

Metropolitan Transportation Authority Capital Construction

All-Agency Contract Evaluation System

Report 2019-S-14 | March 2021

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

Division of State Government Accountability



Audit Highlights

Objectives

To determine whether Metropolitan Transportation Authority (MTA) Capital Construction is monitoring and evaluating its contractors/consultants in compliance with its All-Agency Contract Evaluation (ACE) review process and taking action where performance ratings are less than satisfactory. In addition, we sought to determine whether MTA officials are reviewing and using the ACE ratings prior to awarding contracts. The audit covered contracts active between January 1, 2015 and May 14, 2019. The fieldwork was conducted until March 13, 2020.

About the Program

In 1997, the MTA implemented the ACE system, a performance evaluation system developed and operated by MTA Headquarters for use by all agencies to report on contractor and consultant performance. The MTA-adopted ACE Guidelines (Guidelines) help the agencies to uniformly obtain and record reliable information on performance on MTA capital contracts equal to or greater than \$250,000.

MTA's Office of Construction Oversight is responsible for oversight of MTA agencies' use of the ACE system and for issuing guidelines on ACE. Each agency has the flexibility to create its own policies and procedures, which must adhere to the Guidelines. The Assistant Director of Construction Oversight chairs the ACE Committee, which consists of representatives from each agency. The ACE Committee deliberates on matters of policy governing the ACE system.

To implement the Guidelines, MTA Capital Construction (one of the six MTA agencies) issued "Project Procedure - MTA's All-Agency Contractor Evaluation System" (Procedures). The Procedures require an interim performance evaluation within six months of the Notice-of-Award, with subsequent evaluations conducted twice a year. This shall continue through completion of the work or default. A summary performance evaluation will follow the last interim evaluation. Beginning August 1, 2017, due dates for the interim evaluations were changed to make them the same six-month period ended March 31 and September 30. Evaluations must be filed in the ACE database within 45 days of the evaluation period end date.

Evaluations consist of two to five categories depending on the type of contract. For instance, architect and engineering post-construction contracts have two categories and construction contracts have five categories. They are: Safety; Quality; Scheduling; Management; and Minority, Women and Disadvantaged Business Enterprise. Each category has several components, which are rated individually. The ACE administrator at each agency is responsible for ensuring that the evaluations are completed, reviewed, approved, and properly recorded.

Key Findings

- MTA Capital Construction did not always follow the Procedures when monitoring and evaluating contractor/consultant performance. As a result, it did not fully benefit from the established processes.
- Our review of 11 contracts found that, generally, the project managers and construction managers who completed the evaluations maintained documentation to support each Marginal and Unsatisfactory rating, as required. However, documentation was not consistently maintained to support projects rated Satisfactory, and, in some cases, either the work performed or the

information in the file did not appear to support or contradicted the ratings. Moreover, lack of clarity in the Procedures gave the project teams broad discretion, introducing the risk that contractors are being treated inconsistently.

- Although required, evaluations were not done for two contractors. Both contractors went one year without ACEs, even though they are required to be conducted twice per year. In both situations, the contractors would have received a less-than-satisfactory overall rating, which may have impacted their chances of being awarded future contracts. While MTA Capital Construction stated that this was done in the best interest of the agency, this determination was not documented.
- Letters notifying contractors of their deficiencies were sent late. For one contractor, the letters were sent 114, 296, and 192 days, respectively, after the end of the corresponding evaluation periods. Such delays hinder efforts to improve contractor performance while work is still underway.

Key Recommendations

- Train the MTA Capital Construction ACE evaluators and administrators regarding issues including, but not limited to, adherence to deadlines, compliance with the Procedures, retention of documents that support the ACE ratings, and guidance for rating common situations for ACE components.
- Update the Procedures to implement a clear process on how to handle “N/A” (not applicable) ratings.
- Establish a time frame for when critical documents (e.g., notification letters) should be sent, and identify patterns in component issues and work with contractors while they are on site.
- Require documentation in the procurement file to support the rationale for awarding or rejecting a contract, as required by the Procedures.



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

March 4, 2021

Patrick J. Foye
Chairman and Chief Executive Officer
Metropolitan Transportation Authority
2 Broadway
New York, NY 10004

Dear Mr. Foye:

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 *All-Agency Contract Evaluation System*. 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
ACE	All-Agency Contract Evaluation	<i>Key Term</i>
Guidelines	ACE Guidelines	<i>Key Term</i>
MTA	Metropolitan Transportation Authority	<i>Auditee</i>
MWDBE	Minority, Women and Disadvantaged Business Enterprise	<i>Key Term</i>
N/A	Not Applicable	<i>Key Term</i>
Procedures	Project Procedure - MTA's All-Agency Contractor Evaluation System	<i>Key Term</i>
QSA	Quarterly Safety Assessment	<i>Key Term</i>
Responsibility Guidelines	MTA All-Agency Responsibility Guidelines	<i>Key Term</i>
Transit	New York City Transit	<i>Agency</i>
Vendor Relations	Vendor Relations Department	<i>Department</i>

Background

In 1997, the Metropolitan Transportation Authority (MTA) implemented the All-Agency Contract Evaluation (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 to share the results among themselves. The MTA adopted the ACE Guidelines (Guidelines) to help the agencies uniformly obtain and record reliable information on the performance of contractors and consultants working on capital contracts equal to or greater than \$250,000.

MTA's Office of Construction Oversight is responsible for oversight of MTA agencies' use of the ACE System and for the Guidelines. Each agency has the flexibility to create its own policies and procedures, which must adhere to the Guidelines. The Assistant Director of Construction Oversight chairs the ACE Committee, which deliberates on matters of policy governing the ACE system.

To implement the Guidelines, MTA Capital Construction issued a "Project Procedure - MTA's All-Agency Contractor Evaluation System" (Procedures) requiring an interim performance evaluation within six months of the Notice-of-Award, with subsequent evaluations conducted twice a year. This shall continue through completion of the work or default. A summary performance evaluation will follow the last interim evaluation. Beginning August 1, 2017, due dates for the interim evaluations were changed to make them uniform to the six-month period ended March 31 and September 30. Evaluations must be filed in the ACE database within 45 days of the period end date.

Evaluations consists of two to five categories depending on the type of contract. For instance, architect and engineering post-construction contracts have two categories and construction contracts have five categories. They are: Safety; Quality; Scheduling; Management; and Minority, Women and Disadvantaged Business Enterprise (MWDBE). Each category has individually rated components used to assess the contractor's overall performance.

Additionally, each agency has an administrator responsible for the overall administration of the ACE program, ensuring that the evaluations are completed, reviewed, approved, and properly recorded. Evaluations are the joint responsibility of an Evaluator, a Reviewer, and an Approver. The Evaluator is responsible for the day-to-day management of the contractor, performs the evaluation, and forwards it to the Reviewer. The Approver receives the ACE after the Reviewer signs off. An Evaluator can give one of five performance ratings: Satisfactory, Marginal, Unsatisfactory, Not Applicable (N/A), and Unable to Rate (reserved only for MWDBE compliance evaluations). If one of the categories within an evaluation that earns an overall Satisfactory rating receives a less-than-satisfactory rating, the agency is required to notify the contractor using a Deficient Performance Letter at the time the evaluation is done and give the contractor an opportunity to correct the deficiencies noted.

To determine eligibility for contract awards, all MTA agencies have access to the ACE database to determine the past performance of all contractors/consultants who have performed work at any MTA agency. When adverse information or significant adverse information is uncovered on the prospective contractor/consultant, it may provide

grounds for finding the vendor non-responsible for future contracts. If the MTA agency decides to award the contract despite less-than-satisfactory performance on previous contracts, the procurement officials must prepare and send a significant adverse information memorandum to various MTA officials and departments for approval.

Audit Findings and Recommendations

MTA Capital Construction did not always follow its Procedures when monitoring and evaluating contractor/consultant performance. As a result, it did not fully benefit from established processes. For example, we found that 17 out of 40 evaluations for eight contractors were submitted late, including 13 that ranged from 50 to 319 days late. For nine contracts reviewed, construction managers (usually the Evaluators) did not consistently maintain documentation to directly support each Satisfactory rating. An ACE was not completed for two contractors.

