiring its approval. This approach helps ensure that the Board has all available relevant information needed to make informed judgments.

Ensuring the Accuracy of ACE Evaluations

Under current ACE Guidelines, determining the accuracy of contractor performance ratings rests exclusively with those agency officials assigned to review and approve evaluations before they are added to the ACE database. However, given the case studies discussed in this report, as well as our interviews with CPM project officials, ACE Administrators and the MTA Office of Construction Oversight, we believe that more independent reviews may be needed to ensure that ACE evaluations accurately reflect vendor performance. In this regard, we believe that the recent actions of the MTA Office of Construction Oversight offer the most promising remedy to this monitoring problem.

As noted earlier, the IEC provides the MTA with an independent assessment of the quality of performance of contractors awarded large construction projects. After consulting with OIG auditors about the findings of this report, OCO has suggested that the IEC should examine the ACE evaluations relating to contractors under OCO's review and identify to the MTA Board's Capital Program Oversight Committee inconsistencies between ACE evaluations and the IEC's own observation of contractor performance.

We believe that the IEC's proposed involvement in reviewing ACE evaluations would provide a much needed independent certification that the agencies' performance ratings on the most significant construction contracts are accurately reflecting objective performance standards related to the terms of the contract.

RECOMMENDATIONS

To address the issues identified in this report, we submitted a series of recommendations to the MTA for comment. The Authority's responses are presented after each recommendation. Where necessary, we have commented on the Authority's response.

1. MTA agencies should institute spot-checks of project managers' evaluations of contractors to ensure that these evaluations accurately rate unsatisfactory contractor performance and that they preclude re-ratings for convenience or to effectuate a "business decision."

MTA Response:

The MTA agreed to this recommendation and noted that agency ACE Administrators will "discuss the approaches currently being used to spot check evaluations to ensure a consistently strong review process across all agencies."

2. MTA All-Agency Guidelines should explicitly prohibit the upgrading of overall Unsatisfactory ratings when contractor notification requirements have not been met. Instead, the Guidelines should be amended to require that evaluations be entered on the ACE system as "Unsatisfactory Under Review" until the contractors have been formally notified of alleged performance problems and afforded the opportunity to respond to such issues. This preliminary evaluation should be available to all agencies within the MTA in case they are considering awarding a contract to this vendor.

MTA Response:

The MTA agreed to modify ACE Guidelines "to explicitly prohibit the upgrading of overall Unsatisfactory ratings when contractor notification requirements have not been met." While the MTA stated that its ACE system currently has the capacity to place Unsatisfactory evaluations "On Hold" to allow additional time to obtain contractor responses, the Authority disagreed with our recommendation to make preliminary ratings available within the MTA. In this regard, the MTA cited its agencies' current prohibitions against considering ratings of "Unsatisfactory" "as a factor in award determinations at that agency or another agency until notification is given to the Contractor and all 'due process' requirements are fulfilled." However, the MTA agreed to "consult with the agencies' Law, CPM and Procurement Departments to determine whether this approach can be better balanced to address the agency concern over due-process safeguards with the OIG's intent to share Unsatisfactory information more broadly."

OIG Comment:

Although we are encouraged by the MTA's agreement to prohibit the inappropriate upgrading of Overall Unsatisfactory ratings, we still have concerns about the Authority's internal transparency regarding poor performing contractors who have not completed the evaluation process. Neither the ACE Guidelines nor CPM's own evaluation procedures require or even suggest that managers utilize the ACE system's "On Hold" function when evaluations are overdue. Rather, many of the CPM managers we interviewed for this report believed, mistakenly, that CPM procedures require overdue Unsatisfactory ratings to be

upgraded whenever contractors have not been afforded the notifications required by the ACE Guidelines.

As to the dissemination of preliminary ratings, the Authority raised “due process” concerns. To a certain extent, though, this objection misses the point that the agencies simply must be properly informed about the vendors with whom they contract. To accomplish that goal, we believe the Authority must find a way to share these ratings in a way that is reasonable and fair and expedite the evaluation process, particularly when contractor performance is Unsatisfactory. OIG will continue to monitor this situation. We will also monitor MTA’s planned efforts to help the agencies achieve a “better balance” between due process obligations and the need to share highly significant information about MTA vendors.

