

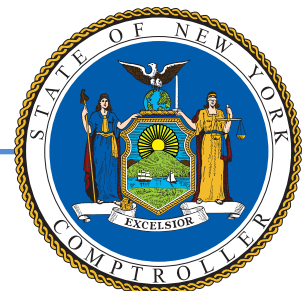
Metropolitan Transportation Authority

Selected Aspects of the All-Agency Contractor Evaluation System at Long Island Rail Road, Metro-North Railroad, New York City Transit, and Triborough Bridge and Tunnel Authority

Report 2019-S-52 | November 2022

OFFICE OF THE NEW YORK STATE COMPTROLLER
Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objectives

To determine whether the Metropolitan Transportation Authority (MTA) is monitoring and evaluating its contractors/consultants in compliance with its All-Agency Contractor Evaluation (ACE) system and taking appropriate action where performance ratings are less than satisfactory. We also determined whether procurement officials at the agencies reviewed and used the ACE ratings prior to making a contract award. The audit covered contracts from January 2016 to March 2020.

About the Program

In 1997, MTA implemented the ACE system, a performance evaluation system developed and operated by MTA Headquarters for use by its agencies to report on contractor and consultant performance and share the results with each other. MTA adopted the ACE Guidelines to help its agencies uniformly obtain and record reliable information on the performance of contractors and consultants working on capital-funded contracts equal to or greater than \$250,000. Interim ACEs are due semi-annually throughout the contract and a final summary evaluation upon completion. Letters must be sent to the contractor informing them when the evaluation or any of its categories or components is less than satisfactory and requiring them to address the issues.

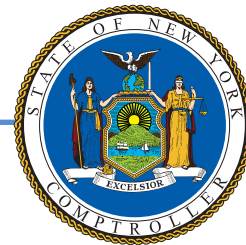
ACEs must be reviewed when determining whether to award additional contracts where the same contractor is party to a new contract (either alone or in a joint venture). Issues with Unsatisfactory or repeated Marginal evaluations can hinder a contractor being determined responsible to take on new contract work.

Key Findings

MTA did not properly handle the review of responsibility for two of 10 sampled contractors with repeated less-than-satisfactory ACEs when awarding new contracts. MTA missed opportunities to advise project management teams about areas of known performance issues with contractors when they were awarded new contracts. Further, MTA did not ensure that ACEs were performed timely by evaluators who were responsible for the project, or, in certain cases, that the evaluations were done at all.

Key Recommendations

- Enforce and monitor procurement staff's adherence to the agency procedures. Require the agency President's approval of a responsibility determination in all cases where Adverse Information or Significant Adverse Information was noted.
- Require the agency ACE Administrator to contact the ACE evaluator when an evaluation is not filed within 45 days. Make an entry in the ACE database to indicate the evaluation is delinquent.
- Develop procedures to:
 - Include analysis of the category ratings over time to determine whether, in addition to the overall ratings, the categorical assessment reveals significant issues with the vendor's performance.
 - Share performance issues found in the responsibility review with the next project manager.



**Office of the New York State Comptroller
Division of State Government Accountability**

November 16, 2022

Janno Lieber
Chairman and Chief Executive Officer
Metropolitan Transportation Authority
2 Broadway
New York, NY 10004

Dear Mr. Lieber:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for the tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Selected Aspects of the All-Agency Contractor Evaluation System at Long Island Rail Road, Metro-North Railroad, New York City Transit, and Triborough Bridge and Tunnel Authority*. This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Division of State Government Accountability

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Glossary of Terms

| Term | Description | Identifier |
|---------------------------|---|-------------------|
| MTA | Metropolitan Transportation Authority | <i>Auditee</i> |
| | | |
| ACE | All-Agency Contractor Evaluation | <i>Key Term</i> |
| Agencies | LIRR, Metro-North, TBTA, Transit | <i>Agency</i> |
| C&D | MTA Construction and Development Company | <i>Agency</i> |
| DDCR | MTA Department of Diversity and Civil Rights | <i>Division</i> |
| Guidelines | ACE Guidelines | <i>Key Term</i> |
| LIRR | Long Island Rail Road | <i>Agency</i> |
| Metro-North | Metro-North Railroad | <i>Agency</i> |
| MWDBE | Minority-Owned, Women-Owned, and Disadvantaged Business Enterprises | <i>Key Term</i> |
| OCO | MTA Office of Construction Oversight | <i>Division</i> |
| Responsibility Guidelines | MTA All-Agency Responsibility Guidelines | <i>Key Term</i> |
| TBTA | Triborough Bridge and Tunnel Authority (aka MTA Bridges & Tunnels) | <i>Agency</i> |
| Transit | New York City Transit | <i>Agency</i> |

Background

The Metropolitan Transportation Authority (MTA) is a public benefit corporation chartered by the New York State Legislature in 1965 and is comprised of six agencies: New York City Transit (Transit), MTA Bus Company, Long Island Rail Road (LIRR), Metro-North Railroad (Metro-North), Triborough Bridge and Tunnel Authority (TBTA), and MTA Construction and Development Company (C&D). This report covers the efforts of Transit, LIRR, Metro-North and TBTA (collectively referred to in this report as “the Agencies”) to implement the MTA’s All-Agency Contractor Evaluation (ACE) system.

In 1997, MTA implemented the ACE system, a performance evaluation system developed and operated by MTA Headquarters for use by its agencies to report on contractor and consultant performance and share the results with each other. MTA adopted the ACE Guidelines (Guidelines) to help its agencies uniformly obtain and record reliable information on the performance of contractors and consultants working on capital-funded contracts equal to or greater than \$250,000.

The Guidelines require semi-annual Interim Performance Evaluations for each contract. The first Interim Performance Evaluation period begins at Notice of Award and shall not exceed 6 months in duration. Each subsequent interim period begins immediately following the prior period cutoff date and shall also not exceed 6 months in duration, with this process continuing through Completion of the Work or Default. Following the last interim period, the Summary Performance Evaluation (or “final evaluation”) shall be performed. The evaluations are to be entered into the ACE database system no later than 45 days from the end of the performance review period. In 2018, all MTA agencies moved to uniform March 31st and September 30th performance review end dates. To implement the Guidelines, each of the agencies issued its own policy or procedure.

Evaluations consist of two to five categories depending on the type of contract. For instance, architect and engineering post-construction contracts have two categories: Overall Architectural/Engineering Design and Minority-Owned, Women-Owned, and Disadvantaged Business Enterprises (MWDDBE) Compliance. Construction contracts have five categories: Safety, Quality, Scheduling, Management, and MWDDBE. Each category has individually rated components used to assess the contractor’s overall performance.

Each agency has an ACE Administrator, responsible for the overall program administration, to ensure that the evaluations are performed, reviewed, approved, and properly recorded. Evaluations are the joint responsibility of an Evaluator (a person responsible for the day-to-day management of the contractor and the person who completes the evaluation), a Reviewer (the individual with supervisory responsibility for the Evaluator and the contract being evaluated), and an Approver (the next-level management individual that the Reviewer reports to). If either the Reviewer or Approver request changes to the evaluation, it must be returned to the Evaluator.

An Evaluator can give one of five performance ratings for each component, each category, and for the overall evaluation: Satisfactory, Marginal, Unsatisfactory, Not

Applicable, and Unable to Rate. When contractors receive less-than-satisfactory evaluations, in part or in full, they are to be notified in writing.

There are a series of letters that are used depending on the ratings. For example, if all the categories receive a Satisfactory rating but one or more components are otherwise, the agency can notify the contractor using the ACE Performance Improvement Letter. A poorly performing contractor might receive an ACE Unsatisfactory Overall Performance Letter. These letters are intended to give the contractor an opportunity to correct the deficiencies noted. Starting in 2018, when a less-than-satisfactory rating is uploaded into the ACE system, any required notification letter templates are automatically generated by the ACE system.

When awarding a new capital contract, MTA agencies have a duty to conduct a review as to the responsibility of the proposed vendor/contractor under the MTA All-Agency Responsibility Guidelines (Responsibility Guidelines). ACE ratings are one of the factors reviewed by the awarding agency to determine whether a contractor is considered “responsible.” All MTA agencies have access to the ACE database to obtain information about the past performance of all contractors/consultants who have performed capital contract work at any MTA agency. All MTA agencies are required to review all evaluations for the contractor for a lookback period of 3 years. When Adverse Information or Significant Adverse Information is uncovered about the prospective contractor/consultant from ACE or from other sources, it may provide grounds for finding the vendor non-responsible for a contract. If the MTA agency decides to award the contract despite less-than-satisfactory performance on previous contracts, the procurement officials must prepare and send an Adverse Information memorandum to various MTA officials and departments for approval, including the agency President.

This is our second report on the ACE system – the first report ([2019-S-14](#)) was issued March 4, 2021 and covered MTA Capital Construction.

In 2019, the MTA announced the approval of a Transformation Plan. As an initial step in this transformation, on December 18, 2019, MTA approved the renaming of Capital Construction as the MTA Construction and Development Company (C&D). This entity now oversees the integration of all capital planning, development, and project delivery. Prior to the transformation, Capital Construction handled the large expansion projects at Transit and the commuter rail agencies.