In addition, MTA Capital Construction did not take action when performance was less than satisfactory. Mandatory letters notifying contractors of their deficiencies were sent late. One contractor's letters were sent 114, 296, and 192 days after the end of their corresponding evaluation periods. MTA Capital Construction did not document any of the spot checks for proper signatures, adequate backup information, and supporting documentation.

Our review of 25 contracts found four contractors where the ACE ratings were not used prior to awarding a contract. Despite receiving Unsatisfactory ratings, two of the four contractors were awarded a contract without documented rationale supporting this decision. In addition, the review of vendor background checks was not supported for two contractors.

Monitoring and Evaluating Contractors/ Consultants

Rating Methodology

Documentation for Satisfactory Ratings

According to the Procedures, an Evaluator should have sufficient objective evidence to support a Satisfactory rating; however, this does not have to be attached to the evaluation. Our review of 11 contracts found that, generally, the project managers and construction managers (designated representative for managing the construction contract) maintained documentation to support each Marginal and Unsatisfactory rating, as required. However, documentation was not consistently maintained to support contracts that were rated Satisfactory.

As part of our testing, we reviewed performance reports, meeting minutes, and non-conformance reports that either showed general satisfaction with the contractor's performance or did not disclose any issues that would yield less-than-satisfactory ratings for specific ACE components. We also spoke to project managers and contract managers responsible for evaluating these projects. Based on our review, we determined that the lack of consistency regarding documentation occurred in part because the Procedures are not explicit regarding what is required to be reviewed and kept to support each component rating. Rather, each project management team makes these decisions independently, allowing subjective component ratings for similar issues and creating a risk that some contractors may be assessed differently than others. For example:

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- The project executive for one contract said he did not review and use the documentation that the Procedures referenced to determine and support the ACE rating for the Scheduling category. Rather, he stated that he completes the evaluation based on his understanding of what was actually happening on site.
 - The contract manager for another contract rated two Scheduling components as Satisfactory despite the construction manager's admission that these components were unsatisfactory during the period. The determination was made based on a contract modification, wherein the contractor agreed to prospectively revise its baseline schedule to meet the substantial completion date. The construction manager gave a Satisfactory rating based on the expectation of improvement. Documentation was not available to support the Satisfactory rating, which should have reflected the unsatisfactory performance. Subsequent evaluations should have reflected any improvement.

In response to our preliminary findings, MTA Capital Construction officials stated they disagreed with our conclusions, but provided no documentation to refute our findings. However, officials did agree that maintaining support for a Satisfactory rating is a good practice, and they intend to incorporate this into the Procedures.

Reflection of Work Performance in Ratings

We found that components of two contracts were rated Satisfactory, but showed no work to support the rating. A rating of N/A should be used when a category is not applicable to the work performed, according to the Procedures.

Replying to our preliminary findings, MTA Capital Construction officials agreed that N/A ratings should be applied in such cases. For one contract, they agreed with our findings, but claimed the wrong form was used and the Satisfactory rating was incorrectly used for categories not applicable to the project. For the second contract, they disagreed, stating that work was performed, even if limited. They provided additional documentation, but the rating was still not supported. In addition, the files contained a recommendation from the construction manager that an N/A rating be used for one component due to the lack of such work being done at the job site.

Contradictory Documentation

In addition to a lack of documentation, some documentation appeared to contradict the ratings. For example, according to the Procedures, the Safety category of the ACE should be rated based on the review of, among other things, Quarterly Safety Assessment (QSA) reports, the Lost Time and Recordable Injury Rates chart, and Daily Hazard Analysis logs. Of these three documents, we were told by a project executive that the QSA reports are the main source of information used for the Safety rating on the ACE evaluation. The QSA reports document contractor safety performance, deficiencies at the job site, and how long contractors take to mitigate each issue. The QSA reports contain 25 safety categories, which consist of a total of 230 elements, and a score is calculated based on the rating of each element.

Appropriate application of QSA report ratings is essential because they affect the overall ACE rating and assessment of the contractor for current and future awards.

For two contracts, the QSA reports included descriptions of working conditions that did not support the ACE ratings. These safety deficiencies resulted in the deduction of points from the QSA report scores and should have had an adverse effect on the overall ACE ratings, but did not. For example, for one of the two contracts, the ACE rating for Site Maintenance¹ was Satisfactory despite the improper storage of combustibles, empty or not fully charged fire extinguishers, blocked standpipes (which are needed to fight fires), and blocked exits and walkways due to excess debris.

In response to our preliminary findings, MTA Capital Construction staff stated that QSA reports are not the “main source” for a safety rating. They added that several other documents are considered when evaluating safety and the total score justified the satisfactory ratings. They also stated that the contractors’ efforts to correct the hazards were included in the ratings. However, we did not find any notes on the Safety reports regarding what the contractor did to mitigate or eradicate the hazards at the work site. When we requested the notes to support that action had been taken by the contractor, we were provided with the Procedures but no support that the hazards had been mitigated or eradicated. Additionally, while the average reflects overall performance, it does not give the full picture; if certain categories receive low ratings, this should be reflected in the ACE score.

For another contract, the construction manager provided a Deficient Performance Letter documenting that the sub-contractor responsible for scheduling did not comply with scheduling requirements or meet contract milestones. The letter for this period indicated that Scheduling was Unsatisfactory, which is not in agreement with the Marginal rating entered in the ACE system. The contract manager stated that the scheduler was replaced during the evaluation period ended March 31, 2019. Therefore, a Marginal overall rating was given to show that improvement was projected for the future evaluation period. However, this rating is not in compliance with the Procedures. Scheduling should have been rated Unsatisfactory because the Deficient Performance Letter clearly showed an issue with the contractor’s performance. In response to our preliminary findings, MTA Capital Construction disagreed that the rating reflects anticipated performance and cited a different letter, dated February 20, 2019, which advised the contractor that its performance, if not corrected, could result in either an Unsatisfactory or Marginal rating. However, the subsequent letter dated May 10, 2019, which covers the rating period, clearly states the scheduling was Unsatisfactory.

Judgment for Similar Situations

Inconsistently applied component and category ratings may result in different handling of similar issues. We found three contractors who all experienced problems

¹ Site Maintenance evaluates general housekeeping at the work site. This includes, but is not limited to, storage of hazardous materials, physical hazards impacting site access, general cleanliness of the site, tripping hazards, and any physical hazards.

with staffing, but each received different ratings. The first contract originated in 2015, and the construction manager sent 12 letters to the contractor from May 2016 through January 2018 to discuss the lack of adequate staff, including a full-time quality manager, a full-time quality assistant, and technical experts. Although these letters were critical of the contractor, the Adequacy of Staffing component received Satisfactory ratings from November 30, 2016 to April 30, 2019. The construction manager explained that the decision was based on his judgment that the lack of staffing positions did not have a significant effect on the overall project. The project executive further explained that this issue may have been cited as the cause of other components being rated Marginal or Unsatisfactory. However, these explanations were not supported by the documents in the project file.

In contrast, the project manager for another contract cited the replacement of a quality manager as sufficient documentation for a Marginal rating in the Quality Assurance Program. A third contractor was rated Unsatisfactory for Adequate Staffing due to a single vacancy – a full-time scheduler. This contractor received Unsatisfactory ratings for multiple components of this contract using the same cause.

MTA Capital Construction replied to our preliminary findings that construction projects are not “one size fits all,” and each project’s differences influence the way construction managers rate the contractors, giving the appearance of inconsistency. We acknowledge that not all construction projects are the same, but guidelines for evaluating similar conditions should be available to avoid the appearance of subjectivity. At the closing conference, agency officials indicated that they will consider this issue.

Component Rating Versus Category Rating

The Procedures outline how overall category performance ratings shall be determined based on component ratings. Three of the 11 contracts reviewed had multiple less-than-satisfactory component ratings that were not correctly applied to the overall category rating, as required.

For example, one contract had three components in the Management category rated as marginal, yet the category was rated as Satisfactory instead of Marginal, as required by the Procedures. Another category on the same evaluation, Quality, had two unsatisfactory component ratings, which should have resulted in an overall Unsatisfactory rating instead of the Marginal rating received. Had the project manager complied with the Procedures, the overall ACE rating for the contract would have been either Marginal or Unsatisfactory, rather than Satisfactory, for the period ended March 31, 2018, which may have led to the contractor being adversely impacted when seeking future MTA contracts.