3. The Office of Construction Oversight should require the Independent Engineering Consultant to examine the ACE evaluations relating to contractors under their review and identify to the MTA Board’s Capital Program Oversight Committee (CPOC) inconsistencies between ACE evaluations and the IEC’s own observation of contractor performance.

MTA Response:

The MTA agreed and will require the IEC to review ACE evaluations, and to identify any concerns of inaccurate ratings to CPOC.

4. The MTA should direct any ACE evaluators who believe they have been inappropriately directed or pressured by agency officials to upgrade or exclude Unsatisfactory contractor performance ratings from the ACE system, to report such conduct to the MTA Chief Compliance Officer and to the OIG for investigation.

MTA Response:

The MTA agreed and will modify the ACE Guidelines as needed.

SECTION II: UNTIMELY ENTRY OF ACE EVALUATIONS

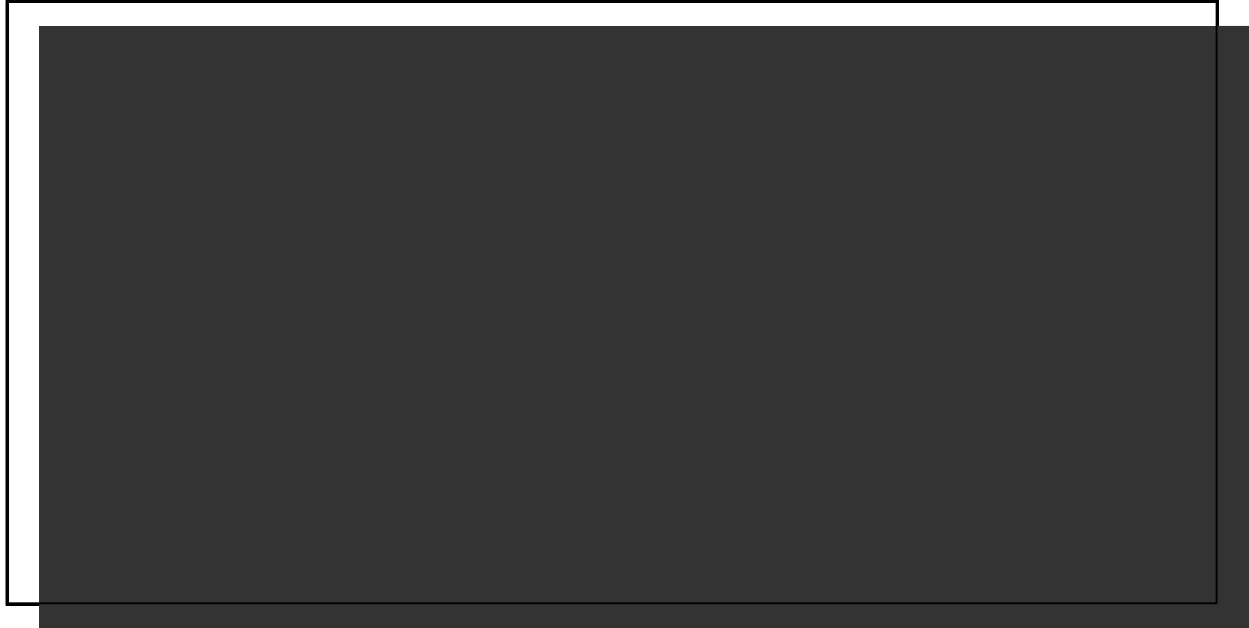
For responsibility determinations to be most effective in selecting qualified contractors, agency procurement officers require complete and up-to-date performance history for all candidates. As noted in MTA Audit Services' 1995 report on the COCOPES system, the Authority's prior method for screening high-risk vendors was seriously compromised because capital project managers did not enter timely evaluations for contracts awarded by their agencies.

The ACE Guidelines themselves do not establish precisely when an evaluation is entered in "timely" fashion. Instead, they state that evaluations are to be done every six months. In practice, however, the ACE system does not generate an overdue list until an evaluation is 45 days late in being posted. An MTA official initially told us that all evaluations filed after the six month deadline are overdue, but after discussion with the agencies, he reported to us that a 45 day "processing period" appears to be in use.¹⁴ While we were told different interpretations of whether filing after the 45 day period is considered late, the one principle universally accepted is that submissions entered on ACE *after* 45 days are overdue.