Audit Findings and Recommendations

Our audit identified opportunities to improve and strengthen the ACE system and its use by MTA management. Officials advised us in April 2021 that MTA had drafted revisions to the ACE system, and that they were awaiting approval to implement. However, the revisions could not be provided until they were formally approved. As of August 26, 2022, we have not been updated on the specifics or status of those changes. As the MTA moves forward in finalizing the consolidation of capital functions within C&D, addressing the deficiencies noted in both this report and our prior report will improve the contractor evaluation process.

MTA agencies and staff did not always follow the Guidelines and/or agency policy/procedures when monitoring and evaluating contractor/consultant performance. As a result, MTA did not fully benefit from established processes.

For example, in reviewing previously performed ACEs, we found that, for 24 evaluations covering six contracts, documentation indicated that ACE ratings of key categories and/or components were either contradicted or not supported by the records. For three contractors, an ACE was not completed in multiple instances. In addition, two contracts were not evaluated by individuals who met the requirements for an Evaluator.

Of significance, our review of 10 responsibility checks done prior to the award of contracts found that, for seven, the review of ACE ratings was not well documented and/or not taken into account prior to awarding a contract. Despite receiving at least three successive less-than-satisfactory ratings, three contractors were awarded a new contract. For one, we found a waiver signed by the agency's President. For the others, there was no documented rationale and required approvals supporting this decision.

ACE System Improvement

ACE pertains to an essential MTA function (i.e., procurement of capital contracts); however, we found no evidence that the MTA Board approved the Guidelines.

The MTA's Office of Construction Oversight (OCO) has overall responsibility for the ACE system and its Guidelines, and its Assistant Director of Construction Oversight chairs the ACE Committee, an inter-agency group that deliberates on matters of policy governing the ACE system. Although the OCO is responsible for the ACE system and for issuing general policies and guidelines, we note that OCO has limited its oversight over the MTA agencies and takes no position on some variances taken by constituent agencies.

While the Guidelines are general and applicable to all MTA agencies, each agency established its own ACE policy or procedure, which are inconsistent and not sufficiently specific. For example, the Guidelines do not exempt any capital contracts from ACE; however, one agency did not use ACE for multiple capital-funded rolling stock contracts, whereas two other agencies used ACE for rolling stock contracts. There were instances where ACEs were done by raters who did not have first-hand knowledge of the project. For example, one employee assigned to rate multiple

contracts obtained ACE-related information by calling the project staff. When we inquired, this employee did not have any documents to support either the ACE ratings or the phone conversations. Another employee followed a similar process, using email to communicate with project staff but kept emails of the communications.

Furthermore, we noted that both the Guidelines and constituent agencies' ACE policies and procedures do not address the areas bulleted below. Details that support these conclusions follow in the remainder of the report.

- Tracking of capital contracts: Guidelines/policies do not discuss how capital contracts should be tracked (by ACE Administrators) to ensure evaluations are performed and what follow-up procedures should be performed when ACEs are not done.
- Assigning responsibilities: Guidelines/policies lack clarity as to who should be assigned as Evaluator and Reviewer in some cases, who at each agency is responsible for monitoring contract assignment, who is responsible for compiling and reviewing evaluation support, and who is responsible for monitoring whether and when summary (final) evaluations are necessary and performed.
- Supporting records: Guidelines/policies do not specify the supporting records that must be prepared, retained, and maintained for interim or summary (final) evaluations; additionally, Satisfactory evaluations are often not supported/documented.
- Evaluation process: Guidelines/policies do not delineate how the rating of the components relates to the rating of the category (e.g., there is no statement of how the rating of the components is weighted and can result in a less-than-satisfactory rating), nor do they document the circumstances where "Not applicable" and "Unable to Rate" can be used or instruct as to what should be done when an evaluation was not performed. Guidelines/policies do not cover situations regarding task-order contracts, where a contractor's work impacts multiple projects. Moreover, the ACE may be done by individuals who do not visit project sites or directly supervise the contractor's work.
- Exemption of capital contracts from ACE: The Guidelines do not specify any contract exemptions from ACE. However, agency policies/procedures and practices include exemptions/exceptions where certain capital contracts will not obtain an ACE review. For example, contracts for rolling stock and contracts managed by Metro-North on behalf of the Connecticut Department of Transportation are exempted from ACE. Guidelines do not specify how to integrate the results of other evaluation processes that agencies in some circumstances use in lieu of ACE into the database or into the responsibility determination in place of an ACE.
- MWDBE: Guidelines/policies do not provide specific guidance on how interim ACEs should rate MWDBE goals (e.g., focus on clearly communicating the

contractor's performance against the goal during the scope period of the evaluation). Guidance does not discuss how to use MTA's Department of Diversity and Civil Rights (DDCR) rating recommendation for each period and how this should be reflected by the Evaluator. Where ACE ratings are different from the one suggested by DDCR, it should be documented and reported to DDCR. Guidance should explain how deviations from the established MWDBE goals throughout the contract period should translate to the ratings and how underperformance in the MWDBE category should be communicated to the contractor.

- Communication with contractors: Guidelines/policies do not place specific responsibility for communicating if and how less-than-satisfactory performance in an ACE component should be communicated to the contractor. However, letters to contractors are required by the ACE system and should be enforced.

As the MTA moves forward in finalizing the consolidation of capital functions within C&D, addressing the deficiencies noted in both this report and our prior report will improve the contractor evaluation process.

Use of ACE Ratings Prior to Contract Award

Responsibility Determinations

Prior to the final award determination on a contract, MTA agencies have a duty to conduct a review as to the responsibility of the proposed vendor/contractor under the Responsibility Guidelines. This review includes a vendor questionnaire, review of financial information and references, background checks, a review of ACE ratings for that vendor's participation in any MTA contracts for the past 3 years, and other information. Each agency uses a form that encompasses the process, including an indication of a review of the prior evaluations, and also has its own responsibility review procedure.

The Responsibility Guidelines define Significant Adverse Information regarding a bidder to include but not be limited to an Unsatisfactory final performance evaluation on a contract with any MTA agency within the immediate prior 3 years, or an uncured interim Unsatisfactory rating on a contract with any MTA agency. Adverse Information regarding a bidder includes a Marginal rating on two or more final ACEs within the prior 3 years, or an overall Marginal rating on three or more consecutive interim evaluations. If an agency finds that a vendor with either Significant Adverse Information or Adverse Information passes the responsibility determination review and recommends a new contract award, the agency President has to approve the award in writing. Additionally, for a vendor with Significant Adverse Information, the Chair of MTA would need to approve the award (if valued at \$1 million or more) in writing in consultation with MTA's General Counsel. We were advised that prior to approving such an award, MTA may require a formal monitoring arrangement with the contractor and a third-party monitor.

We reviewed the portion of the responsibility review covering ACEs for 12 sampled contract awards (three at each of the four agencies) and found that the review was not supported by sufficient documentation.

One agency had no evaluations included in the procurement packages. This agency's procedures require only a review of the ACE database and a copy of the database check, not the full evaluations.

When we checked the files for the three contracts at this agency, we found that one with a joint venture only had an undated "ACE Online Search" report for one of the contractors, and it showed nine prior contracts with no details of the individual evaluations. Four of these nine contracts had no evaluations during the lookback period. For the same joint venture, OCO provided us 15 prior contracts with 58 evaluations in the lookback period. It is not possible to determine which evaluations were reviewed by the procurement unit based on the documentation retained/provided.

Another agency reviewed only a sample of one ACE for each of the prior 3 years per contract instead of all the applicable ACEs for all contracts by that bidder within the lookback period. For this agency, there were only three to five evaluations in each of the three contract files reviewed, while there were as many as 103 evaluations in the lookback period for one bidder alone. For another of the agencies, the contract manager indicated the project was inherited, so he did not have access to the full information/records for the project.

To determine if the ratings should have constituted Adverse Information or Significant Adverse Information under the Responsibility Guidelines, we obtained the ACEs from OCO. We also reviewed procurement file information provided by the agencies. We found three contractors that were awarded a contract despite receiving less-than-satisfactory ratings that would have constituted Adverse Information or Significant Adverse Information. The procurement files for two of these contracts had no Adverse Information or Significant Adverse Information waivers or memos, and there was no rationale on file for the decision to award the contract even though performance was not considered Satisfactory. For the third contract, we found a waiver of Adverse Information signed by the agency President.

In the case of one contractor, while the Vendor Responsibility Form stated that the ACE database was checked on November 26, 2019, it indicated ACEs were "Not Found." However, the procurement package contained three ACEs for the vendor. We checked with OCO and found 14 contracts for this vendor with a total of 59 ACEs during the 3 years prior to the review date. There is no assurance that any of these ACEs were actually checked since the Vendor Responsibility Form does not indicate that these evaluations were considered.

We found that two of the 14 contracts had three less-than-satisfactory ACEs in sequence, which is defined as Adverse Information in both the Responsibility Guidelines and the agency's responsibility procedure. Therefore, an Adverse Information waiver letter signed by the agency President would have been required

to have been submitted with the procurement package. No Adverse Information waiver letter was found or noted in the file.

This is a major vendor at MTA with an extensive contract history. ACEs should have been found and reviewed to determine if this vendor should be deemed responsible and awarded the contract. Due to the lack of proper review, ACEs may not have been considered when making contract awards, and the vendor was not held accountable for any prior contract performance. Agency personnel stated that this was an error on their behalf and the “Not Found” notation signifies that there is a great issue in the review process pertaining to the contractor in question. In addition, staff involved in the responsibility review process were not adhering to procedures in regard to the obtaining a vendor’s ACE history.