In response to preliminary findings, MTA Capital Construction agreed that two of the three evaluation ratings were improperly calculated. For the third, it did not explain the reason for the incorrect category rating based on the component rating.

Submission of Evaluations

MTA Capital Construction allowed two exceptions to the requirement to submit evaluations, despite no provision within the Guidelines or Procedures to do so. Two contractors went one year without ACEs, although these evaluations are required to be conducted twice per year. According to the construction manager for one of the projects, due to contract negotiations to resolve scheduling issues, senior management decided to hold off on the ACE until an agreement could be made. A contract modification was agreed to in the following year. For the other contract, the construction manager and project executive explained that skipping an ACE period was in both the MTA's and the contractor's best interest, to give the contractor time to correct scheduling issues and finish the project on time. In both situations, the contractors would have received a less-than-satisfactory overall rating, which may have impacted their chances of being awarded future contracts.

In response to our preliminary findings, MTA Capital Construction did not dispute that the evaluations were not submitted within the required time frame and added that it was a conscious decision not to rate these contractors during these evaluation periods, as they determined this to be in the best interest of the agency. They claimed that these decisions were documented in the system as "Unable to Rate" because that was the only option in the system. However, nothing was noted in the system for these evaluations, and there are no provisions in the Guidelines to allow an evaluation to be skipped. Giving contractors an exemption in order to prevent less-than-satisfactory ratings is misleading to those considering the contractor for future contracts.

Timeliness

ACE Reporting

Evaluations must be entered into the database no later than 45 days from the end of the performance review period. For eight contracts, 17 of the 40 evaluations were submitted late. The tardiness ranged from 3 to 319 days late, with 13 of them over 50 days late.

Late evaluations pose a greater risk of not reflecting the six-month period assessed or being unavailable for decision-making purposes. Moreover, as performance evaluations help to improve contractor performance, it is imperative that contractors/consultants be advised in a timely manner of any performance deficiencies to allow ample time to remedy the issues.

In response to our preliminary findings, MTA Capital Construction accepted the finding that certain evaluations were not entered into the ACE database within the procedural time frames, but claimed to have since corrected the deficiency. However, this does not indicate if the root cause of the issue was determined and mitigated.

Notification Letters

Under the Procedures, MTA Capital Construction is required to notify the contractor using a standard Deficient Performance Letter if one or more of the category ratings are less than satisfactory. Two contractors in our sample received these letters consistently late. For one contractor, letters were received 114, 296, and 192 days, respectively, after the end of the evaluation periods.

For the other contractor, the ACE database showed 17 Marginal and 12 Unsatisfactory component ratings for two periods (June 30, 2016 and December 31, 2016), which led to multiple less-than-satisfactory overall category ratings. However, the first time the contractor was formally notified of these ratings was November 1, 2017. Moreover, the notification included all ACE ratings dating back to January 2015.

According to agency officials, communication was ongoing during this time. However, they could not provide support that the deficiencies were conveyed promptly during each relevant period. Had ACE ratings been formally presented in a timely manner, the contractor may have had an opportunity to improve performance.

In response to our preliminary findings, MTA Capital Construction acknowledged that these letters were late, but added that the contractor received other communications regarding performance in the form of other letters, meetings, and discussions. While the criteria do not give specific time frames for deficiency letters, it is reasonable to expect that these letters be sent shortly after the evaluation period so corrective actions can be performed. Without timely notification, there is less chance that the deficiencies will be fixed and that the contract will be completed timely and within budget.

Spot Checks

The Procedures state that the ACE administrator is responsible for the overall administration of the ACE program, which includes ensuring that “Agency-determined spot-check criteria is maintained and implemented.”

According to the ACE administrator, every six-month cycle, spot checks are performed to check for proper signatures and supporting documentation. However, no documentation is kept to support that these spot checks are being performed. Without documentation, there is no assurance that these spot checks were performed – and no record of what was found or of any improvements made as a result.

Agency officials agree that spot checks are not documented, but stated that the Procedures do not require them. However, they acknowledge that documenting spot checks is a good practice and they intend to incorporate them into the Procedures.

Persistent Less-Than-Satisfactory Component Ratings

We found five contracts with at least four components rated as less than satisfactory. The Procedures do not detail any corrective actions for persistent less-than-

satisfactory component ratings, even though such performance could lead to project delays, unsafe working conditions, and poor work quality.

For example, four components of one contract were rated as less than satisfactory in four out of five evaluations, although the overall evaluation was Satisfactory. Issues regarding the contractor included late submissions, inadequate follow-up, and refusal to revise a schedule.

For another contract, the five evaluations were all rated as less than satisfactory overall, with ten components rated as less than satisfactory for at least four of the five evaluations. One such component was workmanship, and the rating reflected an improperly completed guard rail and an electrical switch that did not meet code.

In response to our preliminary findings, MTA Capital Construction officials disagreed with our conclusions, stating that the Procedures advise that the component ratings be averaged together to establish an overall rating for each ACE category. They also stated that allowing poor component ratings to trigger recourse against a contractor who is otherwise performing well would not be in the best interest of either the agency or the public. Officials pointed out the Procedures take into account all components when rating a category. However, reviewing evaluations for patterns to work on with contractors while they are still on site would benefit the project, contractor, agency, and public.

Recommendations

1. Train ACE Evaluators and Administrators regarding:
 - Adherence to deadlines;
 - Compliance with the Procedures;
 - Retention of documents that support the ACE ratings;
 - Guidance for rating common situations for ACE components; and
 - Best practices for dealing with problem contractors.
2. Update the Procedures to:
 - Implement a clear process for handling “N/A” ratings;
 - Establish a time frame for sending critical documents (e.g., Deficient Performance Letters); and
 - Identify patterns in component issues and work with contractors while they are still on site.
3. Enforce deadlines to ensure compliance with the Procedures.
4. Document spot checks of all evaluations.

Monitoring Contracts

No evaluations were completed for one of the contracts sampled. The contract was for Independence Compliance Monitoring awarded to supervise project activities in areas such as Disadvantage Business Enterprise, payments to subcontractors and suppliers, and payment of prevailing wages to workers. In addition, the monitor was to be responsible for developing a fraud awareness program at the projects to encourage employees to report any unethical, fraudulent, or illegal activity.

The Procedures do not exempt this contract, and others like it, from evaluations.

During fieldwork, MTA Capital Construction officials agreed that the Procedures do not exclude the six Independence Compliance Monitoring contracts from evaluations, and acknowledged that no ACEs were completed for the project noted. An agency official stated the Procedures are not clear regarding whether evaluations should be completed for these contracts. Contrary to information provided during fieldwork, in response to our preliminary findings, MTA Capital Construction stated it did not agree that these contracts are subject to ACE. Rather, the Procedures explicitly exclude these because they are of indefinite quantity and funded by a civil settlement agreement and not by capital funds. Even though the contract in question was paid with funds received from a civil settlement between a contractor and five agencies, the monies paid to the MTA from the contractor were originally paid to the contractor using capital funds.

Officials stated that they are revising the Procedures to avoid confusion about which contracts are subject to the ACE system. They also noted that they will explore developing a forum (separate and apart from ACE) by which all MTA agencies can share their experiences with monitoring firms.

When an ACE is not completed, the MTA is not able to use one of its resources – information in the ACE database – to help it select the most qualified contractor to provide needed services. The MTA may select a less qualified contractor for a future contract award when past performance is not considered during the vendor responsibility check.

Recommendations

5. Perform evaluations for current and future Independence Compliance Monitoring contracts.
6. Revise the Procedures to clarify and support, in writing, which types of contracts are subject to evaluations.
7. Ensure training provides clarification on types of contracts subject to the ACE system.

Use of ACE Ratings Prior to Contract Award

MTA Capital Construction has the duty to vet firms under consideration for contracts under the MTA All-Agency Responsibility Guidelines (Responsibility Guidelines). Background checks are conducted on the selected vendor prior to the final award determination. New York City Transit's (Transit) Vendor Relations Department (Vendor Relations) performs most background checks for MTA Capital Construction, but final award determination is made by the agency alone.

Transit uses the Vendor Responsibility Check Form, a 14-point review that encompasses the entire process. Although the background check examines the vendor's history for the past ten years, a check of evaluations for vendor responsibility considers only ACEs for the three most recent consecutive years. The background check also considers evaluations of all vendors associated with any proposed joint venture.