To determine the timeliness of evaluation entries, we examined all 2,579 evaluations prepared by NYC Transit, LIRR, MNR, and B&T between 2006 and 2008 and identified whether project managers had entered the data into the ACE system on time. Our tests indicated that all of the agencies had entries on ACE that were overdue, ranging from a low of 4% of total entries at MNR to LIRR's high of 51%. In four cases, LIRR contractors lacked an ACE evaluation for over a year. Table 5 summarizes the results of our tests in this area:

¹⁴ Agency regulations are not consistent in the matter. NYC Transit's and B&T's written ACE Guidelines require evaluations to be completed and entered into the ACE system by the six month due date. LIRR's ACE Guidelines don't specify when evaluations should be submitted, but the agency's ACE Administrator told us that his agency requires evaluations to be submitted by that date. MNR's ACE Administrator indicated that as a matter of customary practice, his agency affirmatively considers a submission that occurs within 45 days of the due date to be timely.

TABLE 5:
ACE Evaluation Entries (2006 – 2008)



Our review indicated that during this period, LIRR’s ACE Administrator responsibilities were performed by its Director of Program Operations in the LIRR Office of Capital Program Management. The Director stated, however, that his dual roles did not allow him sufficient time to enforce data entry deadlines.

Late evaluations, particularly when they identify Unsatisfactory performance, prevent agency procurement offices and ultimately the MTA Board from having the most up-to-date performance data on vendors vying for capital contracts. During our review, we noted that nine of the 347 significantly overdue evaluations involved contractors whose performance had been rated Overall U by agency project officials. In one of these cases at LIRR, construction and program managers delayed entering an Unsatisfactory evaluation on one firm, DMJM & Harris, for more than nine months. LIRR’s ACE Administrator acknowledged that, at most, the managers’ review and approval of this evaluation should only have taken one to two months to complete. The details of this case are presented on the following page:

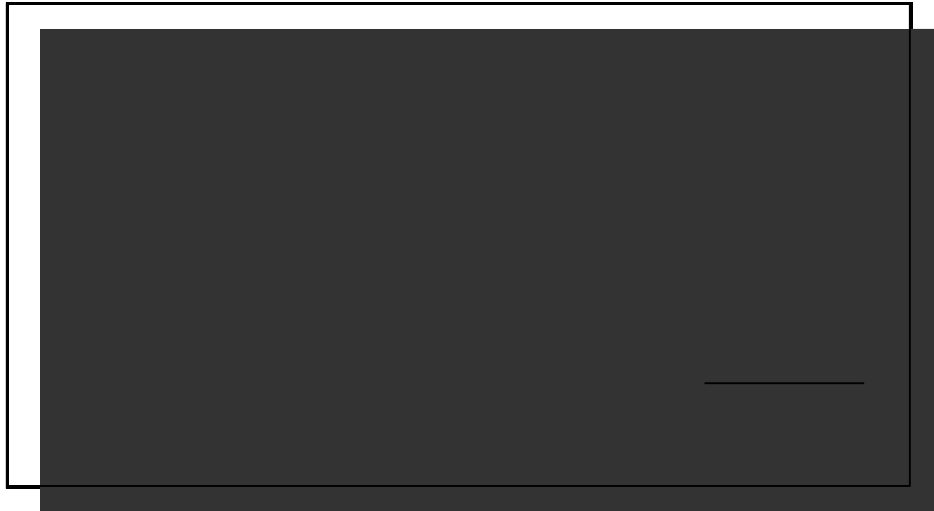
Case Study #4

Contractor: DMJM & Harris
Contract: LIRR #5814
Evaluation Period: 2nd Half of 2005

In 2004, LIRR awarded an environmental services consultant contract worth more than \$4 million to DMJM. By the end of 2005, however, the project manager determined that the contractor's work plan was so seriously deficient that LIRR refused to pay for 4,000 consulting service hours originally billed by DMJM. Given the firm's apparent failure to meet its contractual obligations, the project manager rated DMJM's performance as Overall U for the second half of 2005 and submitted a hard-copy evaluation on February 1, 2006, one week after the established due date of January 25.