The Responsibility Guidelines do not provide any specifics on what documentation should be maintained in the procurement file as evidence of ACE review, so this is left to agency procedures, which are inadequate (e.g., requiring a copy of a “database check” that does not show details of evaluations reviewed). The Responsibility Guidelines also do not provide follow-up procedures for when ACEs are not available for review (e.g., missing, late, not done).

With no documentation in the procurement file to show the rationale used to award the contract to a vendor that has been rated as deficient on a series of recent ACEs, there is limited assurance that the contract should have been awarded to a vendor with Unsatisfactory or Marginal ratings. Without a documented review of past ACEs, important information about a contractor’s performance may be missed, and contracts could be awarded based on incomplete, limited, and/or incorrect information. In addition, complete information regarding contractor’s performance was not provided to agency leadership (e.g., agency President, agency/MTA General Counsel, and the MTA Chair) for their consideration during the vetting process to help them make an informed decision regarding the award of a contract.

Performance Trends

In reviewing the prior ACE ratings of contractors being considered for contract awards, we noted that the Guidelines and procedures are silent with regard to consecutive or recurring less-than-satisfactory category ratings in areas that are critical to the vendor’s performance. These issues may not trigger concern at a level required in the Responsibility Guidelines; however, our review revealed instances where the contractor received successive less-than-satisfactory ratings in one or more categories, which should serve to inform the prospective project manager of issues to keep a close watch on.

For example, when reviewing one bidder’s previous evaluations, we noted one contract with a joint venture partner had a rating of Marginal for the Scheduling category for three consecutive ACEs during the responsibility review lookback period. The contractor had also received four Marginals and one Unsatisfactory in that category in evaluations prior to the lookback period, resulting in a total of eight consecutive less-than-satisfactory evaluations in that category. While this may not

constitute sufficient evidence to question the responsibility of the vendor under the Responsibility Guidelines, the next project manager should be aware of these issues.

For another contract with a different joint venture partner, our review showed that, for three ACEs, the contractor received three less-than-satisfactory category ratings for the Quality category, two in Scheduling, and two in the Management category as well as in the overall rating.

Another contractor received Marginal ratings in the MWDBE category. There was a total of 10 instances in the related contracts where the contractor received Marginal ratings in this category during the lookback period. There were 15 additional instances in which the contractor was rated Marginal in this category after the contract was awarded. Although overall performance is used in determining responsibility, this example shows how previous performance ratings in a specific area can be indicative of future performance and should be reviewed. In addition, if still found responsible, the next project manager should be informed of these performance issues in order to monitor the category closely.

We also noted that, for eight contracts, some ACEs were completed late and, therefore, not available for responsibility reviews during the lookback period. For one contract, seven scheduled evaluations covering periods that ended between February 2014 and May 2016 were all done between August 15, 2016 and November 30, 2016. In addition, the scheduled dates were not in compliance with the Guidelines of twice in 1 year, as there were four evaluations scheduled for 2014.

Recommendations

1. Update the Responsibility Guidelines to include procedures containing specific requirements regarding what records should be prepared and maintained to document the proper consideration of all applicable ACEs during the responsibility review as well as follow-up procedures to be used when ACEs are not available for review.
2. Prior to approval of a responsibility determination, require additional independent supervisory review when the initial responsibility review indicates ACEs were “Not Found” on the vendor checklist.
3. Enforce and monitor procurement staff’s adherence to the agency procedures. Require the agency President’s approval of a responsibility determination without exception where Adverse Information or Significant Adverse Information was noted to be filed in the procurement file.
4. Require the agency ACE Administrator to contact the ACE Evaluator when an ACE is not filed within 45 days. Make an entry in the ACE database to indicate the evaluation is delinquent.
5. Require those performing a responsibility review to contact OCO when an evaluation needed for review is missing from the database.

6. Develop procedures to:

- Include analysis of the ACE category ratings over time to determine whether, in addition to the overall ratings, the categorical assessment reveals significant issues with the vendors' performance.
- Share performance issues found in the responsibility review with the next project manager.

Evaluating Contractors and Consultants

Support for Evaluations

According to the Guidelines, the appropriate ACE shall be completed with a rating for each component, as applicable for the work. However, neither the Guidelines nor agency procedures or policies require support for Satisfactory ratings.

Further, we found that ACE ratings of key categories and/or components were either contradicted or not supported by the records for 24 evaluations for six contracts, covering all four agencies.

For one contract, the ACE ratings of key categories were contradicted by the letters sent to the contractor for all three evaluations ending March 31, 2019, September 30, 2019, and March 31, 2020. The contractor was rated Satisfactory in six categories, despite receiving three Deficient Performance Letters noting deficiencies. For the March 31, 2019 evaluation, the letter clearly states, "your firm has been rated less-than-satisfactory;" however, the evaluation is checked Satisfactory. The letter indicates the contractor was "not-in-compliance" regarding Safety, Scheduling, and Management, with the evaluation agreeing with two categories but rating Scheduling as Satisfactory. For the March 31, 2020 evaluation, the letter and evaluation agree on an overall Satisfactory rating; however, the letter states three categories were less than satisfactory: Safety, Scheduling, and Management – indicating "Deficiencies are constantly repeated," "Deficient in management of subcontractor schedules," etc. Nevertheless, the written evaluation indicates Satisfactory for all five categories, with six components marked as Marginal. In addition, despite each letter specifically directing the submittal of a written corrective action plan within 5 days, there were no corrective action plans submitted for any period by the contractor, as required in the procedures for less-than-satisfactory evaluations.

In response to our preliminary findings, agency officials stated that deficient performance letters are a proactive tool to drive improvement on the part of the contractor. They added that the project team has the final say on the weight and importance of components regarding an overall category rating. This is problematic because judgment can differ from person to person, and if the project team has a change of staffing, the ACE may not be performed uniformly – which defeats the objective of the ACE system. Additionally, the response does not address the fact that the letters and the evaluations on file are not consistent, and, as such, may not

properly document the performance of the contractor for review for future contract awards.

Eighteen of the 24 evaluations where we questioned the ratings were for the MWDBE category. For one contract, although DDCR provided input for the ratings, the Evaluator did not concur. DDCR suggested three ratings of Not Applicable and a rating of Marginal, yet the contractor was rated as Satisfactory for all four evaluations we reviewed. Agency procedure calls for the Evaluator and DDCR representative to discuss non-compliant participation but does not require the retention of evidence or support for the resolution of differences between DDCR's proposed rating and the actual rating in the ACE. In fact, the agency procedures define Satisfactory as "in compliance with MWDBE participation goals," which is substantially different than Marginal (somewhat non-compliant with MWDBE participation goals). There did not appear to be support for the change. According to a representative from MWDBE Contract Compliance, when the contract is somewhat non-compliant with MWDBE participation goals, the contractor is rated Marginal. DDCR officials also stated that a "good faith effort to meet the goal" can be a determining factor. When ratings are not an accurate reflection of the contractor's performance, the contractor may not be made aware of issues that need to be improved. In addition, without standards, an incorrect conclusion can be drawn by others when reviewing the evaluations.

Further, one agency official's response to our preliminary findings stated that, for interim evaluations, input from DDCR is solicited in support of the evaluation process and to inform the MWDBE component and category ratings. However, the Guidelines and procedures do not require the use of DDCR's suggested evaluation ratings for interim evaluations. Nevertheless, the agency indicated it will consider strengthening its records requirements for interim evaluations by documenting when ratings differ from DDCR input.

No Evaluations Performed

ACEs are required for all capital-funded contracts equal to or greater than \$250,000. OCO allowed agencies to make exceptions to the requirement to submit evaluations, despite no provision in the Guidelines to do so. For three contracts we reviewed, we located one of the 10 evaluations required. We question how the contractors' performance was reviewed as part of a pre-award responsibility review since there was no ACE on file. There is no provision in the Guidelines that would allow exceptions from ACE for a capital-funded contract.

Some evaluations were not done due to difficulties assigning contracts to Evaluators. For a \$6 million engineering consultant contract, which was expected to run from December 2017 through December 2024, we found that there were no ACEs on file for the first four evaluation periods. We were advised that the agency's ACE Administrator, in an effort to assign the contract to an evaluation team, reached out by email but received no answer, and no further steps were taken to address the issue. As a result, the first four ACEs were never performed. The fifth evaluation was performed in April 2020 when the responsibility for the contract was assigned to a

different group. When required evaluations are not completed, performance-related issues may not be brought to the contractor's attention and addressed. Additionally, the contractor performance assessment is not available to other MTA agencies in the event of a responsibility review for a new contract.

We identified contracts that were not reviewed under ACE because the agency used other evaluation processes. For example, ACEs were not prepared for a rolling stock contract in the amount of \$600,252,208 beginning May 31, 2012 and ending June 30, 2022. OCO officials advised us that there were no ACEs for this contract because the agency has, for the last 20 years, evaluated rolling stock contracts in a system called VENDEVAL. According to agency officials, this is a manual system, and it evaluates the vendors' performance on contracts they claim are not conducive to ACE, which they say is more applicable to construction-related procurements. Moreover, VENDEVAL does not differentiate between contracts that are funded with capital or operating contracts. Instead, the evaluation process is based on the nature of the materials and not the type of funding. However, the Guidelines are applicable to all capital-funded contracts and have no exceptions for rolling stock procurement. In contrast, two other MTA agencies that procure rolling stock used ACE to evaluate contractor performance.