We found two contractors that, despite receiving less-than-satisfactory ratings that would constitute adverse information or significant adverse information, were awarded a contract. The procurement files for these contracts had no adverse information or significant adverse information waivers or memos, and there was no rationale for the decision to award the contract, even though past performance was not considered Satisfactory. For two other contracts, the review of background checks was not supported by sufficient documentation. No evaluations were included, even though they are necessary for determining whether any past performance was deficient and constituted adverse information or significant adverse information.

In response to our preliminary findings, MTA Capital Construction indicated that the lookback period for one of the contractors was incorrect by a month, which would result in only two consecutive Marginal ratings. Although the request for a background check was received by Vendor Relations in January 2019, the check was not completed and sent to be vetted for an approval until February 20, 2019. During the course of the audit, officials stated that the lookback period started from the date received by Vendor Relations. Further, the agency Assistant Chief Operating Officer for Vendor Relations (whose staff performs the vetting) stated that the three-year lookback period usually begins from the "Date Received" on the Vendor Responsibility Check Form. However, in its response and during the closing conference, MTA Capital Construction stated that the vetting date is used. This confusion arises, in part, because of unclear guidance. The Responsibility Guidelines state only that the lookback should be the "immediate prior three (3) years."

In addition, MTA Capital Construction noted that the rating for one of the three evaluations for a contract was a final and not an interim evaluation and, therefore, not appropriate to be considered in deciding whether such information constituted adverse information. However, the Procedures do not limit what constitutes adverse information or significant adverse information, and this should have raised concerns regarding the contractor's future performance. Additionally, for at least one other vendor in our sample, MTA Capital Construction did consider the final evaluation;

for this vendor, the Marginal final rating was mentioned in a staff summary for disclosure, again raising the concern about subjectivity and vendors being treated differently.

After the closing conference, agency officials also indicated that, for one of the two contracts with missing documentation, the file had been reviewed/accessed by multiple organizations and, although the expectation is that the file will remain intact, review may have resulted in parts being misplaced. For the other contract, they noted that the staff summary indicates the vendor was evaluated and was determined to be “responsive and responsible,” but the background check was completed years ago and the procurement representative who worked on this matter no longer works at the agency.

Significant adverse information and adverse information are important, especially when the overall ACE rating resulted from a less-than-satisfactory rating in the same sub-component category. For example, the procurement file for one vendor showed three consecutive evaluations for the contract reviewed had overall Marginal ratings, resulting from consistent Marginal ratings for the Quality and Management categories.

Our review of procurement files for the remaining 21 contracts sampled found no examples of adverse information or significant adverse information. Overall ACE ratings for these were mostly Satisfactory, with some Marginal ratings, but none had more than two consecutive overall Marginal ratings. There was no documentation on the background check for one contract because it was transferred from another public authority.

In addition, procurement officials believe that they may decide whether a deficient rating on evaluations from prior vendor contracts warrants an adverse information or significant adverse information memo when making a determination to award a future contract to the same vendor. We noted that the wording in the Responsibility Guidelines differs from the Procedures regarding whether an ACE rating warrants an adverse information or significant adverse information memo. Due to this lack of clarity within the Procedures, there is less assurance the vendor responsibility checks are uniformly performed.

During the review process, the agency Assistant Chief Operating Officer for Vendor Relations staff prepare a preliminary summary report that highlights important information obtained from the background check. The agency Assistant Chief Operating Officer for Vendor Relations reviews the preliminary summary report and communicates to MTA Capital Construction anything that the agency should be aware of prior to the final award determination. According to Transit and MTA Capital Construction officials, such information is communicated by phone or through meetings and by providing a folder containing hard copies, the completed Vendor Responsibility Check Form, a due diligence summary report, transcripts of past special responsibility hearings, news articles, and other records from the background check. However, these processes are not documented. Moreover, the Responsibility Guidelines do not require this report to be filed as part of the procurement package.

Additionally, the Responsibility Guidelines state that they apply “where the contracting officer is required to determine the responsibility of a firm,” but the situation in which a contracting officer is not required to determine the responsibility is not documented. This ambiguity can lead to each contracting officer interpreting the Guidelines differently.

In response to our preliminary findings, MTA Capital Construction stated that controls are in place to perform reviews that ensure that the rationale for contract award decisions is documented. There was no documentation to support this statement or explanation as to how decisions are made when possible significant adverse information is involved. MTA Capital Construction agreed with our recommendation, but added that the Responsibility Guidelines are not ambiguous because they are based on contract amounts. There was no explanation as to when a contracting officer is not required to determine the response, which is a separate clause from the dollar requirement.

Recommendations

8. Ensure documentation in the procurement file supports the rationale for awarding or rejecting a contract (including, but not limited to, additional information from the project management team), as required by the Procedures.
9. Periodically conduct independent reviews of the procurement file to ensure that the rationale for the decision to award contracts is documented.
10. Ensure that staff reviewing Vendor Responsibility have written procedures that clearly state when the background check starts to make sure that the correct ACE ratings are included.

Audit Scope, Objectives, and Methodology

The objectives of our audit were to determine whether MTA Capital Construction is monitoring and evaluating its contractors/consultants in compliance with its ACE review process and taking action where performance ratings are less than satisfactory. In addition, we sought to determine whether MTA officials are reviewing and using the ACE ratings prior to awarding contracts. The audit covered contracts active between January 1, 2015 and May 14, 2019. The fieldwork was conducted until March 13, 2020.

To accomplish our objectives and assess the relevant internal controls, we reviewed MTA Capital Construction-related 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.

We obtained a listing of 58 contracts that were active from January 1, 2015 to May 14, 2019. To determine whether MTA Capital Construction is monitoring and evaluating its contractors/consultants in compliance with its ACE review process and taking action where performance rating is less than satisfactory, we reviewed a judgmental sample of 11 contracts, based on amount and type. We reviewed supporting documentation for the five most recent evaluations for each contract.

To determine if MTA officials are reviewing and using the ACE ratings prior to making a contract award, we selected a judgmental sample of 25 of 58 contracts active between January 1, 2015 and May 14, 2019. These 25 contracts totaled \$6 billion, ranging from \$1.5 million to \$800 million. We included contracts covering different types of services and contract amounts. We reviewed documentation (e.g., prior evaluations related to the vendor background check) in the procurement file to determine whether procurement officials included ACEs on prior MTA contracts when making a determination to award a contract. We examined evaluations for the three most recent consecutive years. Our samples were 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. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Reporting Requirements

We provided a draft copy of this report 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.

MTA responded that, as part of its transformation, the MTA C&D (formerly MTA Capital Construction) is now managing MTA's Capital Program and the construction and consulting contracts funded under that program. The response indicates MTA's agreement with nine of the ten recommendations, stating that four of the recommendations were already in place and five are in various stages of implementation. This could be a positive sign that the evaluation process will improve now that it has been placed under one agency. However, in formulating new procedures, the MTA must be careful that best practices developed and followed by other MTA agencies in carrying out the ACE system are not lost. Our responses to certain MTA comments are included in the report's State Comptroller's Comments.

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

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

Patrick J. Foye
Chairman and Chief Executive Officer



Metropolitan Transportation Authority

State of New York

December 21, 2020

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-14 (All-Agency Contract Evaluation System)

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 John N. Lieber, President, MTA Construction & Development, which address this report.

Additionally, I will be working with staff to ensure that management is following up on and enforcing the audit's recommendations, where appropriate, and requesting regular, interim reports to that effect.

Sincerely,

A handwritten signature in black ink that reads 'Pat Foye'.

Patrick J. Foye
Chairman and Chief Executive Officer

c: Anni Zhu, MTA Chief of Staff to the MTA Chairman & Chief Executive Officer
Michele Woods, Auditor General, MTA Audit Services

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



December 21, 2020

VIA ELECTRONIC MAIL

Patrick J. Foye
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-14, dated November 20, 2020**


Dear Chairman Foye:

Thank you for providing MTA Construction & Development Company (“MTA C&D”) with an opportunity to respond to the Office of the New York State Comptroller’s (the “OSC”) draft audit report on our compliance with the Metropolitan Transportation Authority’s (“MTA”) all-agency contractor evaluation (“ACE”) system.¹

As an initial matter, we note that in connection with the MTA’s transformation, MTA C&D is now managing MTA’s Capital Program and the consulting and construction contracts funded under that Program. These duties previously resided with each of the MTA operating agencies. We expect this consolidation will result in positive changes to our contractor evaluation process, as one agency now bears the responsibility for the management of capital construction and consulting contracts.

