

Testimony of Attorney General Martha Coakley
Joint Committee on Federal Stimulus Oversight
Hearing on *Ensuring Accountability and Transparency in The Massachusetts*
Recovery and Reinvestment Plan
March 25, 2009

Good afternoon Chairman Pacheco, Chairman Linsky, and members of the Committee, thank you for giving me the opportunity to join you today to discuss the American Recovery and Reinvestment Act and ways in which we can ensure that federal stimulus funds best spur economic recovery and provide value to the taxpayers, while minimizing waste, inefficiency, fraud and corruption.

The potential for mistakes is heightened because of the emphasis on speed.

The potential for mistakes is heightened because of the emphasis on speed. The focus of Congress and state governments is on putting people to work, awarding contracts, and placing shovels in the ground quickly. As we do so, we must take pains to balance speed with care. The public has reason to be wary. A recent wave of stories from various states about apparent corruption, fraud, and “pay to play” abuses in the awarding of government contracts and other benefits have shaken confidence in the ability of government to steward public funds wisely. Add to that the lax oversight and accountability at the root of the current economic crisis and it is perfectly understandable why people are so skeptical.

Our office is working with the Patrick administration and other offices to promote two key goals: accountability and transparency.

Our office is working with the Patrick administration and other offices to promote two key goals: accountability and transparency. First, both bidding programs and

compliance programs need to focus on identifying responsible contractors or grant recipients and holding them accountable. By identifying potential problems up front, we can prevent waste and inefficiency, as well as potential fraud. An ounce of prevention is worth a pound of grand jury investigations down the line.

Second, it is important that the Commonwealth proceed with a transparent process so that the public can see how its money is being spent. Transparency is important as an end in itself – it can help replace public skepticism and cynicism with trust. It also deters sloppy and fraudulent conduct by shedding sunlight on how business is being conducted. In addition, transparency helps us do our jobs. When private citizens, not to mention the media, identify problems and bring them to our attention, we can then act to remedy those problems.

Today, I would like to discuss in more detail the three phases of stimulus programs and how they promote integrity: first, the bidding stage; second, post-bidding compliance; and third, litigation and law enforcement. Then I will add some final thoughts on transparency.

Oversight and monitoring will take resources, and this is a worthwhile investment.

One consistent theme of our approach is that proper oversight and monitoring requires some resources. Without such integrity measures, we will surely pay a high price later – in the form of inefficient contracts, shoddy work and products, and expensive prosecutions of people who have committed fraud.

In the private sector, CEOs live by the truism: “Fast, Good or Cheap – Pick Two.” When it comes to an unprecedented stimulus package involving hundreds of billions of dollars, we can have fast action to boost our economy, and it can be done well, with

integrity and free from influence-peddling and corruption. But it cannot be “cheap.” We need robust audit programs, public bidding procedures, and other measures that let sunshine into the bidding process and prevent insider deals.

1. Bidding

• **Public bidding laws serve an important function.**

Under the federal stimulus bill, the Commonwealth will have large amounts of money to distribute for transportation infrastructure projects, housing and other construction projects, green energy programs such as weatherization, and various grant programs. Speed in procurement is an important objective, particularly in the context of federal “use it or lose it” requirements that will mandate the expedited commencement of projects.

However, speed must be balanced with critical public bidding protections necessary to ensure that contracts are competitively and impartially awarded based on the value and quality of the goods and services to be provided. The procurement laws that currently govern public projects generally strike the right balance. They ensure that contracts are awarded based on value and merit, not because of friendships, campaign contributions, fraud, or simple sloppiness.

• **Agencies awarding contracts need adequate staffing and resources to implement an effective bidding process.**

Agencies awarding contracts need adequate staffing and resources to implement an effective bidding process. It is not enough to have strong procurement laws on the books. It is critical that when the Highway Department, DCAM, EOEEA or other agencies use public bidding procedures, they have sufficient trained professionals. These staffs must first draft the RFPs carefully, to make sure that they are properly defining the

scope of work and the nature of the project. If an RFP is drafted sloppily, and fails to identify the contractor's responsibilities, then we face a much higher risk of disputes, uncertainty, and costly litigation down the road.

Once the RFP is drafted, agencies need capable staff to review bids and follow the bid process, and to negotiate a final contract with the winning bidder. Again, the better the work done at this early stage, the fewer problems the Commonwealth will face later on.

- **Agencies need to engage in outreach to educate potential bidders about the procurement process.**

The best way to ensure that bidders follow the procurement process is to educate them about how it works. Outreach and education on the bidding process will also help small businesses, including minority and women-owned businesses, to compete on a level playing field. Agencies should offer "plain-English" instructions that are easily available on their websites. They should conduct open training sessions, conduct outreach through trade groups, and have adequate staffing so that a small business that is rushing to complete a bid is able to reach a live human being at the agency who can answer questions about the bidding process.

- **The Attorney General's Office handles bid protests, and we will seek to resolve cases on an expedited basis.**

If a bidder believes that the procurement laws have been violated, they are normally entitled to file a formal bid protest. Our office conducts the initial review of bid protests, and after analysis and hearings, we issue decisions resolving these protests. Our decision is usually the final step in a protest, although parties sometimes choose to appeal our rulings in court.