Further, ACEs are performed twice a year, whereas VENDEVAL evaluations are annual. Also, because the Responsibility Guidelines do not refer to VENDEVAL as part of the vendor responsibility review, there is no assurance that the responsibility review properly includes complete information on the vendor's performance.

We compared the evaluations and determined that VENDEVAL categories and components are not as detailed as those of ACE. For example, management of subcontractors and suppliers is not a part of VENDEVAL. Also, Scheduling is not a category, whereas ACE's Scheduling category has six components: Scheduling, Scheduling Adherence, Adequacy of Staffing, Availability of Materials and Equipment, Subcontractor/Supplier Selection, and Contract Milestones. We also note that rail car procurements are rarely on schedule, so not having a Scheduling category is a significant omission.

In response to our preliminary findings, the agency explained its belief that ACEs were only for construction contracts and consultant contracts and rolling stock procurements are categorized as "equipment." However, the agency included the rolling stock contracts on the list of capital contracts and, according to the Staff Summary, the contracts were funded from the MTA Capital funds. Rolling stock is also not an off-the shelf commodity, but a unique design and manufacturing/built product requiring extensive engineering review, inspections, and contract oversight. The response indicated that the two agencies who currently use the ACE system for rolling stock will begin to use an evaluation process other than ACE for all new awards.

Correlation of Category Ratings With Component Ratings

Evaluations can have up to five categories, each of which is made up of multiple components that are rated individually to inform the overall category rating. There is no written guidance regarding the number of components which, if less than satisfactory, would result in a less-than-satisfactory category rating. Instead, this is left up to the Evaluator's discretion, which can lead to inconsistent ACEs even on the same contract. For three contracts at three agencies, we noted the ACE, or its categories, were either not correctly, consistently, or objectively rated.

- For one contract, the Scheduling category was inconsistently rated for two evaluations. On one evaluation, the Scheduling component was rated Marginal, and the overall rating of the Scheduling category was rated Marginal. On the other evaluation, two components – Scheduling and Schedule Adherence – were rated Marginal; however, the Scheduling category was rated Satisfactory. The project file did not explain this inconsistency. The agency agreed with our preliminary finding.
- For four evaluations for two contracts, overall category ratings were not rated in a manner supported by the component ratings. For example, for one contract, there were three evaluations where the contractor received a Satisfactory rating for Quality, Scheduling, or Management even though half of the components were rated as Marginal. The procedures are silent regarding how the number or proportion of less-than-satisfactory component ratings affect the overall category performance rating.

Similarly, we were informed by other agencies that because of the different nature of each project, the importance of each component may differ from project to project. However, with no clear guidance, overall category ratings will be inconsistent throughout ACEs. When the category rating is not an accurate reflection of the component ratings, inaccurate contractor performance information is available for use by other MTA agencies. In addition, the contractor's performance issues will not be addressed and remedied.

In response to our preliminary findings, one agency agreed with our recommendation. Another agency stated that its policy does not provide rules regarding ratings because of the different nature of each project; however, the judgment of the personnel close to the project must be used to determine the weight of the component rating on a given category. In addition, both agencies stated their expectation that there will be a new ACE system developed that will be more objective.

Notification Letters

Both the Guidelines and agency procedures/policies require that the agencies notify the contractor using a standard Deficient Performance Letter if one or more of the category ratings are less than satisfactory. The procedures are silent as to when notification letters must be sent. In addition, the procedures for two agencies do not

assign any personnel the responsibility of ensuring the protocol for notification letters is being followed.

There is no evidence that the required letters were sent to three contractors. For example, at one agency for the period ended September 30, 2018, a contractor received a Marginal rating in the category of Quality and Scheduling but did not receive a Deficient Performance Letter as required. Also, this contractor was required to be sent a “Performance Improvement Letter” for the next three periods since the components were rated less than satisfactory; however, the agency could not document that any ACE performance letters were sent. Performance deficiencies that are not brought to the contractor’s attention cannot be addressed promptly, postponing action to correct the deficiencies.

In response to our preliminary findings, one agency agreed with our findings; however, the other did not, indicating that its procedures make a letter optional. However, these procedures are based on draft guidance and not the most recently approved OCO Guidelines. During the scope of this audit, the letters were required.

ACE Evaluator’s Responsibilities

Two contracts were not evaluated by the appropriate agency personnel. The agency responsible for the contracts assigned responsibilities of the ACE Evaluators to two individuals (a Staff Analyst and an Associate Transit Analyst) who were not responsible for day-to-day management of the work, as required.

Both of these contracts were structured in a manner where the contractor’s work was assigned as task orders overseen by different Project Managers. One Evaluator communicated with the Project Managers by phone and, unless they provided any performance deficiencies, the contractors’ performance was rated as Satisfactory. However, there is no support in writing. The second Evaluator maintained records of the emails or phone calls made to obtain information.

The agency did not follow its ACE procedures, which require the ACE Evaluator to be the individual responsible for day-to-day management of the work. Therefore, there is no assurance that the ACE ratings are supported and that the MTA agencies received accurate information on the contractors’ performance.

In response to our preliminary findings, the agency disagreed, commenting that these contracts were indefinite quantity task-order contracts, which cover a vast expanse of tasks. The response further stated that the agency aims to identify areas where these consultants are not meeting the requirements of the individually required tasks. These tasks and the individual comments are what drive the overall evaluation of the consultants’ performance. Rather than changing the Evaluator, the agency said it recognizes the benefit of changing the definition of ACE Evaluator to better comply with its process for indefinite quantity task-order contracts for consultant services. However, the Evaluator should be the person who is responsible for day-to-day management of the work. Because task-order contracting results in one contractor reporting to multiple project managers, the Evaluator requires skills

and knowledge at a level that is familiar with the totality of the work at the task-order level that are rolled up into one summary evaluation for the contract through a formal process.

The agency added that its procedure requires back-up documentation for ratings of Marginal and Unsatisfactory; therefore, requesting documentation for a Satisfactory rating would not meet the intent of the ACE requirements. However, the procedures clearly state: “the Program Area shall maintain copies of all documentation regarding the evaluation,” making no distinction between the ratings. In addition, as stated above, the Evaluator advised us that there’s no record of the individual conversations with Project Managers and there is nothing in writing to support the rating.

Recommendations

7. Ensure that performance evaluations are completed in accordance with the official ACE Guidelines and agency procedures, regardless of the type of contract. This includes:
 - Having ACE Administrators timely identify and assign capital contracts to evaluation teams, tracking all capital to ensure required ACEs are completed and submitted on time, and following up with evaluation teams when evaluations are not submitted timely.
 - Accurately reflecting the contractors’ performance and sending required notification letters that reflect the same rating and factual information contained in the contractor’s evaluation.
 - Updating the Guidelines and procedures to establish a time frame for sending notification letters and require the ACE Administrator to verify letters are issued timely.
 - Documenting support for contractor performance ratings that reference contract records; requiring support/documents for Satisfactory ratings.
 - Developing comprehensive procedures or guidance on how the component ratings should affect the overall category ratings.
 - Ensuring that the assigned ACE Evaluator is the individual responsible for day-to-day management of work. If not possible, the role of Evaluator should be assigned to a higher-level project management official with overall responsibility for the contractor’s work.
 - Ensuring that evidence related to contractor’s performance is documented for task-order contracts, using written evaluations for each task order, which are then summarized by contract.
8. Ensure that contractors prepare, submit, and implement corrective action plans for less-than-satisfactory performance.

9. Regarding MWDBE ratings:

- Revise Guidelines to provide that, if an Evaluator revises the DDCR-suggested rating, written rationale and support must be prepared/retained.
- Develop clear MWDBE guidelines that address how the contractor's interim MWDBE participation rates should translate to the interim rating of the MWDBE category.
- Ensure that "Unable to Rate" ratings are only given when no MWDBE work has been scheduled or performed during the evaluation period or are otherwise clearly documented and supported.

10. Close loopholes which allow contracts to escape ACE by:

- Reassessing various evaluation procedures related to rolling stock capital contracts and select an appropriate, uniform methodology and document the justification.
- Developing a means for integrating other evaluation systems used for capital-funded contracts into the Responsibility Guidelines, including consideration if the review cycle is less frequent than ACE.
- Developing a process for granting exemptions to capital contracts from ACE reviews.
- Requiring OCO be notified when an agency allows an exemption or departure from ACE procedures and document in the ACE database.

Audit Scope, Objectives, and Methodology

The objectives of our audit were to determine whether the MTA is monitoring and evaluating its contractors/consultants in compliance with its ACE system and taking appropriate action where performance ratings are less than satisfactory. We also determined whether procurement officials at the agencies reviewed and used the ACE ratings prior to making a contract award. The audit covered contracts from January 2016 to March 2020.

To accomplish our objectives and assess the relevant internal controls, we reviewed policies, procedures, and guidelines. We interviewed officials and employees to obtain an understanding of the ACE review and evaluation processes. We also reviewed records for each of the sampled projects.

To determine whether MTA is monitoring and evaluating its contractors/consultants in compliance with its ACE review process and acting where performance rating is less than satisfactory, we reviewed a judgmental sample of 12 contracts, based on amount and type of service, excluding contracts that were less than \$1 million or that were for services such as utilities. This sample was taken from a listing of 917 contracts that were active from January 1, 2016 to December 31, 2019 for each agency. We reviewed supporting documentation for the four most recent evaluations for each contract including ACEs through the evaluation period ended March 31, 2020. This sample was not designed to be projected to the entire population.