One such positive change is already in progress -- MTA C&D is currently working to reinvent ACE into a system that focuses more heavily on objective metrics and processes. We expect that many of the concerns raised in the OSC’s report will be addressed with the implementation of the new system, which we have committed to roll out by the third quarter of 2021. We also note that the structure of the new system may render some of the OSC’s concerns moot.

That said, in accordance with Executive Law Section 170, below are MTA C&D’s responses to the findings and recommendations contained in the OSC report.

¹ The audit report is addressed to MTA Capital Construction Company (“MTACC”). In December 2019, MTACC officially became “MTA Construction & Development Company.” As such, while the audit period of the OSC’s report pre-dates this agency transition, MTACC is no longer an existing entity, making MTA C&D the correct agency to respond to the OSC’s findings and recommendations.

RESPONSE TO OSC FINDINGS²

Response to Documentation for Satisfactory Ratings:

MTA C&D disputes the OSC’s finding that sufficient objective evidence was not consistently maintained to support satisfactory ACE ratings, as required by MTA C&D ACE Procedure (the “ACE Procedure”).

ACE Procedure does not require that sufficient objective evidence be maintained in the ACE files to support a satisfactory rating. Section 4.15.1 of the ACE Procedures states that objective evidence is required for marginal and unsatisfactory ratings, but this requirement is not extended to satisfactory ratings: “All Overall Performance and Component ratings of Marginal and Unsatisfactory must be substantiated with objective documentation, attached to the evaluation, to support the rating. The Evaluator should also have sufficient objective evidence to support a rating of Satisfactory; however, this does not have to be attached to the evaluation.” (emphasis in original).³

[Comment 1](#)

MTA C&D complies with this ACE procedure. By way of example, meeting minutes, inspection reports, spending reports, schedule updates and key performance indicators prepared for each project all provide objective evidence to support the satisfactory ratings at issue, and this documentation was provided to the OSC in connection with the audit.

[Comment 2](#)

MTA C&D also disputes the OSC finding that there is a lack of consistency with respect to type of documentation used to support each component ACE satisfactory rating.⁴ MTA C&D reminds the OSC that each contract is different and the documentation that supports each rating differs with the requirements of each contract. MTA C&D also notes that, despite these contractual differences, the ACE Procedures do provide guidance as to the types of documents that can be used to support each component rating. By way of example, Section 4.1.1 of the ACE Procedure expressly states:

[Comment 3](#)

² For ease of reference, MTA C&D’s responses are categorized to align with the headers in the OSC report. In addition, MTA C&D has kept with the OSC’s practice of not referring to contract numbers or contractor names when referencing a contract.

³ MTA C&D’s response relates solely to satisfactory ratings because the OSC report found that MTA C&D generally maintained documentation to support marginal and unsatisfactory ratings as required by ACE Procedure.

⁴ ACE evaluations consist of component, category and overall performance ratings. Component ratings are the individual elements of a contractor’s performance reviewed by the ACE team when conducting a contractor evaluation. These component ratings fall under each category rating, which is the group of components organized by topic. By way of example, for the category rating of safety, the components rating would include all of the factors that are considered and reviewed by the ACE team in determining the contractor’s overall category rating on safety performance. Section 4.14.4 of the ACE Procedure explains how the overall category ratings are calculated to determine the contractor’s overall performance rating.

The review of objective evidence by [MTA C&D] Quality managers shall include but not be limited to:

- the results of the Quarterly Quality Oversight performed (See MTA C&D Procedure QA.01) during the Evaluation Period,
- newly generated Nonconformance Reports (See MTA C&D Procedure QA.02) during the Evaluation Period,
- existing (open) Nonconformance Reports (NCRs) from previous Evaluation Periods,
- other everyday Quality observations and interfacing.

Similar document guidance is provided in the ACE Procedure for categories being reviewed under ACE, such as the safety (ACE Procedure 4.1.2) and scheduling (ACE Procedure 4.1.3) categories. Notably, these lists are intentionally described as non-exclusive to account for the differences in MTA C&D contracts.

The OSC cites two contracts to support its finding on lack of consistency, concluding that lack of guidance as to the type of documentation required to support each component ACE rating led to subjective, independent decision making by each project team and created a risk that some contractors may be assessed differently than others. With respect to the first contract cited by the OSC, the OSC determined that the ACE component ratings given for that contract were subjective because the MTA C&D Project Executive based his ACE evaluation approval on his observation of what was actually happening on the jobsite, not the supporting documentation. However, this statement is not contradictory to the ACE Procedure, nor does it somehow make the underlying ACE ratings subjective. As the OSC is aware, there are three levels of review for each ACE evaluation – an evaluator, a reviewer, and an approver. As defined in Section 3.0 of the ACE Procedure, the Project Executive is the approver, which is the highest level of review. This approver is the person responsible for approving the evaluation after: (i) the evaluator (i.e., the person responsible for managing the contractor and carefully reviewing the relevant documentation) completes the ACE evaluation; and (ii) the evaluation completed by the evaluator has been reviewed by the reviewer (i.e., a person who sits at a higher program manager level and checks the evaluation for any inaccuracies). As such, it is not inappropriate for the Project Executive (as approver) to confirm that the ratings appearing on the evaluation are consistent with his observations.

With regard to the second contract, the OSC stated that the ACE evaluation team subjectively gave a satisfactory rating based upon an expectation of a contractor's improvement, as opposed to actual improvement demonstrated during the evaluation period. To refute this finding, MTA C&D provided the OSC with documentation to establish that the improvement occurred within the evaluation period.

[Comment 4](#)

Response to Reflection of Work Performance in Ratings:

MTA C&D agrees with the OSC's finding that "N/A" ratings should be applied only to situations where the work category contained in the ACE form is not applicable to the work required by the contract. This is consistent with the requirements of ACE Procedure Section 4.15.

The OSC identifies two contracts in which it found that a satisfactory rating was given instead of an "N/A." With respect to the first contract, MTA C&D does not dispute the finding and notes that the evaluator who entered the rating has since been re-trained on this issue to ensure

that the mistake does not happen again.

With respect to the second contract, MA C&D disputes the OSC finding that the safety and quality components of the evaluation should have been rated “N/A” instead of satisfactory. The OSC bases its finding on the fact that the work performed by the contractor in these categories was limited (through no fault of the contractor) during the ACE period at issue. Although field work was not scheduled or performed during the ACE period at issue, the contractor used the time to complete necessary administrative work relating to the categories of safety and quality, and performed this work satisfactorily, justifying the evaluator’s rating.

[Comment 5](#)

Response to Contradictory Documentation:

MTA C&D disagrees with the OSC’s finding that the documentation ACE evaluators used to support their ACE ratings sometimes contradicted the ACE rating. The OSC refers to an example of ACE review where the overall ACE safety score reflected an average of ACE ratings. The OSC found that by averaging the component safety ratings together to arrive at an overall score in the safety category, MTA C&D failed to provide a full picture of the individual component categories where the contractor’s performance was lacking. For this contract, the documentation provided to the OSC shows that the points allocated to the contractor in each of the safety categories averaged in the high 80s or low 90s, justifying a satisfactory score in ACE. Moreover, while the supporting documentation does reference certain hazards that were observed at the job site, those hazards were accounted for and did not bring down the overall score below satisfactory because the contractor quickly corrected the hazards (with the majority of the noted hazards having been corrected within a day and all having been corrected within a week).

