

# STATE OF NEW YORK



## Office of the Inspector General Metropolitan Transportation Authority

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### **Program Design Deficiencies in the MTA All-Agency Contractor Evaluation (ACE) Program**

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## PROGRAM DESIGN DEFICIENCIES IN THE MTA ALL-AGENCY CONTRACTOR EVALUATION (ACE) PROGRAM

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### INTRODUCTION

The Office of the MTA Inspector General (OIG) recently completed an extensive audit of the Metropolitan Transportation Authority's (MTA) All-Agency Contractor Evaluation (ACE) program. Under this program, all MTA constituent agencies, including New York City Transit (NYC Transit), the Long Island Rail Road (LIRR), Metro-North Railroad (MNR), and Bridges & Tunnels (B&T), are required to evaluate the performance of the capital contractors they employ and file performance ratings on the MTA-wide ACE database for use in assessing contractor responsibility during future contract awards.

The results of this audit are being released simultaneously in two separate OIG reports. In our first report,<sup>1</sup> we identified several deficiencies in MTA controls that permitted unsatisfactory contractor performance to be either overrated or filed late, thereby impeding the usefulness of this data in the vetting process for future contract awards. We also questioned agency procedures that exclude subcontractors from evaluation within the ACE program, even though such vendors perform some 70 to 80 percent of the work involved in capital contracts. We then offered seven recommendations designed to promote a more accurate and timely identification of poor performing companies by the four agencies, including a prohibition against overrating, and to incorporate subcontractor evaluations into the ACE program.

In this, the second report, 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;
- Automatic default ratings for agency contractors; and
- Criteria for Final Evaluation rating periods.

Prior to finalizing this report, we sent a preliminary draft to the MTA for review. Notably, the Authority accepted our findings and the five recommendations included in that draft. After considering the Authority's comments, we have also added a sixth recommendation to further improve the capabilities of the ACE program.

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<sup>1</sup> MTA/OIG Report # 2009-8, "Assessing the Effectiveness of the MTA All-Agency Contractor Evaluation (ACE) Program."

## BACKGROUND

As a best procurement practice in awarding capital construction contracts, the MTA requires pre-award background checks to determine whether prospective contractors have had poor performance records on prior MTA contracts. Once such 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<sup>2</sup> 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.

In 1998, after experiencing almost ten years of problems in establishing a credible contractor performance database, the MTA adopted guidelines for ACE, its new contractor evaluation program. ACE Guidelines required capital project managers at each agency 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.

The ACE Guidelines also established a uniform contractor evaluation process for all MTA agencies, requiring evaluators to assess and rate four separate performance indicators – quality, management, safety 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.

Under the ACE program, completed contractor evaluations are available electronically to the MTA's constituent agencies and used as a resource when determining the responsibility of vendors who bid on upcoming capital contracts.

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<sup>2</sup> Aside from performance on past MTA contracts, 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 ability to meet contract requirements. Procurement officials also 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.

In 1997, before instituting ACE and the ACE Guidelines, the MTA issued its revised All-Agency Responsibility Guidelines (Responsibility Guidelines), including the following pertinent portion regarding Significant Adverse Information (SAI):

If the agency personnel authorized to determine a bidder's responsibility . . . determines that significant adverse information about a bidder has been obtained, the determination that the bidder is responsible or not responsible shall include the rationale for the decision in light of the adverse information and, if the determination is that the bidder is responsible, shall be approved by the agency's President . . . and the Executive Director in consultation with the MTA's General Counsel. Significant adverse information about a bidder *includes but is not limited to an unsatisfactory final performance evaluation on a contract with any MTA agency within the immediate prior three years [and] an uncured interim unsatisfactory rating on a contract with any MTA agency.* . . . If the award is subject to Board approval, the significant adverse information shall be included in the staff summary as an informational item. (Emphasis added.)

## FINDINGS AND RECOMMENDATIONS

After examining the current design of the ACE program, our review identified five areas that warrant changes to improve the overall efficiency and effectiveness of the program. In the pages below, we describe our findings in these five areas and identify recommendations to address our concerns. We have presented the MTA's response following the recommendation to which it pertains and, where necessary, we have commented on the Authority's response.

### Post-Final Evaluations Should Be Conducted

While the ACE evaluation process typically stops at the end of the contract, the ACE Guidelines offer agencies the option to enter additional ratings on ACE if unsatisfactory contractor performance is discovered after the conclusion of the contract (post-final evaluations). However, the four constituent agencies we reviewed rarely conducted post-final evaluations – even when serious lapses were discovered after the close of contracts.<sup>3</sup>

For example, in 2008, a year after the completion of the contract for the construction of the 100th Street bus depot, NYC Transit personnel discovered that several portions of the building's brick facade had not been properly tied to the building's steel structure, creating a safety hazard to pedestrians. Although the cause of these problems was attributed to poor quality work performed by the contractor, the agency did not prepare a post-final evaluation. As a result, the contractor's poor construction quality was not entered on ACE, thus depriving all MTA agencies of unsatisfactory performance information that would be highly relevant in determining the contractor's responsibility to receive future awards.