However, the evaluation was not entered on the ACE system in a timely fashion. According to LIRR records, the review and approval of the Overall U rating by the construction and program managers did not occur until October 19, 2006, eight and one-half months after the project manager submitted the evaluation. The LIRR ACE Administrator finally entered the evaluation on ACE on October 30, 2006.

Our examination of MTA procurement records indicates that DMJM placed bids on and was ultimately awarded five contracts, worth a total of nearly \$25 million at three other MTA agencies during the nine-month processing delay of the ACE evaluation that began on January 25, 2006, as shown in Table 6 on the following page:

TABLE 6:***Contract Awards to DMJM & Harris (1/25/06 thru 10/30/06)***

While DMJM's Overall U rating at LIRR would not have automatically disqualified the vendor from being awarded these other contracts, such awards would have required the approval of the agency president and the MTA Executive Director in consultation with the MTA General Counsel since, as previously noted, the Overall U rating constitutes Significant Adverse Information. Further, when the five contracts were submitted to the MTA Board, the agencies would have had to include the SAI data as an informational item on the contract's staff summary. Because of the delay in reporting DMJM's performance problems, all of these safeguards in the contractor selection process were defeated.

It should be noted that the project manager's evaluation for DMJM for the very next rating period (1st half of 2006) was overall Satisfactory. We found, however, that both evaluations were entered on the ACE system on the very same day (October 30, 2006), raising the concern that LIRR managers had deliberately delayed placing the Unsatisfactory rating on ACE until a subsequent rating would negate its effect on the contractor selection process.

Both the ACE Administrator and the evaluation reviewer vehemently denied that any LIRR official had exerted influence to delay the dissemination of DMJM's Unsatisfactory work ratings to the other MTA agencies. While we were unable to document that this processing delay was intentional, even an appearance of data manipulation underscores the need for greater controls to ensure the timely filing of ACE evaluations.

RECOMMENDATIONS

As we have seen, timeliness in performance data entry can play a critical role in the contractor selection process. Unsatisfactory performance ratings, when not entered promptly on ACE, are excluded from the contractor responsibility determinations, thus decreasing the MTA's ability to identify and screen out high risk vendors. In this regard, we offer the following recommendations:

5. ACE Administrators should identify managers who consistently violate MTA requirements for prompt filing of ACE evaluations, and report them to their agencies' chief capital program officers for review and appropriate corrective action.

MTA Response:

The MTA agreed to review agency procedures to ensure that all agencies have a sufficient process in place to identify delinquent managers.

6. MTA should assign ACE Administrator responsibilities to agency officials dedicated to and held responsible for properly monitoring contractor evaluations.

MTA Response:

The MTA agreed to review internal agency procedures to determine if ACE Administrator responsibilities include monitoring contractor evaluations, and will consider modifications to the ACE Guidelines as needed.

SECTION III: EXCLUSION OF SUBCONTRACTOR EVALUATIONS FROM THE ACE DATABASE

Vendors that receive MTA capital contracts (prime contractors) generally do not directly perform all aspects of the construction work. Instead, they employ multiple subcontractors who specialize in the crafts needed for the project. While our review estimates that subcontractors perform some 70 to 80 percent of the total work on capital projects, B&T, MNR, and LIRR do not compile past performance information on these vendors' role in the construction process. NYC Transit's procedures do require construction managers to create a "Subcontractor/ Supplier Incident Report" whenever the performance of a subcontractor has been documented to be Unsatisfactory. Although the Incident Report is to be filed with NYC Transit's ACE Administrator and NYC Transit's Office of Vendor Relations for future reference when approving Subcontractors/Suppliers, no Incident Reports have actually been filed in the last five years.

Despite the fact that subcontractors appear on MTA job-sites, benefit from MTA insurance policies and indeed perform the bulk of the work on capital projects, MTA Guidelines currently do not require the agencies to prepare either interim or final evaluations of subcontractors for the ACE system. We believe this is a major shortcoming in the scope of the system because it limits the ability of NYC Transit, LIRR, MNR, and B&T to identify subcontractors with poor performance histories, and to make fully informed decisions when approving such subcontractors to participate in capital construction contracts.