The OSC also cites to a contract where it found that the marginal rating given to the contractor for scheduling was contradictory to the work actually performed and instead incorrectly reflected the contractor’s *anticipated* performance for the *next* ACE review period. To support its finding, the OSC relies on a letter sent by the construction manager to the contractor during the ACE evaluation period in which the construction manager advises the contractor that its scheduling performance is unsatisfactory. The OSC’s finding is incorrect. While the letter does notify the contractor of deficiencies in its scheduling performance, it does not characterize this performance as unsatisfactory; rather it advises the contractor that its performance, if not corrected, may result in either an unsatisfactory or marginal rating. The plain text of the letter is as follows: “As stated in previous correspondence, and in accordance with Article 7.04D.1 and Contract specification 01320, paragraph 3.07 1, the failure of [contractor] to maintain an accurate schedule may delay future payments under our Contract and may result in a marginal or unsatisfactory rating in scheduling in the All Agency Contract Evaluation (ACE) system.” (emphasis added) The text of this letter is consistent with the marginal rating given to the contractor for the April 1, 2019 ACE review period. Further, after the letter advising the contractor of the deficiencies was sent, the deficient scheduler was replaced by the contractor with a new scheduler. That new scheduler commenced work in March 2019 (during the applicable ACE evaluation period) and performed at a higher level than the prior scheduler. This improvement is recognized in a letter that was provided to the OSC and was sent during the April 1, 2019 ACE period, where the construction manager advises the new scheduler to “keep up the good work.” Because the new scheduler’s work was performed during the applicable ACE cycle, it was properly included in the ACE review.

[Comment 6](#)

Response to Judgment for Similar Situations:

MTA C&D disagrees with the OSC's finding that MTA C&D exercised its judgment in rating contractors differently for similar work performed, thereby giving the appearance of subjectivity in the ACE ratings. In each case reviewed by the OSC, the ratings were based on the requirements and needs of the individual contract.

In one case OSC found that a contractor should not have received a satisfactory rating for the "adequacy of staffing" component of ACE because the MTA C&D project team had previously sent multiple letters to the contractor highlighting three positions that had not been filled. However, there were approximately 60 people working on this project, and the ACE reviewer did not objectively believe that a staffing shortage of 3 out of 60 had enough bearing to make an otherwise satisfactory staffing rating drop to marginal. Rather, the ACE reviewer determined that the quality assurance component of ACE was the more appropriate section of ACE to address the staffing issue -- the contractor had enough labor on site to perform the work (i.e., there was adequacy of staffing to meet the schedule), but the staff was not of the right quality to perform the work effectively (i.e., the quality assurance of staffing of was not at the level it should have been) and provided a marginal rating for that category.

The two other contracts relied upon by the OSC involved the same rating categories, but different situations. For example, the backup documentation for one of the contracts showed that there was an underperforming quality manager whose inability to provide adequate staffing on the project caused the MTA to retain a consultant to fulfill those responsibilities that justified a marginal ACE rating.

In short, the same issues (such as adequacy of staffing) can result in different ratings on different contracts depending on the circumstances and facts at issue.

Response to Component Ratings vs. Category Ratings:

MTA C&D agrees with the OSC's finding that the ACE Procedures outline how overall category performance ratings should be determined. MTA C&D also agrees that three of the evaluation ratings reviewed in connection with this audit were improperly calculated by MTA C&D. MTA C&D has addressed this issue internally to ensure that this will not happen again.

Response to Submission of Evaluations:

MTA C&D accepts the OSC finding that ACE evaluations for two of the contracts were not performed within the time frame required by the ACE Procedure, but notes that MTA C&D made the conscious decision not to rate these contractors during these evaluation periods. The decision to withhold these evaluations was based upon reasons that MTA C&D executive management determined to be in the best interest of the agency and the public. As noted, MTA C&D documented these evaluation periods "unable to rate" because that was the most relevant option available in the ACE electronic database. MTA C&D does not dispute that there is nothing in the ACE Procedures or the MTA All-Agency Responsibility Guidelines (the "Responsibility Guidelines") that explicitly permitted these "N/A" ratings at the time; however, the MTA is currently working to update its Responsibility Guidelines to allow an agency president to temporarily suspend ACE reviews in situations analogous to the ones that were at issue here.

[Comment 7](#)

Response to ACE Reporting:

MTA C&D accepts the OSC's finding that certain ACE evaluations were not entered into the ACE database within the time frame required by the ACE Procedure, but notes that the cause of this delay has been corrected. As the OSC is aware, during this audit, and partially as a result of the OSC's findings, MTA C&D retained a new ACE Administrator. Since this new Administrator first took over this role (during the October 2019 ACE review period), MTA C&D has had 100% on-time compliance for its ACE reporting. This change is due to the Administrator's diligent efforts in working with the ACE review teams to provide a better understanding of the ACE Procedures and the problems that can arise when reports are filed in an untimely manner, and her constant communication with the ACE review teams to ensure that they meet the required deadlines.

That said, we note that previous delays that MTA C&D may have experienced with respect to the issue of entering ACE evaluations into the ACE database did not have any impact on the agency's ability to properly vet its contractors. These evaluations were available in hardcopy for review and were used when the ACE evaluations were not available in the ACE database.

[Comment 8](#)

Response to Notification Letters:

MTA C&D accepts the OSC's finding that the deficient performance letter form attached to the ACE Procedure was not sent out immediately for certain contracts, but notes that these contractors were notified of the ACE deficiencies through other forms of communication, including discussions at project meetings, discussions on jobsites, and other letters. MTA C&D also notes that samples of the communications sent to contractors advising of these ACE deficiencies, along with the contractor responses to those letters, were previously provided to the OSC.

Response to Spot Checks:

MTA C&D disputes the OSC's finding that the MTA C&D ACE Administrator did not properly document spot checks of the review of ACE compliance. MTA C&D refers the OSC to Section 4.3.5 of the ACE Procedure, which requires that spot checks be performed, but does not require that they be documented. That said, and as noted in the OSC report, the prior MTA C&D ACE Administrator represented that the spot checks were being performed during every ACE cycle, which is compliant with the ACE Procedure requirement. In addition, the current ACE Administrator is now documenting spot checks.

[Comment 9](#)

Response to Persistent Less-Than-Satisfactory Component Ratings:

MTA C&D disputes the OSC's finding that MTA contractors are consistently performing poorly without defined recourse by the agency.

MTA C&D does not contest the OSC's finding that the audit revealed five contracts where component ratings were less than satisfactory, but the contractor still received an overall rating of satisfactory. However, we note that the ratings are in line with the requirements of the ACE Procedure. Indeed, ACE Procedure requires that the component ratings are averaged together to establish an overall rating for each ACE category. This is done to ensure that the overall category rating accurately reflects the contractor's performance in that particular function. Allowing poor component ratings to trigger recourse against a contractor who is otherwise performing well overall would not be in the best interest of either the agency or the public. That said, the OSC's

apparent underlying concern here -- i.e., that evaluations should be reviewed for repetitive poor performance areas so that these issues can be addressed while the contractor is working on the project -- is being addressed by MTA C&D and these patterns are being reviewed.

Further, MTA C&D notes that persistent less than satisfactory performance is addressed by MTA C&D outside of the ACE parameters. Indeed, ACE is merely a supplement to good project management. MTA C&D project managers work with contractors daily to correct deficiencies through in-person meetings, written correspondence and other directives. In addition, where necessary, MTA C&D exercises its right to pursue its contractual remedies, which can include defaulting a non-performing contractor.

[Comment 10](#)

Response to Monitoring Contracts Findings:

MTA C&D disagrees with the OSC finding that independent compliance monitoring contracts are subject to ACE. Sections 4.5 and 4.6 of the ACE Procedure are instructive on this point.

Section 4.5 of the ACE Procedure provides an all-inclusive list of the contracts subject to ACE review. This provision clearly states that applicable contracts must be capital funded, have a minimum award value of \$250,000 and fit within the parameters of at least one the specific consultant and contractor categories contained in sub-sections 4.5.1 and 4.5.2. Sub-section 4.5.1 lists the consultant contracts that are subject to evaluation as “• Architects, • Engineers, [and] • Engineering Services.” Sub-section 4.5.2 lists the contractor contracts that are subject to evaluation as “• Construction, • Technology, [and] • Design Build.” As the OSC is aware, independent monitoring contracts do not fall into any of these categories, and they are considered indefinite quantities contracts, which are expressly excluded from ACE review pursuant Section 4.6 of the ACE Procedure. Moreover, the contracts identified by the OSC had no obligated amounts attached to them and so fail to meet the \$250,000 minimum dollar value requirement.

[Comment 11](#)

Response to Finding on the Use of ACE Ratings Prior to Contact Award:

MTA C&D agrees with the OSC’s findings that MTA C&D has a duty to vet contractors under consideration for agency contracts and that this vetting must be done in accordance with the requirements of the Responsibility Guidelines. That said, MTA C&D represents that it is meeting that obligation and disagrees with the OSC’s specific findings under this section of the report.