Recommendation:

1. Require post-final evaluations whenever poor performance is identified after contract closings.

*MTA Response:*

*Although the MTA agreed to this recommendation, it modified its acceptance, stating:*

*...implementation of this recommendation will require an examination of contract language of both contractors and designers to determine responsibility, including the role of designers and/or inspectors during construction support services. In addition, because latent defects are likely to be uncovered by Agency operations personnel (as opposed to [Capital Program Management] personnel), the mechanics of how this evaluation would be approved by upper management and then input into the ACE System, must also be determined.*

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<sup>3</sup> For the four agencies we reviewed, there were a total of five post-final evaluations submitted for 2006-2008 (out of approximately 380 contracts for that period), all of them rated Satisfactory.

*OIG Comment:*

*We strongly believe that the MTA's evaluation of contractor performance must include post-final assessments of the quality of the end product ultimately delivered to the MTA. While we are pleased that the MTA accepted our recommendation, we will continue to monitor the Authority's efforts to integrate post-final evaluations within current ACE procedures.*

**Current ACE Training Requirements Need to Be Strengthened**

To properly conduct contractor evaluations, agency managers must be trained in the processes needed for preparing, reviewing, and approving these evaluations and the rating standards applicable to them. However, our review found that ACE Guidelines do not specify the amount or frequency of such training that agency managers should receive before they are authorized to prepare and file contractor evaluations on the ACE database.

In the absence of an all-agency standard for ACE training, we find the actual amount of training provided varies considerably among the four agencies we examined. While B&T, NYC Transit and MNR have conducted periodic ACE training classes between 2006 and 2009, LIRR has not provided any formal ACE training to its managers for much of the past three years.

## Recommendation:

2. Mandate appropriate ACE training for agency managers responsible for evaluating contractors and for those charged with monitoring the timeliness of these evaluations.

*MTA Response:*

*The MTA agreed to this recommendation.*

**Problems with Contractor Evaluation Forms**

Current ACE Guidelines set up evaluation standards related to two types of capital contracts – construction and consultant services. For construction contractors, agency managers are required to rate four separate performance indicators – quality, management, safety and scheduling. For consultants, including design professionals, only two performance indicators (quality and management) need be evaluated. The Guidelines also identify specific subcategories<sup>4</sup> related to each performance indicator that agency managers must consider when determining an overall performance rating.

To ensure a uniform evaluation process, ACE employs two standard evaluation forms – one for rating construction contractors and another for consultants. While these evaluation forms cover most types of capital projects, many agency managers we interviewed believed they were not well-suited for evaluating two specific types of contracts: contracts involving the development

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<sup>4</sup> For example, in the Scheduling Performance Indicator category, ACE requires that evaluators consider six different subcategories including the contractor's adherence to scheduling requirements, the availability of materials and equipment to meet the schedule and whether the project was completed within contract milestones.

and installation of new technology and computer software; and Design-Build contracts (i.e., where both the design and construction phases of a capital project are awarded to a single vendor under the same contract).

As to the former, our review found that the generic subcategories contained in the ACE standard evaluation forms do not capture many of the varied and nuanced factors related to rating new technology/software projects, such as the quality and effectiveness of software testing and the contractors' ability to manage the integration of new technology into the current transit system. The forms also produced a lack of consistency in the way managers actually rated technology and software development contracts. For example, one construction manager at NYC Transit stated that problems with software development are generally reflected under the quality performance indicator while another manager stated that he included software development problems under the management and schedule categories.

ACE Guidelines also do not specify whether to use the consultant form or the construction form to rate Design-Build contracts, which by their nature involve both consultant and construction services. As a result, the agencies' methods for evaluating such contracts vary widely. At NYC Transit, managers have the option of assigning two distinct project numbers to a single Design-Build contract to ensure that the appropriate type of evaluation form is used to rate the design and construction work phases. By contrast, Metro-North evaluates both phases of Design-Build contracts on the standard ACE form used for construction projects. Metro-North officials acknowledged, however, that performance information related to the design aspect of the project may be lost as a result of this method and that the agency is currently looking at alternatives for rating such contracts. Bridges & Tunnels' Director of Quality Assurance shared the other agencies' concerns and suggested that the MTA create a new form specifically for evaluating Design-Build contracts.