The absence of a central database on subcontractor performance further impedes internal transparency and an informed decision-making process amongst the MTA constituent agencies themselves. Indeed, we found that Grand Mechanical Corporation, a NYC Transit subcontractor on the agency's Stillwell Avenue station construction project, which was in default for poor performance, was subsequently hired as a subcontractor to perform the same type of work on an LIRR contract. The details of this case are shown on the following page:

Case Study #5

Subcontractor: Grand Mechanical Corporation
Contract: NYCT Stillwell Ave Portal Project
Evaluation Period: 1st Half of 2006

In April 2006, Grand Mechanical was defaulted by the project's prime contractor because of unsatisfactory performance in installing boilers. According to CPM managers, the project's substantial completion was delayed about 30 months because of Grand Mechanical's poor performance.

In December 2006, eight months after defaulting on the NYC Transit contract, Grand Mechanical was hired as a subcontractor on LIRR's construction project for the Atlantic Terminal Entry Pavilion and Permanent Ticket Office (Contract #5911). LIRR approved Grand Mechanical without any knowledge of the vendor's past performance problems at NYC Transit.

When we interviewed the current Senior Vice President and Deputy Vice President for NYC Transit CPM, they expressed interest in our recommendation to initiate subcontractor evaluations at their agency. However, both officials asserted that several potential impediments would have to be overcome before this change could be put in place, including:

- Subcontractors could question the Authority's right to evaluate their performance because the agencies have no "privity of contract"¹⁵ with them;¹⁶
- NYC Transit does not currently obtain copies of the contracts between the prime contractor and the subcontractor specifying the actual division of work between the two vendors. Without such documents, agency evaluators would be unable to identify the appropriate parties responsible for poor workmanship on the job;
- The Senior Vice President noted that disputes between prime contractors and subcontractors frequently result in both parties blaming each other for the problems at the work site, making it difficult for the ACE evaluator to correctly judge who is at fault; and

¹⁵ Privity of contract is defined as "The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so," Black's Law Dictionary, Ninth Edition (2009).

¹⁶ In its response (discussed below) to this report, the Authority wrote, "As stated in earlier meetings with OIG, concerns over subcontractor evaluations include: the agencies have no privity of contract with subcontractors; subcontractor performance can be affected by any number of factors of which the agencies would have no knowledge; and myriad due process issues."

- The Deputy Vice President stated that the large number of subcontractors used on agency projects may overwhelm agency managers' ability to evaluate all of them.

The rationale for evaluating subcontractor performance generally speaking is clear: an owner is affected by and needs to know the quality of the performance of those doing work on its projects. Anything less jeopardizes present contracts and future awards. This rationale as it applies to subcontractors doing work for the MTA is even more compelling, given that these subcontractors perform the bulk of the work on the Authority's capital projects. We note, too, that other governmental agencies in the New York metropolitan area conduct performance evaluations of subcontractors.

To illustrate, the Port Authority of New York and New Jersey (PANY/NJ) informed us that it has been evaluating subcontractor performance for over 30 years. The New York City School Construction Authority (SCA) also performs subcontractor evaluations, and it does so with procedures that certainly seem to address the impediments asserted by NYC Transit.

For example, to make certain that its subcontractors comply with the performance evaluation process despite the absence of "privity," SCA includes the following "flow-down" provision as a general condition in its prime contracts: "Each subcontract shall contain a provision for performance evaluation by SCA in the form and substance equivalent to Section 20.07 hereof [construction contractor, subcontractor and vendor performance evaluation]."

To ensure due process, SCA requires that a subcontractor rated Unsatisfactory be given written notice thereof, and an opportunity to request review by an Evaluation Panel.¹⁷ If the Evaluation Panel decides against the subcontractor, the subcontractor must be notified in writing of the adverse decision, and given an opportunity to file a request for reconsideration of the decision to the President and Chief Executive Officer.

Given the foregoing, it does not appear that the inability of the Authority to sue a subcontractor because of the absence of "privity," should mean that the Authority cannot consider the performance of the subcontractor and evaluate it. Indeed, the General Counsel of the SCA, Assistant General Counsel to the PANY/NJ and the Division Chief of the Contracts & Real Estate Division of the New York City Law Department share our view that lack of privity is not a valid legal obstacle to subcontractor evaluation. They agreed that simply because an agency cannot enforce contractual rights against a subcontractor due to the absence of a contract, does not mean that the agency cannot make observations about the subcontractor's performance. What makes the Authority's position inconsistent is that MTA agencies clearly and correctly assert that they have the right to *approve* subcontractors,¹⁸ from which the right to *evaluate* subcontractors naturally flows.