The OSC’s finding that two contractors were awarded a contract despite having received less than satisfactory ratings that should constitute adverse information (“AI”) or significant adverse information (“SAI”) is incorrect. Indeed, the Responsibility Guidelines are clear that AI is found where a contractor has either (i) an overall marginal rating on two or more final performance ratings, or (ii) an overall marginal rating on three or more consecutive interim performance ratings on the same contract (See Responsibility Guidelines, Paragraph 6). The Responsibility Guidelines also make clear that SAI is found in situations where the contractor has either (i) an unsatisfactory final performance ACE evaluation on a contract with any MTA agency within the past three years, or (ii) an uncured interim unsatisfactory rating on a contract with any MTA agency in the past three years. (See Responsibility Guidelines, Paragraph 5).

The documentation that MTA C&D provided to the OSC for the first contract at issue showed that the contractor had received one final performance rating of marginal on a contract with another MTA agency, but the documentation did not show a second final rating of marginal (as would be needed for an AI finding based on final evaluation ratings). Nor did the documentation show that the contractor received overall marginal ratings on three or more consecutive interim performance ratings on the same contract (as would be needed for an AI finding based on interim evaluation ratings).

With regard to the second contract, it appears that on a previous New York City Transit Authority (“NYCT”) contract, the contractor received an interim rating of marginal, followed by an interim rating of unsatisfactory, followed by another interim rating of marginal during the audit period at issue. This would not have resulted in SAI because there were not three unsatisfactory ratings or a final contract rating of unsatisfactory (the unsatisfactory rating here is an interim rating, which does not trigger SAI). Although the ratings do not fit into the exact requirements for AI, MTA C&D agrees that AI should have been found here.⁵

The OSC also found that for two other contracts that were audited, the review of the background checks was not supported by sufficient documentation. Notably, both of these contracts are quite old – for the first one, the background check was performed over 19 years ago and for the other the check was performed 8 years ago, and the complete files were no longer available. However, MTA C&D was able provide the OSC with a copy of the completed vendor responsibility background check form and related background check documentation for the first contract, which confirms that a comprehensive background check was completed in October 2001. In addition, MTA C&D provided a copy of an August 2012 memo sent by MTA C&D to Vendor Relations requesting that a background check be performed for the proposed vendor on the second contract. That memo also attached a copy of the vendor’s completed responsibility questionnaire.⁶

Comment 12

⁵ We note that the absence of an SAI or AI memo does not mean that concerns relating to the responsibility of this contractor were not discussed prior to the issuance of a contract award. To the contrary, these concerns were flagged on the Vendor Responsibility Check Form for MTA C&D’s consideration in determining whether to find the contractor responsible with the following language: “firm has significant and poor performance on 3 contracts – discuss related issues prior to any new awards with appropriate project manager.” On that same form, the Vendor Relations Department also pointed out that while the contractor’s past poor performance may not automatically constitute adverse information under the governing responsibility guidelines, it should still be considered in determining whether the contractor is responsible: “poor performance as noted in the attached may be sufficient to reflect on the vendor’s overall responsibility but it is not automatic adverse information.” In light of the issues raised in the background check, MTA C&D held a special responsibility hearing for this vendor prior to the contract award. That hearing resulted in the contractor’s agreement to implement additional quality assurance measures if they were to be awarded the pending contract. Upon proper consideration and review, MTA C&D accepted that agreement and found the contractor to be responsible in connection with its review of the contract that MTA C&D was seeking to award to this contractor.

⁶ We note that because the background check for this vendor was performed over eight years ago, the complete file was not available, but the Board Staff Summary that was provided to the OSC confirms that the record of performance and qualifications for this vendor was evaluated by the awarding agency and that the vendor was determined to be “responsive and responsible.”

The OSC also found ambiguity in the start date for the three-year lookback period for ACE reviews in connection with background checks, as set forth in the Responsibility Guidelines. The OSC believes this ambiguity led to confusion with respect to a background check for one of the contracts under audit.

The MTA consistently applies a lookback period that begins from the date the vendor was vetted. The vetting date appears on the Vendor Responsibility Check Form that accompanies all background checks. For the contract at issue, it appears that the OSC focused on the January 2019 date that the request was received by Vendor Relations to perform the audit, but should have used the February 20, 2019 date listed on the form as the date that the vetting was completed. For the contract at issue as referenced by the OSC, using the correct February 20, 2019 date as the lookback start date, the three-year period runs back to February 20, 2016, meaning that only two consecutive interim marginals existed on this contract. Because three consecutive marginals are needed for AI, there was not an AI finding.

The OSC's finding that procurement officials believe that they may decide whether deficient ratings that contractors received on prior contracts warrant AI or SAI on a future contract award is incorrect; these decisions are all based in the Responsibility Guidelines and procurement rules. As noted above, the Responsibility Guidelines are clear as to the types of ACE ratings that require an AI or SAI finding. MTA C&D does not diverge from these Guidelines.

[Comment 13](#)

Moreover, in determining whether a contractor is otherwise responsible for a new contract award, a complete review of the background check file is performed. This check is not performed by one procurement official and is in no way subjective. To the contrary, for a typical MTA C&D contract, NYCT's Vendor Relations Department typically completes the background check. In those cases, NYCT's Assistant Chief Operations Officer of Vendor Relations⁷ transmits to MTA C&D a hardcopy folder that includes all of NYCT Vendor Relations' background check findings, such as a due diligence summary report (summarizing the background check findings), a completed vendor responsibility checklist (which contains check boxes for Vendor Relations to confirm which databases and other sources were reviewed, and any notes associated with those checks), transcripts from any past special responsibility hearings on the prospective vendor (and, if applicable, a recommendation for a new hearing for the contract award under review), news articles containing relevant vendor information, and a background check (consisting of criminal records, tax information, debarment information, any significant adverse information memos relating to the prospective vendor, and a lookback of relevant ACE findings). To the extent that either Vendor Relations or MTA C&D believe the information contained in the folder warrants further discussion, the agencies will meet to talk through any issues and ensure that MTA C&D has a complete and accurate understanding of the responsibility of the potential vendor. Indeed, only after MTA C&D is satisfied that it has all necessary information relating to the responsibility of the vendor does the agency move forward with a decision as to whether the vendor should be granted the contract award. With respect to the OSC's concern that this process is not documented, we respectfully refer them to paragraph 7 of the Responsibility Guidelines, which details the process and the types of

[Comment 14](#)

⁷ The OSC report incorrectly refers to the NYCT Assistant Chief Operations Officer of Vendor Relations as the Chief Operating Officer. The Chief Operating Officer at NYCT is not involved in these reviews.

information the procurement officer must review in order to determine whether a contractor is responsible.

With respect to the OSC's final finding -- that the Responsibility Guidelines are ambiguous with respect to when background checks should be performed -- we disagree. The Responsibility Guidelines make clear that a responsibility check should be performed in connection with "the award of any contract where the contracting officer is required to determine the responsibility of a firm and the estimated value of the contract at the time of award is equal to or greater than \$250,000." (See Responsibility Guidelines, paragraph 1). With respect to contract awards that fall below that amount, the Guidelines provide that, "each agency may use these procedures to establish simplified procedures appropriate to such awards." (*Id.*) These requirements are reiterated again on the Vendor Responsibility Check Form that is used for background checks. The form reminds agency staff of the situations in which a background check is to be performed and of the types of searches to be included in the check and even provides the phone number of a Vendor Relations employee to contact with any questions.

RESPONSE TO OSC RECOMMENDATIONS

Recommendation No. 1:

- Train ACE evaluators and administrators regarding adherence to deadlines, compliance with ACE procedures, retention of documents that support the ACE ratings, guidance for rating common situations for ACE components and best practices for dealing with problem contractors.

MTA C&D Response to Recommendation No. 1:

MTA C&D agrees with the OSC's recommendation that ACE evaluators and administrators should be trained on all ACE-related issues, and notes that training is already included as part of MTA C&D's current operation. That said, MTA C&D realizes that more structured training would be beneficial and is currently working to enhance its training efforts. MTA C&D is also working with the other MTA agencies and the MTA Office of Construction Oversight to ensure that MTA C&D is following best practices.