To determine if MTA officials used ACE ratings to evaluate the contractor responsibility prior to making a contract award, we selected a judgmental sample of 12 of 164 contracts active between 2016 and 2019 ranging from \$12.5 million to \$365.1 million. We included contracts covering different types of services and contract amounts. We reviewed documentation (e.g., vendor responsibility forms) in the procurement file. We tested the data used to select our samples and conduct our audit work, and determined it was sufficiently reliable for the purpose of our audit objectives. This sample was not designed to be projected to the entire population.

Statutory Requirements

Authority

This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State, including some duties on behalf of public authorities. For MTA, these include reporting MTA as a discrete component unit in the State's financial statements and approving selected contracts. These duties could be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our professional judgment, these duties do not affect our ability to conduct this independent audit of MTA's oversight and administration of its All-Agency Contractor Evaluation system.

Reporting Requirements

We provided a draft copy to MTA officials for their review and formal comment. Their comments were considered in preparing this final report and are attached in their entirety at the end of it.

In their response, MTA points out that conditions have changed since the audit began, such as the agency-wide transformation plan and the consolidation of the MTA's capital program into one agency. In line with these changes, the ACE system was replaced with a new construction contractor review system. MTA officials claim that the new system moots many of the ACE-specific recommendations but acknowledges that they incorporated many of the recommendations we provided. Further, this audit report contains additional recommendations that can further strengthen the new system. Our responses addressing certain MTA remarks are included in our State Comptroller's Comments, which are embedded within MTA's response.

Within 180 days after the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Metropolitan Transportation Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees advising what steps were taken to implement the recommendations contained herein, and where the recommendations were not implemented, the reasons why.

Agency Comments and State Comptroller's Comments

2 Broadway
New York, NY 10004
212 878-7000 Tel

Janno Lieber
Chairman and Chief Executive Officer



Metropolitan Transportation Authority

State of New York

September 27, 2022

VIA E-MAIL

Ms. Carmen Maldonado
Audit Director
The Office of the State Comptroller
Division of State Government Accountability
59 Maiden Lane, 21st Floor
New York, NY 10038

Re: Draft Report #2019-S-52 (Selected Aspects of the All-Agency Contractor Evaluation System at Long Island Rail Road, Metro-North Railroad, New York City Transit, and Triborough Bridge and Tunnel Authority)

Dear Ms. Maldonado:

This is in reply to your letter requesting a response to the above-referenced draft report.

I have attached for your information the comments of Lisette Camilo, Chief Administrative Officer and Jamie Torres-Springer, President, MTA Construction & Development, which address this report.

Sincerely,

A handwritten signature in black ink that reads "Janno Lieber".

Janno Lieber

c: Laura Wiles, MTA Chief of Staff
Michele Woods, MTA Auditor General

The agencies of the MTA

MTA New York City Transit
MTA Long Island Rail Road

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Construction & Development
MTA Bus Company

2 Broadway
New York, NY 10004
212 878-7000 Tel



Metropolitan Transportation Authority

State of New York

September 27, 2022

VIA ELECTRONIC MAIL

Mr. Janno Lieber
Chairman and Chief Executive Officer
Metropolitan Transportation Authority
2 Broadway
New York, New York 10004

Re: Response to the Office of the New York State Comptroller
Draft Audit Report 2019-S-52, dated August 2022

Dear Chairman Lieber:

Thank you for providing us with an opportunity to respond to the Office of the New York State Comptroller's (the "OSC") draft report of the MTA operating agencies' compliance with the MTA all-agency contractor evaluation ("ACE") system.¹

As an initial matter, we note that the audit period for the draft report is January 2016 through March 2020. Much has changed at the MTA since that time. One significant change is that the MTA has since undergone an agency-wide transformation aimed at simplifying the organizational structure and making the MTA a more efficient and cost-effective organization. As part of that transformation, the MTA's capital program has since been consolidated into one agency, MTA Construction & Development Company ("C&D"), which is now solely responsible for awarding and managing the capital program's construction contracts and for overseeing the related contractor evaluations.

In line with the large scale transformational changes occurring throughout the MTA, in the third quarter of 2021 MTA C&D replaced the longstanding ACE system that is the subject of the draft audit with a brand new construction contractor review system. This new system is a complete redesign of ACE, thereby mooted many of the ACE-specific recommendations contained in the draft report. That said, in creating this new system, MTA C&D did incorporate many of the key findings and recommendations contained in the OSC's March 2021 ACE Audit of MTA C&D, such as: (i) basing the new system on objective metrics and processes; (ii) clearly defining the scope of contracts reviewed under the system; (iii) creating one standard policy for all system users; (iv) requiring the system reviews to be completed by MTA staff with personal knowledge of the contractor's performance; (v) eliminating an evaluator's

¹ The OSC's report is addressed to the Long Island Rail Road Company ("LIRR"), the Metro-North Commuter Railroad ("MNR"), the New York City Transit Authority ("NYCT") and the Triborough Bridge and Tunnel Authority ("TBTA", and collectively with LIRR, MNR, NYCT and TBTA, the "MTA Operating Agencies"). As noted in the report, MTA Construction & Development Company's ("MTA C&D") compliance with ACE was audited by the OSC separately and the OSC issued that audit report on March 4, 2021 (the "March 2021 ACE Audit").

The agencies of the MTA

MTA New York City Transit
MTA Long Island Railroad

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Construction & Development
MTA Bus Company

ability to add a “non-applicable” rating; (vi) requiring the evaluator to maintain backup documentation for all levels of review; and (vii) enhancing and increasing the training for system users and administrators.²

State Comptroller’s Comment – In response to the draft report, MTA C&D referred to the issues identified by the audit as “moot.” We disagree. Audits are relevant not just to implementation of controls but also to design. While MTA has an updated contractor evaluation process, which used many recommendations in our prior report in developing the new process, it did not incorporate all relevant recommendations. The additional recommendations, if adopted, would further strengthen C&D’s process. Additionally, the recommendations that expand monitoring would strengthen operations by ensuring the controls that are in place are followed. For instance, we reviewed our files and found, for one contract, the response does not mention that the evaluations on file were incomplete. As a result, when the responsibility review was done, information regarding certain evaluations where the contractor’s performance was less than satisfactory was not on file. As the file was incomplete, we obtained additional ACEs from OCO. The presence of these evaluations would have required additional steps by MTA to complete the responsibility review.

One of the key components of this new system is that it requires objective contract data to be gathered on a more frequent basis than ACE. While ACE evaluated contractors and consultants every six months, the new system requires standard contract key performance indicators (“KPIs”) to be entered quarterly. This change is significant because the quarterly KPIs provide more current and accurate information for use by the contractor and the MTA. In addition to the quarterly KPIs, the new system also requires the MTA evaluator to complete an annual assessment, a substantial completion review (which takes place at the substantial completion contract milestone) and a final review (which takes place when the contract is closed) of the contractor, providing more information that can be used by the MTA vendor responsibility review team when assessing new contract awards.

State Comptroller’s Comment – MTA states that, in the new system, the final review takes place when the contract is closed. However, a review of 25 Project Status Reports dated April 2022 shows that it took from 3 months to 5 years to close out the contract, with a median of 11 months. Thus, it may be almost a year after substantial completion of a contract before the final evaluation is completed.

Further, unlike the ACE system, the new system requires that the contract evaluator be the MTA employee who is primarily responsible for the management of that contract. This person is typically known within the MTA as the “Project CEO.” This requirement was included to ensure that the person performing the evaluation always has first-hand knowledge of the contractor’s performance. To confirm that the Project CEO is basing their evaluation on objective information, they are responsible for providing and maintaining backup documentation for the KPIs, annual assessment and contract reviews, and for storing that backup documentation in one centralized location for record keeping purposes.

State Comptroller’s Comment – MTA implies that changes were made in the new system, but we note that the change mentioned existed in the old system. Specifically, the response states that the new system “requires that the contract evaluator be the MTA employee who is primarily responsible for the management of that contract. This person is typically known as the ‘Project CEO.’” However, that was

² On April 28, 2021, prior to the new system roll out, MTA C&D met with OSC officials to provide a briefing on the key aspects of this new system. If the OSC would like a follow-up briefing, MTA C&D is happy to arrange for one.

also true of the old system, with the major difference being the title of the responsible employee.

To address the OSC's concern of the different, and sometimes divergent, governing policies and guidelines that were in place under the ACE system, the new system is governed by just one policy. That policy clearly and concisely defines the nature and dollar value of contracts that are subject to evaluation, along with the processes that must be followed to ensure a fair and objective contract evaluation. System users and administrators are trained on this policy and the system logistics to confirm that they understand the requirements. This training is more formal than the prior ACE training, with online sessions being conducted by the system administrator and/or their staff on a regular basis. Training is available both to new users and existing users who are interested in a refresher course.

State Comptroller's Comment – MTA's response did not include a copy of the new policy, so we did not review the accuracy of this statement.