¹⁷ The Evaluation Panel is comprised of one representative from each of the following: Project Management; Architecture and Engineering; and the Office of the Vice President and General Counsel.

¹⁸ See, for example, paragraph 16 of the standard form Bidder Requirements Section used by NYC Transit and MTA Capital Construction Company.

We are also unclear as to why potential finger-pointing between contractor and subcontractor, hardly an uncommon occurrence in the construction industry, should thwart the evaluation process. While we recognize that the introduction of such a process within the current ACE Guidelines will have to address any potential implementation issues, given the enormous significance of the role of subcontractors on MTA projects it is imperative that the Authority work through these issues, evaluate those who perform substantial construction work for the agencies and include such evaluations on the ACE system.

It should be noted that the MTA's inability to establish an effective subcontractor evaluation system had been previously brought to the Authority's attention in a 2006 report by MTA Audit Services, the Authority's own internal auditor. That report examined NYC Transit's compliance with its own procedures requiring the agency's contract managers to create a "Subcontractor/Supplier Incident Report" whenever the performance of a subcontractor has been documented to be Unsatisfactory. This report stated:

*We also found that the monitoring of subcontractors needs improvement. We found that there were no incident reports submitted from July 1, 2005 to June 1, 2006, even though there were at least five cases where subcontractors had poor performance which resulted in the work being stopped by the Office of System Safety. **If the subcontractor's poor performance is not properly documented, there is a risk that a subcontractor may be chosen for future projects despite their prior poor performance (emphasis added).***¹⁹

Although NYC Transit agreed in 2006 to improve its contract managers' compliance with subcontractor incident report requirements, the agency has failed to do so. Our review finds that contract managers have not filed a single subcontractor evaluation in the three years since MTA Audit Services' report was released.

¹⁹ MTA Audit Services Report NYT-06-049, concerning NYC Transit Capital Program Management's implementation of ACE (at p. 1).

RECOMMENDATIONS

7. The MTA should promptly initiate a process for evaluating subcontractors who perform substantial construction work for the agencies and for including such evaluations on the ACE system.

MTA Response:

While the MTA expressed reservations about amending its ACE Guidelines to require periodic performance evaluations for subcontractors, the Authority did agree to consider instituting a process for evaluating subcontractors “by exception” rather by rule. The Authority’s response cites PANY/NJ and SCA among other government agencies that employ exception-based programs for evaluating their subcontractors’ performance. The MTA further stated that any all-agency subcontractor rating system should be independent from the ACE system, following the model of NYC Transit’s current Subcontractor/Supplier Incident Report process.

OIG Comment:

While the MTA’s consideration of new requirements for evaluating subcontractor performance is a step in the right direction, we believe that the rating process suggested in its response unnecessarily restricts the scope and usefulness of such evaluations. Further, we disagree with the Authority’s assertion that evaluating subcontractors by exception rather than by rule is the standard practice employed by PANY/NJ and SCA. Our discussions with the top officials of these agencies confirm that their evaluations are done by rule rather than by exception.

We also are concerned about the MTA’s intention to use NYC Transit’s in-house Subcontractor/Supplier Incident Report process as a model for a potential all-agency subcontractor evaluation program. Our review found that NYC Transit consistently fails to ensure that subcontractors are evaluated, even on an exception basis. Further, we note that the agency’s managers have not filed a single Subcontractor/Supplier Incident Report between 2004 and 2009, even after agreeing with the recommendations in a 2006 MTA Audit Services report that they utilize that system.

We continue to urge the MTA to perform evaluations of subcontractors who perform significant work for the Authority and to make such ratings available to all MTA agencies via the ACE system. While the Authority’s agreement to consider exception-based evaluations is an important first step, we will monitor its progress accordingly to ensure that any eventual evaluation program it adopts will meet the goals of our recommendation.

SECTION IV: OIG INITIATIVES FOR IMPROVING THE EFFECTIVENESS OF MTA RESPONSIBILITY DETERMINATIONS

The OIG has a long history of advocating extensive background checks on the MTA's prospective contractors to reduce the risk of waste, abuse, and fraud in capital construction projects. As previously noted in this report, the MTA adopted its All-Agency Contractor Responsibility Guidelines in September 1988 in response to OIG recommendations and included significant input from this office in the drafting of its responsibility determination requirements.