Recommendation No. 2:

- Update the ACE procedures to implement a clear process for handling "N/A" ratings, establish a time frame for sending critical documents (e.g., deficient performance letters), and identify patterns in component issues and work with contractors while they are still on site.

MTA C&D Response to Recommendation No. 2:

MTA C&D very much agrees with the OSC's recommendation that the MTA's ACE procedures (including the ACE Procedure, Responsibility Guidelines and the MTA All-Agency ACE Guidelines) need updating. As noted above, in connection with the MTA transformation, and MTA C&D's expanded role in managing MTA's Capital Program and the consulting and construction contracts funded under that Program, MTA C&D is currently working to reinvent ACE into a system that focuses more heavily on objective metrics and

processes based on clear and concise governing documents. MTA C&D is committed to rolling out the new system by the third quarter of 2021.

That said, MTA C&D believes that section 4.15 of the existing ACE Procedure provides clarity on the process for handling “N/A” ratings for ACE.

With respect to the OSC’s recommendation that the ACE Procedure should include a time frame for sending critical documents, MTA C&D agrees with the recommendation.

With respect to the OSC’s recommendation that the ACE Procedures should require ACE evaluators to identify patterns in ACE component ratings and require the MTA C&D project teams to work with the contractors to resolve any deficiencies while the contractors are still working on the jobsite, MTA C&D agrees with this recommendation but notes that this is already being done as part of MTA C&D’s current operations. Indeed, MTA C&D’s new ACE Administrator has been working with the project teams to ensure that any component rating deficiencies are included in the deficient performance letters that are sent to contractors following the ACE review. In addition, MTA C&D notes that ACE is merely a supplement to good project management. MTA C&D project managers work with contractors daily to correct deficiencies through in-person meetings, written correspondence and other directives. In addition, where necessary, MTA C&D exercises its right to pursue its contractual remedies.

[Comment 10](#)

Recommendation No. 3:

- Enforce deadlines to ensure compliance with the ACE procedures.

MTA C&D Response to Recommendation No. 3:

MTA C&D agrees with the OSC’s recommendation that deadlines should be enforced to ensure compliance with all relevant ACE procedures and guidelines but notes that this is already part of MTA C&D’s current operation. Indeed, MTA C&D’s new ACE Administrator has corrected the timeliness deficiencies that were raised in connection with the OSC audit, and the agency is proud to report that it achieved 100% on-time compliance for ACE reporting since this new Administrator took over during the October 2019 ACE cycle.

We further note that the ACE Administrator has been working with the project teams to ensure that deficient performance letters are sent out in a timely manner and that all other ACE procedural deadlines are being met. MTA C&D has also been fully compliant with the ACE Procedures in this regard since the new ACE Administrator’s October 2019 ACE cycle start date.

Recommendation No. 4:

- Document spot checks of all evaluations.

MTA C&D Response to Recommendation No. 4:

MTA C&D agrees that documenting spot checks is a good practice and intends to incorporate this into its revised contractor evaluation procedures. MTA C&D also notes that, although the current MTA ACE Procedure does not require that spot checks be documented, MTA C&D’s ACE Administrator has already proactively begun to do so.

Recommendation No. 5:

- Perform evaluations for current and future independent compliance monitoring contracts.

MTA C&D Response to Recommendation No. 5:

MTA C&D disagrees with this recommendation. As discussed above, independent monitoring contracts are expressly excluded from the ACE Procedure. That said, MTA C&D is willing to consider whether independent monitoring contracts should be included in its new contractor evaluation system or, alternatively, through another forum that would allow MTA agencies to share their experiences with monitoring firms.

Recommendation No. 6:

- Revise the ACE procedures to clarify and support, in writing, which types of contracts are subject to evaluations.

MTA C&D Response to Recommendation No. 6:

MTA C&D agrees with this recommendation, and notes that it has been proactively revising its ACE Procedure to ensure that there is not any confusion as to the types of contracts that are subject to ACE.

Recommendation No. 7:

- Ensure training provides clarification on types of contracts subject to the ACE system.

MTA C&D Response to Recommendation No. 7:

MTA C&D agrees with this recommendation, and notes MTA C&D's ACE Administrator has proactively begun advising MTA C&D's project teams with respect to this issue.

Recommendation No. 8:

- Ensure documentation in the procurement file supports the rationale for awarding or rejecting a contract (including, but not limited to, additional information from the project management team), as required by the ACE procedures.

MTA C&D Response to Recommendation No. 8:

MTA C&D agrees with the OSC's recommendation that MTA C&D staff should ensure that there is documentation in the procurement files that supports the agency's rationale for awarding or rejecting a contract, but notes that this is already being performed as part of MTA C&D current operations.

Patrick J. Foye
December 21, 2020
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Recommendation No. 9:

- Periodically conduct independent reviews of the procurement file to ensure the rationale for the decision to award contracts is documented.

MTA C&D Response to Recommendation No. 9:

MTA C&D agrees with this recommendation, but notes that it is already being performed as part of MTA C&D's current operations. Indeed, there are controls in place both within the MTA (as documented through procurement checklist approvals, the sharing of Procurement Staff Summaries amongst agencies, and audits and oversight provided by the MTA Internal Audit Department and the MTA Office of the Inspector General) and external to the MTA (through city, state and federal audits of the procurement process) to perform these reviews.

Recommendation No. 10:

- Ensure that staff reviewing vendor responsibility have written procedures that clearly state when the background check starts to make sure that the correct ACE ratings are included.

MTA C&D Response to Recommendation No. 10:

MTA C&D agrees with the OSC's recommendation, but notes that this information is already included in the Responsibility Guidelines and ACE Procedure. MTA C&D also notes that it is currently updating its policies to clarify this issue.

* * *

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,



John N. Lieber
President, MTA C&D

cc: Evan M. Eisland, MTA C&D Executive Vice-President and General Counsel
Mark Roche, MTA C&D Deputy Chief Development Officer - Delivery
Tom Savio, MTA HQ Director of Construction Oversight
Diane M. Nardi, MTA C&D Deputy General Counsel

State Comptroller's Comments

1. We assessed whether supporting documents supported the Satisfactory rating, not whether supporting documentation was available in the ACE file. Our finding is based on a thorough review of the records provided by MTA Capital Construction. We reviewed all documentation that was used to support the rating regardless of where it was in the files, and found that sufficient objective evidence was not available to support the recommendation.
2. Although the documents mentioned in the response, such as meeting minutes, may have been present in the files, they did not always contain information to support the Satisfactory rating.
3. We agree that, depending on the contract, the documents contained within the file may be different. Our observation regarding consistency related to how these documents were evaluated.
4. The documentation provided does not support that contractor performance improved during the evaluation period. For the period in question, the Scheduling category was Unsatisfactory, and a modification was agreed to but not until after the evaluation period ended.
5. The draft report incorporated MTA's response to our preliminary findings. We did not change our conclusion because, after a thorough review of the additional documentation provided, we determined it still did not support the rating.
6. The letter is dated May 10, 2019, which is after the evaluation period.
7. Temporarily suspending an ACE negates the purpose of a performance evaluation system, developed and operated by MTA Headquarters, for use by all agencies to report on contractor and consultant performance.
8. The database is the repository for the ACE to be used by other agencies. All evaluations should be there for review. In the cases cited, there was an evaluation in the database, so there would be no reason for a Reviewer to look for any others. In this instance, the Reviewer would not have complete information to make a decision.
9. This information was already included in our draft report. However, we are pleased that the MTA has now acknowledged the importance of documenting its monitoring.
10. While the project managers may work with the contractors daily, a review of the ACE documents can provide a "big picture" overview of the contractor's performance over time that day-to-day conversations cannot.
11. The list of contracts provided by MTA Capital Construction shows that the three contracts for monitoring exceeded the \$250,000 amount. Furthermore, the MTA Capital Construction Procedures for the ACE system do not expressly exclude monitoring contracts from evaluation. While MTA Capital Construction disagrees with Recommendation 5, it indicated that it will consider whether monitoring contracts should be included in the new evaluation system or evaluated using an alternative method.
12. The memorandum requesting the background check without including the results is not sufficient.

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- 13.** MTA officials told auditors that “discretion” can be exercised when deciding whether to prepare a significant adverse information (SAI) or an adverse information (AI) memo.
 - 14.** We did not state that the review was not documented. Rather, we stated that the process by which the information is communicated is not documented.

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