Simply put, the new way the MTA is operating after the creation of MTA C&D resolves many of the issues raised by the OSC in its draft report. The consolidation and centralization of the MTA's capital construction and development functions into one agency has streamlined the capital planning, design, procurement and delivery processes. In turn, it has also greatly improved project reporting because there is now only one agency that handles capital projects from initiation to completion. That said, the MTA always welcomes suggestions on how to improve its processes. To that end, and in accordance with Executive Law Section 170, below are the MTA's responses to the findings and recommendations contained in the draft report:

RESPONSE TO OSC FINDINGS

The draft report focuses on three key findings. The MTA disputes each of those findings because they run contrary to the facts.³

Key Finding # 1: MTA did not properly handle responsibility reviews for two of the 10 sampled contractors with repeated less-than satisfactory ACEs when awarding new contracts.

The OSC's first key finding is that the MTA did not properly handle the responsibility reviews for two out of the ten contractors that the OSC sampled. The OSC bases its finding on its determination that these two contractors had three less-than-satisfactory ACE reviews when they were awarded a new

³ Notably, many of the findings contained in the draft report fail to distinguish between the separate nature of each of the MTA Operating Agencies, inaccurately implying that the conduct that purportedly underlies a finding is attributable to all of the agencies. Although this implication may be unintentional, we note that the OSC performed separate and independent audits of each agency and, during the time period of the audit, each agency managed its own ACE review process. As such, there is no basis to attribute their findings to and apply the actions of one agency to that of all of the agencies.

State Comptroller's Comment – When the audit began, we were aware that MTA was consolidating this process under C&D. The findings identify areas of weaknesses that are universal across all the operating agencies and are thus not specific to an individual operating agency's process. Now that the process is consolidated across agencies, MTA should ensure that these weaknesses are addressed system wide.

contract. The OSC contends that this series of less-than-satisfactory ratings in sequence should have constituted adverse information under the MTA's Responsibility Guidelines, thereby barring the contractors from receiving a new contract award absent an adverse information waiver letter from the agency president. That is an incorrect interpretation of the Responsibility Guidelines.

The Responsibility Guidelines in effect at the time of the audit period contain a clear and concise standard for a finding of adverse information and significant adverse information. The Guidelines state that adverse information is found where a contractor has either: (i) an overall marginal rating on 2 or more final performance ratings; or (ii) an overall marginal rating on 3 or more consecutive interim performance ratings on the same contract (See Responsibility Guidelines, Paragraph 6; emphasis added). The Guidelines further state that significant adverse information is found where the contractor has either: (i) an unsatisfactory final performance ACE evaluation on a contract with any MTA agency within the past 3 years; or (ii) an uncured interim unsatisfactory rating on a contract with any MTA agency in the past 3 years. (See Responsibility Guidelines, Paragraph 5; emphasis added).

The Responsibility Guidelines also allow for an agency to find a contractor to be responsible notwithstanding an adverse information finding if the agency's president approves the transaction in writing. The concept is the same for a waiver of significant adverse information, but additional signoffs are needed from the MTA Chairman and the MTA General Counsel.

Importantly, a determination of adverse information or significant adverse information, or even a negative implication or presumption based on past performance, that does not rise to the standards contained in the Responsibility Guidelines could be considered arbitrary, unfair treatment of the contractor.

Contract #1

With respect to the first contract referenced in the report, the OSC identified three consecutive overall "marginal" interim performance ACE ratings (due September 5, 2015, March 3, 2016, and August 30, 2016) and determined that these three ratings meet the standard for adverse information and should have been considered in connection with the responsibility review for a new contract award to this contractor that occurred on August 9, 2016. This finding is based on a misunderstanding of the Responsibility Guidelines.

As noted above, the Responsibility Guidelines require a review of the proposed contractor's ACE history before a new contract is awarded to that contractor. The applicable ACE history lookback period is three (3) years, running from the date the contractor is vetted by the MTA vendor responsibility review team. Using a lookback date other than the date vetted could prove problematic because a responsibility determination must be based upon the best information available at the time. That "best information" undoubtedly includes capturing any new ratings (be they good or bad) entered before the contractor is deemed responsible, especially in cases where the last review is less than satisfactory and can result in an adverse information or significant adverse information determination.⁴

⁴ This lookback period standard has been consistently applied by the MTA Operating Agencies since the inception of ACE. The OSC noted its determination that the Responsibility Guidelines were unclear on this issue in its March 2021

Here, the contractor ACE history was vetted by the MTA responsibility review team on August 9, 2016. As noted on the Vendor Responsibility Check Form for this review, the team member reviewed the proposed contractor's past contracts in the ACE system and did not find: (i) any final overall rating of unsatisfactory within the past three years; (ii) any uncorrected interim overall rating of unsatisfactory; (iii) two or more final overall ratings of marginal within the last three years; or (iv) three or more consecutive interim overall ratings of marginal within the last three years. That signoff then includes a hardcopy signature by the reviewer, the printed name of the reviewer and the date of the review, which is handwritten as "8-9-2016." In accordance with the adverse information and significant adverse information standards set forth in the Responsibility Guidelines, this means that the proposed contractor does not have any adverse information or significant adverse information that may inhibit the award of a future contract.

State Comptroller's Comment – MTA's focus is on the signed responsibility review form dated "8-9-2016." However, it does not mention that there were evaluations submitted untimely, and if they had been received on time, there would have been an issue of a significant adverse impact or adverse impact. Moreover, according to MTA's response to Recommendation 1, if an ACE is not in the system, a call is immediately made or an email sent to the project team, and they are advised to file the missing documents immediately. This process is also supposedly in the new system. However, if this recommendation was in fact implemented, the audit would not have identified required documents that were late or not on file. Moreover, without changes, this issue may repeat itself under the new process.

The OSC's draft report appears to focus on the fact that, despite the fact that the proposed contractor had received four years of satisfactory ACE reviews on this contract, two consecutive marginal reviews existed at the time this new contract was awarded. In addition, the next ACE review was scheduled to occur on August 30, 2016 and, had that ACE review been considered by the MTA responsibility review team, the contractor would have had three consecutive interim marginal reviews on the same contract, constituting adverse information and requiring written signoff by the agency president before the pending contract was awarded to this contractor. What the OSC fails to recognize is that the three year lookback period ran from the date that the contract was vetted, which was August 9, 2016. At that time, the next ACE review was not yet due to be entered into the ACE system, so it was not considered, nor was it required to be considered under the governing Responsibility Guidelines.⁵

We also remind the OSC that ACE evaluations are just one factor that the MTA agencies consider in determining whether a contractor is responsible for purposes of doing business with the agencies. Indeed, the Responsibility Guidelines set forth a list of other factors, which are non-exclusive in nature and include:

ACE Audit of MTA C&D. As a result, the Responsibility Guidelines were updated in February 2021 to clarify that the three-year lookback period runs "prior to the date when the contracting officer makes the determination or recommendation regarding the contractor's responsibility." (See Responsibility Guidelines, Paragraph 5).

⁵ Notably, with the exception of the three marginal reviews that this contractor received during the 2015-2016 period in the middle of the contract that the OSC is focused on, every other ACE review on this contract was satisfactory. That is significant because the contract period was ten years.

State Comptroller's Comment – The draft report clearly states that ACE is just one factor in the responsibility review.

- General business experience and stability (including organizational structure, management expertise, length of time doing business, and prior history of defaults, debarments and non-responsibility determinations);
- Cash flow and balance sheet, and the financial demands that will be imposed on the entity by its performance of the contract;
- Size, capacity, and capability of the entity in relation to the work to be performed and in relation to other work being performed by that entity;
- Record of performance on other contracts;
- Record with respect to integrity and business ethics, including criminal activity and other misconduct;
- Whether the entity is barred by any federal, state, local or other public or governmental agency from the award of a contract or submission of bids/proposals; and
- The risks associated with the project.

The MTA's responsibility review team's analysis under these Guidelines extends to a search of public and private databases and repositories that help piece together the proposed contractor's current abilities and deficiencies. These databases include the System for Award Management, the New York State Department of Labor Bureau of Public Works Debarment List, Passport, the New York State Office of General Services Non-Responsible Bidders and Debarred List, Lexis Nexis, and general reviews on the New York State Attorney General and Department of Justice websites. In addition, the contractor's insurance, experience modification rating and bonding capacity are all considered, and all contractors are required to fill out a Contractor Responsibility Questionnaire prior to award. That Questionnaire requires the proposed contractor to affirmatively disclose relevant information to the agency that may impact a determination of responsibility. That document is then reviewed by the MTA's responsibility review team before a contract is awarded. While this is not an exhaustive listing of the tools employed by the MTA in evaluating a contractor's performance prior to award, this should provide a clearer understanding that ACE is just one small part of the review process.

Contract #2

With respect to the second contract referenced in the report, the OSC found that adverse information should have prevented the award of this contract to the contract awardee because there were three less-than-satisfactory ACE ratings in sequence on two other contracts with the same contractor, which should have resulted in a finding of adverse information under the Responsibility Guidelines. Like with the first contract referenced above, this interpretation of the Responsibility Guidelines is also incorrect.

State Comptroller's Comment – For Contract #2, a limited review of the evaluations by MTA, using only a sample of the available evaluations, resulted in an incorrect conclusion for the responsibility review. This information was previously provided by MTA in response to our preliminary findings. In responding to the draft report, MTA C&D states that all items were "cured" and this would have prevented an SAI.

However, this does not address the underlying issue – the limited review of evaluations by the MTA.