Thereafter, the OIG further demonstrated its commitment to improving the contractor selection process by working cooperatively with the MTA and its constituent agencies in screening high-risk vendors who already have demonstrated integrity issues as reported on their background questionnaire. Following a 2001 agreement with the office of the MTA Executive Director, the OIG began conducting checks of criminal backgrounds and certain ratings regarding vendors under consideration for MTA contract awards that required the approval of the MTA Executive Director/CEO. The OIG provided this information to MTA executive management to assist their due diligence review as to a vendor's integrity prior to final contract award decisions.

Beginning in 2008, the OIG worked with the Office of the New York County District Attorney on an investigation that resulted in the indictment later that year of a moving company and its owners on charges of grand larceny and of offering a false instrument for filing. It is alleged that between January 2006 and June 2008 the company stole \$258,000 from NYC Transit by submitting 11 invoices for work the defendants never performed.

This investigation brought to light certain systemic inconsistencies among MTA agencies involving the depth of their due diligence reviews. Indeed, beginning some time before the indictment the Inspector General had continuing discussions with MTA officials about the need for more thorough background checks and better communications between the constituent agencies, including through a database that all could share. The Inspector General also discussed having the OIG get more involved in the background check process.

Building on these discussions and the fruits of the moving company investigation, the OIG started a new initiative to strengthen responsibility determinations across all MTA agencies. The initiative had two overarching goals: first, to share our considerable collective talents and resources to develop best practices and work together; second, to develop a comprehensive and centralized data base, to which all would have access, in which to store our collective knowledge about and experience with the contractors seeking to do business with the MTA.

We believe that improving the accuracy and timeliness of performance evaluation data on the ACE system advocated in this report, together with our initiative on identifying vendor integrity issues, will help make the MTA more transparent and accountable and improve its screening process for construction contracts. As such, our report's recommendations will be thoroughly discussed with the agency procurement officials attending our vendor screening initiative meetings to obtain their input as to the best means of implementing them within the MTA.

CONCLUSION

To ensure that all critical MTA transportation decisions are based on accurate data and sound assumptions, and that they conform to all regulatory goals and guidelines, it is essential that the Authority's processes for its policy making and business decisions are fully supportable and transparent.

Externally, transparency provides the New York State Executive and Legislative branches, as well as the OIG and the riding public in general, with the ability to examine the MTA's rationale for capital and operating expenditures and to determine if the billions in federal and state aid currently employed by the Authority are being wisely invested to meet the transportation needs of the New York metropolitan area.

Internally, transparency plays an equally important role by providing the MTA Board and the MTA Executive Staff with the ability to monitor activities among the various constituent agencies and to decide the merits of capital program contract awards based on the most accurate data available. However, this transparency is lost when evaluations are deficient or late, and when vendors are overrated, as evidenced in our case studies at NYC Transit and LIRR. The loss of transparency in turn weakens the ability of the MTA in general and its constituent agencies in particular to identify contractors who have had performance problems on current contracts, to demand improvement by these contractors, and to log recalcitrant vendors on the ACE database so that they can be properly screened before receiving additional contract awards.

It is troubling that the reporting problems identified here apparently resulted in part from an institutional reluctance to rate contractor work as Unsatisfactory even when that rating is most appropriate. It is even more troubling that top managers permitted, encouraged or actually directed evaluators to overrate performance. Although such actions may not have been intended to mislead the MTA Board and executive staff that review and approve the awards of future contracts to such vendors, those actions foster that result.

It seems clear, given the case studies discussed in this report and the broader picture developed from our interviews with agency project officials, ACE Administrators and the MTA Office of Construction Oversight, that the ACE system's potential for holding contractors accountable for poor work and providing greater transparency in the contractor selection process has been thwarted. While we did not examine contractor evaluations at LIRR, MNR and B&T for accuracy, as we did at NYC Transit, to ascertain the full scope of this effect, we believe that deficiencies in the internal controls governing all agencies' use of ACE places the entire system at risk for serious inaccuracies.

