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Inspector General

**Office of the Inspector General**  
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Lamond W. Kears  
Chief Compliance Officer  
Metropolitan Transportation Authority  
2 Broadway, 16<sup>th</sup> Floor  
New York, NY 10004

**Re: Strengthening the MTA Vendor Code  
of Ethics  
MTA/OIG #2012-04**

Dear Mr. Kears:

As you know, the Office of the MTA Inspector General recently conducted an investigation concerning the integrity of a particular procurement in light of revelations that an MTA agency employee had discussions with a vendor/proposer's employees regarding future employment. Although our investigation revealed no evidence or reason to believe that the integrity of that procurement had been corrupted or otherwise impaired, or that any attempt to do so had been made, the investigation did identify certain fundamental issues regarding distribution of, and compliance with, the Metropolitan Transportation Authority Vendor Code of Ethics ("Vendor Code" or "Code") applicable to vendors for all of the Authority's subsidiaries and affiliates.

**Background**

As a public authority, the MTA is entrusted with the duty to provide a high standard of service to meet its customers' transportation needs. Therefore, the MTA Board adopted an All-Agency Code of Ethics governing its employees, which makes clear that:

The ability to provide a high standard of service is grounded in a strong work ethic, clear corporate policies, and the dedication of a creative work force. The adherence to a strict code of ethics is central to gaining and keeping the trust of our customers. . .

Similarly, the MTA created its Vendor Code of Ethics to further its commitment "to a procurement process that fosters fair and open competition, is conducted under the highest ethical standards and enjoys the complete confidence of the public." The ethical obligations of the vendors are established in the Vendor Code primarily by direct prohibitions on certain vendor conduct (e.g. "zero tolerance" on giving gifts to MTA employees). Regarding negotiations for future employment, however, the Vendor Code takes a different approach: it incorporates verbatim the restrictions imposed on agency employees by the MTA Code of Ethics, and then

declares that “It is expected that Vendors will approach any such solicitation or negotiation with knowledge and understanding of these restrictions and will conduct themselves accordingly.”

Clearly, vendors conduct their business by and through their officers and personnel. For these employees to comply with their ethical obligations, they certainly need to read and understand the Vendor Code, ideally at the outset of the procurement, but in any event **before** interacting with MTA staff – particularly where the vendor employee knows or should know that the MTA employee is participating in a particular procurement. Further, given that the purpose of reading and understanding the Vendor Code is to ensure compliance, it is self-evident that the employees must first *receive* that Code in timely fashion. Finally, distribution of and compliance with the Vendor Code must be viewed by the MTA and vendors alike as a significant part of the procurement process, not merely as a technical requirement.

Because these basic rules of compliance are not now clearly stated in the Vendor Code, we believe that this Code must be clarified. Our findings and recommendations follow.

## FINDINGS

Chapter 8 of the Vendor Code is titled “Certification.” It provides in pertinent part:

### 8.02 Distribution of Vendor Code of Ethics

Additionally, as a condition of being considered for the award of any contract above the MTA’s small purchase threshold, the Primary Contracting Party will be required to submit with its bid or proposal and include in its contract a further certification executed by an officer of that Party. This certification must attest that the Primary Contracting Party and all officers and personnel who may interact or have interacted with the MTA during the course of the procurement or contract have been provided with a copy of this Vendor Code of Ethics.

Significantly, there is no section of the Vendor Code that explicitly directs distribution of that Code and establishes associated requirements. In particular, we find the following deficiencies:

1. The Code does not explicitly require that vendor employees involved in the procurement be provided with a copy at the outset of the procurement, or even *before* interaction with the MTA.
2. The Code does not define “interaction with the MTA.”
3. The Code does not specify in what format vendor employees must receive it. For example, in the procurement process we examined, the Vendor Code was “distributed” in a most perfunctory way: To begin, the agency provided the Vendor Code to the vendor indirectly – that is, in the form of electronic access by listing the web address of the

Vendor Code apparently presented as a “hyperlink” in the online (.pdf) version of the Request for Proposal (RFP), rather than including the text itself. When we tested that link, which should afford one-click access to the document, we received an error message on the MTA web site (mta.info) indicating “Page Not Found.” For its part, the vendor simply directed the members of the bid team to read the RFP—a 347-page document—without specifically referencing the Code, let alone directing the members to read it.<sup>1</sup>

4. By its terms, Code section 8.02 above only requires that the vendor certify that employees who have or may interact with agency personnel received a copy of the Code, not that the employees read it. Further, the Code does not contain any requirement that a vendor certify that its employees have “acted in accordance” with the MTA rules regarding negotiation for future employment (see Code §5.01). By comparison, Code section 8.01 regarding gifts provides:

Every bid or proposal made to and every contract with the MTA above the small purchase threshold must contain a certification that no individual or entity has been or will be offered or given any Gift in connection with such bid or contract and that no conflicts of interest exist.

5. The Code, as noted, now provides that the vendor must certify that “all officers and personnel who may interact or have interacted with the MTA during the course of the procurement or contract have been provided with a copy of this Vendor Code of Ethics.” However, as written, this language does not explicitly impose a continuing obligation on vendors to make **timely** distribution of it to any employee who joins the procurement process along the way. For example, in the procurement process we examined, a vendor employee who joined the procurement months after it commenced was not given a copy of the Vendor Code until the day before his interview with the Office of the MTA Inspector General.

## RECOMMENDATIONS

The MTA Vendor Code of Ethics, and any associated procurement rules, should be amended and/or clarified to require that:

1. Vendors distribute the Vendor Code at the outset of the procurement, and on a continuing timely basis thereafter, to all vendor employees then or subsequently participating in a particular procurement. “Participation” should be appropriately defined.
2. The Vendor Code may be distributed to the requisite employees in either printed or electronic form, provided that it is presented as a separate document or file, and the designated

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<sup>1</sup> A persevering reader who was not dissuaded by the broken hyperlink, and who ignored the error message “Page Not Found,” could access the document by typing in the address as written.

Lamond Kearsce  
Re: MTA/OIG #2012-04  
March 21, 2012  
Page 4

employees must acknowledge the date they received the Code and that they have read, understood, and will comply with its contents.

3. Vendors certify that all relevant employees have received the Code in timely fashion, and that such employees have acknowledged that they read, understood, and are in compliance with its requirements.
4. All bids and proposals must emphasize that compliance with the Vendor Code is a material term of such bid or proposal.

In finalizing this report for submission in accordance with Public Authorities Law §1279, we acknowledge your response to our preliminary report and note your concurrence with our findings and recommendations. As always, we appreciate the courtesy and cooperation afforded to us at all times by you and the staff of the MTA and its agencies.

Very truly yours,



Barry L. Kluger

cc:

Joseph J. Lhota  
James Ferrara  
Michael Horodniceanu  
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Helena Williams