In connection with this review, the MTA responsibility review team looked at two existing contracts awarded to this contractor and used the standard three-year lookback period. That ACE responsibility review was conducted by the MTA responsibility review team on November 26, 2019. Both of these contracts were still active at the time, so the MTA responsibility review team analyzed the interim ACE ratings to determine whether there existed any uncured interim unsatisfactory rating on any MTA agency contract as that would constitute significant adverse information or an overall marginal rating on three or more consecutive interim ratings on the same contract number that would constitute adverse information. Contrary to the OSC’s findings, neither significant adverse information, nor adverse information existed here.

With respect to the adverse information review, the MTA responsibility team looked at two relevant contracts that were awarded to the contractor. While both contracts had three or more marginal or unsatisfactory ratings, those ratings were subsequently “cured” with not one, but multiple satisfactory ratings at the time of the November 26, 2019 review (and continued to have only satisfactory reviews since that time). As noted above, the Responsibility Guidelines only require one satisfactory rating to “cure” any potential adverse information finding. As such, there was no basis to find adverse information here.

State Comptroller’s Comment – MTA did not provide documentation to support its response that the contractor’s marginal or unsatisfactory ratings can be cured with a satisfactory rating. The responsibility procedures state that additional approvals are required, yet they were not in the files provided.

With respect to the significant adverse information review, the MTA responsibility team again looked at two relevant contracts that were awarded to the contractor. Similar to the adverse information review, there were not any uncured interim less than satisfactory ratings at the time of the review. To the contrary, at the time of the responsibility review, both of the contracts had “cured” the prior less than satisfactory ratings with three satisfactory ratings, thereby taking both contracts out of the threat of a significant adverse information finding.

Therefore, there was no basis to find either adverse information or significant adverse information under the Responsibility Guidelines for this contract.⁶

⁶ It is important to note that the contractor in question has a long history with the MTA working on tremendously complex projects. The number of firms with the technical skill set and resources necessary to perform the complex work of the MTA is limited.

State Comptroller’s Comment – The fact that a contractor worked with MTA on tremendously complex projects and the number of firms with the necessary skill set, resources, and technical skills is limited does not justify overlooking less-than-satisfactory performance.

Further, during the course of the audit, the OSC was reminded that the analysis of the ACE for adverse information or significant adverse information is only triggered at the time of a formal background check in connection with a pending contract award. This is one of reasons the Responsibility Guidelines do not find significant adverse information when the ratings are cured. If the contractor has improved its performance before it is awarded a new

Key Finding # 2: MTA missed opportunities to advise project management teams about areas of known performance issues with contractors when they were awarded new contracts.

There exists no factual basis for the OSC's second key finding -- namely that by not relying more heavily on the ACE system, the MTA missed opportunities to advise its project management teams about areas of known performance issues when awarding new contracts. This finding is based upon a misunderstanding of the purpose of the ACE system. Indeed, ACE was never intended to assess contractor performance or punish poor performers. It was never intended to be, and is not, a contract management tool. If there are known performance issues with a contractor, the project team responsible for managing that contract can, and should, meet with the contractor to resolve the open issues and, if necessary, exercise their contractual remedies to correct the contractor's performance. Each project is unique and comes with its own set of challenges and issues. During progress meetings, agency staff discuss the progress of the project with contractor staff, including MWDBE goals, schedule, quality issues, and submittals. The contractor should know if they are missing targets. They provide monthly schedule updates to show delays and the forecasted substantial completion date. They, not the MTA, are responsible for tracking and presenting to the MTA project team any quality issues, nonconformances, and resolutions taken. On the ground, agency construction managers and their staff go onsite on a regular basis to inspect the work for quality and workmanship. Issues are addressed and resolved. If the parties are unable to come to a resolution, the terms of the underlying contract include performance and cost related controls, which can be exercised. All of this occurs outside of ACE.

State Comptroller's Comment – MTA states that ACE was “never intended to assess contractor performance or punish poor performers.” However, taking action when a contractor does not perform the work required by the contract is not punishment but providing accountability over the use of public funds.

The purpose behind ACE is quite different than what is found in the OSC's draft report. ACE was developed to implement a uniform standard for reviewing the status of a contract when assessing a contractor's responsibility for new contract awards. Further, as noted above, ACE is just one of the many review tools that are considered when performing this responsibility review and making this responsibility determination.

Key Finding # 3: MTA did not ensure that ACEs were performed timely by evaluators who were responsible for the project or, in certain cases, that the evaluations were done at all.

(1) No Evaluations Performed:

The only evidence the OSC offers in support of its finding that evaluations were not performed is its review of three (3) contracts where only one (1) of the ten (10) evaluations required was located. While the OSC makes this finding against all four agencies, the three contracts reviewed belonged to only

contract, that should be considered in the responsibility review, as is reflected in the Responsibility Guidelines.

State Comptroller's Comment – MTA did not provide documentation to support its response that the contractor's marginal or unsatisfactory ratings can be cured with a satisfactory rating. The responsibility procedures state that additional approvals are required, yet they were not in the files provided.

two agencies. Issuing this finding against the other two agencies, without evidence, is improper.

State Comptroller's Comment – MTA has consolidated the process as a single process. As such, it is appropriate to address the report to MTA, identifying opportunities for improvement. Moreover, MTA indicates that the new system implemented by MTA's executive management has addressed several of the deficiencies found by the audit.

The OSC first identifies a \$6 million engineering consultant contract without ACE evaluations on file for the first four (4) evaluation periods. The MTA does not dispute that there were not any evaluations performed on this contract during the evaluation period at issue, but notes that it subsequently took corrective action in 2020. As the OSC acknowledges, the ACE administrator made multiple attempts to assign this contract to the correct evaluation team. The correct evaluation team was ultimately assigned, and evaluations began in April 2020. To ensure this does not happen again, in 2020, the agency put a formal internal escalation process in place to ensure that the ACE administrator timely identifies and assigns contracts to evaluation teams. That said, in light of the new contractor evaluation system that was subsequently implemented, this finding becomes moot.

The OSC also takes issue with a \$600 million rolling stock contract that it found was not evaluated under ACE. Although the contract was reviewed under an alternate evaluation system routinely utilized by the MTA (i.e., VENDEVAL), the OSC finds that review system to be inadequate here. This OSC opinion runs contrary to the agency's procedure detailing which system rolling stock contracts should be reviewed under. That procedure makes clear that they are reviewed under VENDEVAL, not ACE.

State Comptroller's Comment – The audit points out that different evaluation systems were used for rolling stock. We did not insist that ACE should be used; rather, we stated that the ACE system had additional factors to evaluate the contractor's performance that should have been considered.

Indeed, the applicable agency's Project Management Procedure No. 115 unequivocally excludes capital funded equipment contracts from ACE. (See PMP/G 115, Section 4.0. Rolling stock contracts are considered "equipment" contracts.) This procedure is in line with the fundamental premise of ACE, which is a system to evaluate construction contracts. The evaluative criteria developed for construction contracts in ACE are not conducive to rolling stock contracts. Further, the new contractor evaluation system does not include rolling stock; these evaluations continue to reside in the VENDEVAL system.

That said, OSC insists that this rolling stock contract should have been evaluated in ACE because the ACE Guidelines do not permit any exceptions; however, this is incorrect. The ACE Guidelines were only issued to provide guidance to the MTA agencies. Each agency implemented and followed its own ACE policy or procedure which differed from agency to agency depending on individualized business practices and needs and may, for good reason, diverge from the ACE Guidelines or add details where the ACE Guidelines are silent. The audited agency here affirmatively decided to exclude capital funded equipment contracts from ACE and detailed that decision for all the reasons explained above and memorialized that decision in its governing project management procedure.

(2) Evaluations Not Performed by Evaluators Responsible for the Project:

The OSC asserts that two contracts issued by one of the MTA agencies were not evaluated appropriately because the individuals assigned responsibility for the ACE evaluations were not responsible for the day-to-day management of the work. There is no basis for this finding.

Both of the contracts at issue were indefinite quantity task-order based consultant contracts. Under such contracts, consultants could be providing a vast array of services on different projects at any given time. While it is correct neither individual who approved the ACE evaluation was responsible for day-to-day management of the contracts, they both communicated with and relied on information obtained from the project managers to make the evaluations. To find that “there is no assurance that the ACE ratings are supported and that the MTA agencies received accurate information on the contractors’ performance” is simply not true. Further, we note that the new contractor evaluation system addresses this issue by requiring the project managers to approve the contractor evaluations.

State Comptroller’s Comment – One of the evaluators did not provide documentation that the project managers were contacted. In the absence of any record, it is appropriate to state that there is no assurance the ACE ratings were supported. The change requiring that program managers approve the contractor evaluations is a step in the right direction.

RESPONSE TO RECOMMENDATIONS

Recommendation No. 1:

Update the Responsibility Guidelines to include procedures containing specific requirements regarding what records should be prepared and maintained to document the proper consideration of all applicable ACEs during the responsibility review as well as follow-up procedures to be used when ACEs are not available for review.

MTA Response to Recommendation No. 1:

The MTA acknowledges this recommendation and notes that this information is already included in the MTA responsibility review team’s vendor review practice documents. Indeed, these documents include a checklist of the records that should be prepared and maintained for the responsibility review and that this checklist is already being following. (A copy of that checklist has previously been provided to the OSC.) In addition, the MTA’s responsibility review team also has a procedure in place for addressing when an ACE review does not appear in the system. A call is immediately made, or an email is sent, to the project team and they are advised that they need to file the ACE review immediately. That same process is being followed for the new evaluation system. The MTA disagrees that these requirements should be included in the Responsibility Guidelines.⁷

⁷ Many of the recommendations contained in the Report reference ACE. As noted above, ACE has been replaced by the new contractor evaluation system. As such, the MTA will respond to the recommendations as if they were addressed to the new system.