By examining the findings made in this report and adopting its recommendations, the MTA can make the ACE system more effective, objective and fair. By doing so, the MTA will be better equipped to promptly detect contractor performance problems; initiate remedial actions to improve the quality and timeliness of the work; and share evaluation data among the constituent agencies to prevent future contract awards to those vendors who fail to perform in a satisfactory manner. In accordance with our statutory mandate, we will monitor implementation by the MTA and its constituent agencies of the recommendations made in this report and will conduct follow-up reviews as necessary and appropriate.

APPENDIX A: OBJECTIVES, SCOPE, AND METHODOLOGY

Our overall objectives were to determine whether MTA agency personnel are:

- complying with relevant all-agency guidelines and agency-specific policies and procedures in conducting all required evaluations;
- accurately evaluating capital contractor and consultant performance;
- providing proper notifications to contractors;
- preparing and submitting all required evaluations when due; and
- properly managing and utilizing the ACE computer system.

To accomplish our objectives, we reviewed applicable MTA guidelines, policies and procedures, whether all-agency or agency-specific. To develop a detailed understanding of the processes and controls in the system, we met with MTA Office of Construction Oversight officials and MTA information technology staff, as well as various other agency personnel responsible for managing and using the performance evaluation system. We also met with the MTA's Independent Engineering Consultant who reports to the MTA Board's Capital Program Oversight Committee.

We obtained a copy of the complete ACE database and its associated audit trail and performed an extensive analysis of them to reach a more complete understanding of the system. For the four MTA agencies in our audit scope – NYC Transit, Metro-North Railroad, the Long Island Rail Road, and MTA Bridges & Tunnels – we analyzed whether all required evaluations were prepared, reviewed, and approved, and whether they were submitted when due. We also reviewed selected hard-copy files at the agencies to confirm data entered into the ACE system and for compliance with all-agency and agency-specific guidelines, policies, and procedures.

The audit covered all 2,579 ACE evaluations entered on the database during the three calendar years between 2006 and 2008 for the above four constituent agencies. These evaluations related to 799 contracts.

For NYC Transit, we performed an in-depth analysis of evaluation performance indicator ratings to determine whether they were in conformance with data prepared by the MTA's Independent Engineering Consultant and CPM's Quality and Scheduling units. In total, there were 309 NYC Transit contracts with 1,059 evaluations submitted between 2006 and 2008. We initially identified ACE evaluations related to 40 contracts in which one or more of the evaluation performance indicators appeared to be in conflict with one or more of the following sources:

- Reports to the MTA Board's Capital Program Oversight Committee by the MTA's Independent Engineering Consultant;
- Monthly Scheduling Reports produced by NYC Transit's Capital Program Management personnel that cover adherence to the contract schedule; and
- Quarterly Oversight Reports produced by CPM's Quality and Safety Management group.

Of these 40 contracts, we selected nine contracts which had the more apparent divergence of their evaluation ratings from the other sources and which had more straight-forward construction and/or engineering issues. We met with MTA Office of Construction Oversight officials and the MTA's Independent Engineering Consultant to discuss this listing of nine contracts. Their comments indicated which of the nine contracts had the clearest divergences and that two other projects that had been on our list of 40 contracts warranted further review. We pared down our list to four projects, two that were in our initial selection and two mentioned by the Independent Engineering Consultant (IEC) personnel.

We then interviewed the 12 NYC Transit staff involved in these evaluations: the four resident engineers who were responsible for preparing the initial evaluations; the four construction managers who were responsible for reviewing the evaluations; and the four program managers who were responsible for approving the evaluations. We queried them as to the basis of the evaluations that they were responsible for in light of apparently conflicting information from other sources. Some responders could not recall the specifics of the project or offered generalized explanations of the circumstances that led to the rating. Recognizing that the interviewees may be at a loss to comment from memory on specifics, we furnished each of the users, subsequent to the interview, with the details of what appeared to us as inaccurate and unsupported performance ratings. We then solicited from the interviewees further input, clarification, and documentation related to these evaluation discrepancies, which we then reviewed.

Our tests on three of the four contracts indicated wide variances between the contractor ratings on ACE and those suggested by the IEC and CPM's Quality and Scheduling units. The fourth contract (# A35871-4 "Myrtle/Wyckoff Station Rehabilitation") was not included in this review because there was no material variance between the ACE ratings and our independent assessments.