Our office currently has only two attorneys who handle bid protests, as part of our Fair Labor division. We appreciate the importance of resolving bid protests in a fast, efficient manner, so that these issues do not hold up construction. However, we have informed the Patrick administration that to handle a large number of anticipated bid protests on an expedited basis, we need some funding. Otherwise, we will be forced to shift more staff to work on bid protests, and thus sacrifice certain wage and hour law enforcement work that we currently perform. We are working with the Patrick administration to determine whether and how a small portion of stimulus funds can be used for this purpose.

- **The Legislature should be hesitant to change current procurement laws in response to the federal stimulus bill.**

Over time, various changes have been proposed to state bidding laws. As in any other area, there is always room for improvement, and if reforms make sense, then the Legislature should consider making changes to ensure that our bidding laws are efficient and effective. However, we believe that it would be a mistake to make hasty, temporary changes to bidding laws simply to cover programs funded through the federal stimulus bill. Making such short-sighted changes would undermine the important protections built into our existing laws. I am confident that we can work together to maintain these controls without the risk of losing stimulus funding.

2. Post-bidding compliance.

Once a contract has been awarded and finalized, state agencies need to monitor the actual spending and quality of work. If we do not get this compliance stage right, we will end up paying large amounts of money to contractors, only to learn later that some

performed sub-par work. Without adequate compliance, our office will be forced to litigate disputes later on.

- **Agencies need to monitor projects closely.**

Once contracts are awarded, state agencies need auditors to monitor the actual spending. With so much money flowing so quickly, some contractors will be tempted to submit inflated bills, or worse. Agencies must scrutinize the bills before they are paid.

- **Independent reviews by the Inspector General and Auditor can further ensure quality, cost-effective performance.**

The offices of the state Inspector General and Auditor have played important watchdog roles over time in preventing and uncovering waste, fraud and abuse in public programs. Their vigilant review of stimulus projects is essential to identify potential problems. This oversight applies both to programs carried out by state agencies, and also to public works conducted by cities and towns, which will directly receive some stimulus funds for construction and other projects.

As with other aspects of oversight, this function requires resources. As with funding for the Attorney General's office, we are waiting for clarification from federal agencies to determine whether and how the Commonwealth can devote a small fraction of stimulus funds to ensure proper independent oversight.

- **The Attorney General's Office will conduct independent oversight over compliance with wage and hour laws.**

In addition to the work done by the Inspector General and Auditor, our office serves as the primary enforcement agency with respect to wage and hour laws, including the prevailing wage law, OSHA-10, the independent contractor law, and other relevant laws. These existing laws create a level playing field and provide appropriate protections

for workers. Our office intends to send out investigators to respond to complaints and to conduct random spot-checks and audits to ensure that stimulus projects comply with these laws.

3. Litigation and law enforcement.

Because the federal stimulus bill provides so much money to help jump-start our economy, it is very likely that at some point, we will encounter problems. A contractor may sue a state agency and claim that it is owed additional money for work that was more complex than anticipated. An agency may discover sub-par work and seek to sue a contractor for breach of contract or false claims violations. We may discover evidence that a bid was awarded in violation of procurement laws, or as the result of ethics violations.

Our office takes all of these types of violations very seriously. For instance, our Big Dig team worked tirelessly to resolve complex claims against more than two dozen contractors. Working with our federal counterparts and officials from various state agencies, we have recovered over half a billion dollars and have held Big Dig contractors accountable. Similarly, we have prosecuted public employees who have violated the law.

As stimulus projects get off the ground, we will continue to coordinate with the Patrick administration, the Auditor, the Inspector General, the Comptroller, and other offices to be ready to respond to inquiries, complaints, and referrals.

4. Transparency

Finally, one more word about transparency. As I said, this is an independent goal, and is something that the Commonwealth needs to achieve at every stage of the process. Even before Congress enacted the final stimulus bill, my staff and I began speaking with

the Governor and his staff about the importance of creating a model website to provide the public with information. We are now working with ITD as it develops a central website to list the names of all bidders on stimulus contracts, post all stimulus contracts and report on the progress of work carried out under those contracts.

It is also imperative that state agencies, cities and towns open up and provide information on how they are operating stimulus programs.

Providing adequate resources for oversight remains an unresolved priority.

As I have indicated, we have been working with the Patrick administration to identify whether and how a small fraction of stimulus funds can be used to support needed oversight and monitoring by state agencies, the Inspector General's office, the Auditor's office, and the Attorney General's office. The federal government to date has not provided a clear answer. This issue should be resolved sooner rather than later – it is important to have control and oversight mechanisms established up front, not once funds are already distributed and shovels already in the ground.

This need for adequate resources arises at a time when, as you know, all state agencies and offices are facing potential budget cuts that are quite serious. The Governor's House 1 budget proposes significant cuts to our office, for instance, that would require us to scale back some of the work that we are currently doing. At this point, we are not suggesting that the Legislature appropriate additional oversight funding because we are hopeful that some of the stimulus funds can be dedicated to that purpose. We look forward to hearing an answer to this open question soon.

The economic crisis and the crisis in government ethics provide a unique opportunity to strengthen public bidding measures and create new mechanisms for

transparency and openness. As we act promptly to get the economy moving again, we should embrace proper regulation of public contracting – we ought not view these needed safeguards as impediments or obstacles to be abandoned. One of President Obama’s greatest promises is to restore the public’s trust in government itself. A well-designed stimulus program with robust integrity measures will be a major step in that direction.