State Comptroller's Comment – We note that MTA's response to Recommendation 1 details how the responsibility team already had a procedure in place when an ACE review does not appear in the system. However, if this procedure was in place and is being followed, the audit would not have identified several evaluations that were late or missing.

Recommendation No. 2:

Prior to approval of a responsibility determination, require additional independent supervisory review when the initial responsibility review indicates ACEs were "Not Found" on the vendor checklist.

MTA Response to Recommendation No. 2:

The MTA disagrees with this recommendation and notes that responsibility determinations already go through several independent levels of review and are audited internally on a regular basis. In addition, when an ACE review, or a review under the new evaluation system, are not found, the MTA's vendor relations group calls or emails the project team to inquire about the status.

Recommendation No. 3:

Enforce and monitor procurement staff's adherence to the agency procedures. Require the agency President's approval of a responsibility determination without exception where Adverse Information or Significant Adverse Information was noted to be filed in the procurement file.

MTA Response to Recommendation No. 3:

The MTA acknowledges this recommendation and notes that it is already being done as part of the agency's business operations. The Responsibility Guidelines clearly explain when an agency President's approval is needed and when the approval of the MTA's Chief Operating Officer (or equivalent title reporting to the Chairman) is needed for the award of a contract to a proposer with adverse information or significant adverse information. These approvals are documented in written memos that include the appropriate signoffs and are placed in the procurement file.

Recommendation No. 4:

Require the agency ACE Administrator to contact the ACE Evaluator when an ACE is not filed within 45 days. Make an entry in the ACE database to indicate the evaluation is delinquent.

MTA Response to Recommendation No. 4:

The MTA disagrees with this recommendation as it is moot under the new evaluation procedure because the 45 day time period no longer exists. That said, similar to the case with MTA's responsibility review group referenced above, the administration staff of the new contractor evaluation system communicate with the project managers when their reporting requirements are not met and also send reminders to those managers before the due date to ensure timely compliance.

State Comptroller's Comment – Although the 45-day filing requirement may no longer exist, the intent of the recommendation is still relevant because it calls for the administrator of the new system to ensure the evaluations are submitted on time.

Recommendation No. 5:

Require those performing a responsibility review to contact the OCO when an evaluation needed for review is missing from the database.

MTA Response to Recommendation No. 5:

The MTA disagrees with this recommendation and notes that OCO does not manage the new contractor evaluation system. The evaluation system documents are maintained by the system administrator (who sits at MTA C&D) and the team performing the responsibility review already reaches out to the project manager if any information is needed or if a review is missing from the database.

State Comptroller's Comment – We did not state that the OCO manages the new construction contractor evaluation system – but that it can provide confirmation that the information about a contractor's performance is complete.

Recommendation No. 6:

Develop procedures to:

- Include analysis of the ACE category ratings over time to determine whether, in addition to the overall ratings, the categorical assessment reveals significant issues with the vendors' performance.
- Share performance issues found in the responsibility review with the next project manager.

MTA Response to Recommendation No. 6:

The MTA disagrees with this recommendation. As noted above, the contractor evaluation system is not intended to be used as a contract management tool. The purpose of the system is to ensure that the MTA has accurate and reliable information when assessing the responsibility of a contractor for new contract awards. That said, the MTA notes that it already shares performance issues found in responsibility reviews with project managers assigned to existing and subsequent contracts. This information is available in the ACE database and is also available through the new contractor evaluation system.

State Comptroller's Comment – MTA states that ACE was “never intended to assess contractor performance or punish poor performers.” However, taking action when a contractor does not perform the work required by the contract is not punishment but providing accountability over the use of public funds.

Recommendation No. 7:

Ensure that performance evaluations are completed in accordance with the official ACE Guidelines and agency procedures, regardless of the type of contract. This includes:

- Having ACE Administrators timely identify and assign capital contracts to evaluation teams, tracking all capital to ensure required ACEs are completed and submitted on time, and following up with evaluation teams when evaluations are not submitted timely.

- Accurately reflecting the contractors' performance and sending required notification letters that reflect the same rating and factual information contained in the contractors' evaluation.
- Updating the Guidelines and procedures to establish a time frame for sending notification letters and require the ACE Administrator to verify letters are issued timely.
- Documenting support for contractor performance ratings that reference contract records; requiring support/documents for Satisfactory ratings.
- Developing comprehensive procedures or guidance on how the component ratings should affect the overall category ratings.
- Ensuring that the assigned ACE Evaluator is the individual responsible for day-to-day management of work. If not possible, the role of evaluator should be assigned to a higher -level project management official with overall responsibility for the contractor's work.
- Ensuring that evidence related to contractor's performance is documented for task-order contracts, using written evaluations for each task order, which are then summarized by contract.

MTA Response to Recommendation No. 7:

The MTA acknowledges the OSC's recommendation that the MTA should ensure that all evaluations are completed in accordance with the governing policy, and also agrees that implementing one standard policy that governs the evaluation system will make this easier to enforce. That said, the MTA notes that this was already done in connection with the new system and that many of the other bulleted recommendations are either already being done under the new system or have become moot because of the differences between ACE and the new system. Additionally, equipment contracts are not included in the new system; they remain in VENDEVAL.

Recommendation No. 8:

Ensure that contractors prepare, submit, and implement corrective action plans for less-than-satisfactory performance.

MTA Response to Recommendation No. 8:

The MTA disagrees with this recommendation because corrective action plans are not required under the new contractor evaluation system. To the extent there is an issue with contractor performance, that is addressed by the project team, in collaboration with the agency business unit leads, lawyers, and, when necessary, executive staff. Each team has discretion as to how best to address these types of matters based upon the circumstances surrounding the project at issue. That can include performance improvement plans, verbal communication, emails, meetings or other communication methods.

State Comptroller's Comment – While providing staff with discretion is admirable, this approach could lead to inconsistent treatment between different contractors as well as weaken accountability – for instance, eliminating necessary documentation of decision making and agreed-upon action, which is contrary to the expectations of contract performance oversight.

Recommendation No. 9:

Regarding MWDBE ratings:

- Revise Guidelines to provide that, if an Evaluator revises the DDCR- suggested rating, written rationale and support must be prepared/retained.
- Develop clear MWDBE guidelines that address how the contractor’s interim MWDBE participation rates should translate to the interim rating of the MWDBE category.
- Ensure that “Unable to Rate” ratings are only given when no MW DBE work has been scheduled or performed during the evaluation period or are otherwise clearly documented and supported.

MTA Response to Recommendation No. 9:

The MTA responds that this recommendation is moot under the new evaluation system. The new system does not allow the project manager to revise the DDCR rating, does not include an interim rating, and does not allow for the issuance of an “unable to rate” rating.

Recommendation No. 10:

Close loopholes which allow contracts to escape ACE by:

- Reassessing various evaluation procedures related to rolling stock capital contracts and select appropriate, uniform methodology and document the justification.
- Where other evaluation systems are used for capital-funded contracts, developing a means for integrating these other evaluations into the Responsibility Guidelines, including consideration if the review cycle is less frequent than ACE.
- Developing a process for granting exemptions to capital contracts from ACE reviews.
- Requiring OCO be notified when an agency allows an exemption or departure from ACE procedures and document in the ACE database.

MTA Response to Recommendation No. 10:

The MTA acknowledges that loopholes should be closed that might allow designated contracts to circumvent the review process, but notes that the MTA previously addressed this issue when it rolled out the new contractor evaluation system. For example, all rolling stock contracts are evaluated in the MTA’s VENDEVAL system, and an exemption has been developed for capital contracts under a certain dollar value and the administrator of the new system will be notified if any contract is exempted.

* * *

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September 27, 2022
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We ask that you please convey to the OSC that we appreciate their consideration of this response in issuing a final report. In the interim, should they need any additional information or have any questions, they should reach out to the designated agency contacts handling this audit.

Very truly yours,



Lisette Camilo
Chief Administrative Officer
MTA



Jamie Torres-Springer
MTA C&D President

cc: Paige Graves, MTA General Counsel
Evan M. Eisland, MTA C&D Executive Vice-President and General Counsel
Mark Roche, MTA C&D Deputy Chief Development Officer - Delivery
Diane M. Nardi, MTA C&D Senior Vice-President and Deputy General Counsel

Contributors to Report

Executive Team

Andrea C. Miller - *Executive Deputy Comptroller*

Tina Kim - *Deputy Comptroller*

Ken Shulman - *Assistant Comptroller*

Audit Team

Carmen Maldonado - *Audit Director*

Robert C. Mehrhoff - *Audit Manager*

Dmitri Vassiliev - *Audit Supervisor*

Erica Zawrotniak - *Audit Supervisor*

Susan Gordon - *Senior Examiner*

Teeranmattie Mahtoo-Dhanraj - *Senior Examiner*

Madelin Vasquez - *Senior Examiner*

Contact Information

(518) 474-3271

StateGovernmentAccountability@osc.ny.gov

Office of the New York State Comptroller
Division of State Government Accountability
110 State Street, 11th Floor
Albany, NY 12236



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