Recommendation:

3. Create contractor evaluation forms specifically suited to Technology/Software Development and Design-Build Contracts.

*MTA Response:*

*The MTA agreed to this recommendation, stating:*

*The ACE Committee<sup>5</sup> will develop appropriate evaluation criteria and, in consultation with EITG [Enterprise Information Technology Group], will determine a budget and schedule for this undertaking.*

*OIG Comment:*

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<sup>5</sup> The ACE Committee, comprised of procurement officials from the MTA constituent agencies and from the MTA Office of Construction Oversight, is empowered to oversee the efficiency and effectiveness of the technical mechanics supporting the ACE program and to craft amendments to ACE procedures whenever needed.

*We appreciate the MTA's agreement with our recommendation and will continue to monitor the Authority's efforts to implement evaluation forms specifically designed for rating contractor performance for technology/software development and Design-Build contracts.*

### **Potential Errors from Automatic Default Ratings**

Under current ACE protocols, whenever an evaluator opens the ACE database screen window to prepare an evaluation, the default setting automatically rates each performance indicator subcategory as "Satisfactory." Although agency managers have the option to lower these ratings to reflect the actual performance found during the rating period, we believe that setting the "Satisfactory" rating by default – although Satisfactory is the highest rating permissible – fosters a mechanical approach toward the evaluation process and increases the risk of overrating contractors.

Recommendation:

4. Eliminate the ACE program's use of "Satisfactory" as the automatic default rating for contractor performance.

*MTA Response:*

*The MTA agreed to this recommendation, stating:*

*... EITG will be requested to eliminate this system-based default setting so that every evaluation element -- both minor and summary -- would entail deliberate judgment on the part of the evaluator.*

### **Undefined Rating Period for Final Evaluations**

ACE Guidelines require contractors to be evaluated every six months during the life of the contract (interim evaluations) and again at the completion or termination of the contract (final evaluation). However, the Guidelines do not define whether the period covered by the final evaluation represents only the final six months as opposed to the life of the contract. With the exception of NYC Transit, which evaluates performance over the duration of the contract,<sup>6</sup> the agencies' own internal guidelines are silent as to what time period the final evaluations should cover.

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<sup>6</sup> NYC Transit's Project Management Guidelines No. 115 state that "the final evaluation should reflect CPM's evaluation of the Contractor/Consultant's effort over the duration of the contract."

Recommendation:

5. Clarify the evaluation period covered by final evaluations on construction contracts.

*MTA Response:*

*The MTA agreed to this recommendation, stating:*

*MTA ACE Guidelines will be modified to clearly indicate that the time-frame of the final evaluation is limited to six months (as with all earlier evaluations).*

*OIG Comment:*

*By treating the final evaluation, in effect, as simply the last interim evaluation, the ACE Guidelines may undermine the separate Responsibility Guidelines in terms of dealing with Significant Adverse Information. We are making the following additional recommendation (Recommendation # 6) to ensure that agency evaluation of contractor performance for future awards is sufficiently comprehensive, more transparent and furthers the Responsibility process.*

Recommendation:

6. The Authority should revise its Responsibility Guidelines to specify that (a) agencies must carefully weigh all evaluations available on ACE, interim and final, when making responsibility determinations regarding contractors' past performance; and (b) patterns of Marginal and/or Unsatisfactory ratings over the life of the contract constitute Significant Adverse Information that must be disclosed to the MTA General Counsel, Executive Director and, where applicable, the MTA Board.

*OIG Comment:*

*Although this recommendation has not been formally presented to the MTA for comment, we have held positive conversations with the MTA Office of Construction Oversight that suggest it will be accepted by the Authority.*

## **CONCLUSION**

Given the serious economic circumstances currently eroding the power of the MTA and its four constituent agencies to maintain and expand the aging transportation infrastructure, there is a pressing need to improve the efficiency and effectiveness of the Authority's capital expenditures. To this end, the OIG conducted an extensive audit of a potentially significant cost savings tool for the MTA -- the ACE program.

Although ACE was designed to enhance the Authority's ability to screen vendors with poor performance histories when selecting contractors for future capital projects, our review finds a number of deficiencies in both the design and application of the evaluation process that limits its efficiency and effectiveness.

In this report, we noted deficiencies in various areas involving the ACE program that have the potential to significantly limit the agencies' ability to flag poor-performing vendors. Examples include the failure to capture post-contract performance problems on ACE and the absence of appropriate evaluation forms for rating certain technology and design-build contracts. Similarly, the use of "Satisfactory" as the automatic default rating for contractors on ACE evaluations, coupled with inadequate training for those who use the ACE system, needlessly risk inaccurate and inappropriate evaluations of contractor performance.

We appreciate the MTA's agreement to implement the five original recommendations proposed in our draft report and trust they will positively consider implementing the sixth recommendation we have added here. Taken together, these proposed changes should further the Authority's ability to promptly detect contractor performance problems. 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; 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 officials of the MTA Office of Construction Oversight, MTA information technology staff and 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 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.