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**INDEPENDENT STATE AUDITOR'S REPORT
ON CERTAIN ACTIVITIES OF THE
MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY
JULY 1, 1996 TO JULY 31, 2001**

**OFFICIAL AUDIT
REPORT
APRIL 3, 2002**

TABLE OF CONTENTS/EXECUTIVE SUMMARY

INTRODUCTION **1**

Our review of the Massachusetts Bay Transportation Authority (MBTA) was conducted to determine the overall effectiveness of its monitoring the activities of Transit Realty Associates, L.L.C. (TRA), which acts as its contractor to manage the MBTA's real estate activities. The audit focused on selected transactions conducted by TRA to determine whether these activities were in conformity with the management contract, including the appropriateness of fees and commissions paid to TRA, the actions authorized by the MBTA and undertaken by TRA to develop up to 5,000 commuter parking spaces under the MBTA's Parking Garage Program, and the selection process utilized by the MBTA in awarding a new five-year contract to manage its real estate activities.

AUDIT RESULTS **4**

1. OVER \$1.8 MILLION IN DESIGN AND DEVELOPMENT FEES SPENT ON A CANCELLED PARKING GARAGE PROGRAM **4**

The MBTA's contract with TRA provided for the planning, design, and construction of up to 5,000 commuter parking spaces as part of the MBTA's Parking Garage Program. The MBTA intended to develop these new parking garage spaces as part of its overall development program and its Central Artery Traffic Mitigation Plan. However, the MBTA cancelled this parking program after paying over \$1.8 million in design and development fees to TRA and other parties before a feasible financing plan was in place to ensure the operational viability of these facilities.

2. MBTA AWARDED \$1.2 MILLION IN PARKING GARAGE DESIGN FEES IN A NON-COMPETITIVE MANNER **9**

Our review of the costs associated with the MBTA's cancelled Parking Garage Program revealed that the MBTA paid approximately \$1.2 million in design fees under a contract that was awarded noncompetitively. In addition, we noted that the firm that received these fees is owned by a principal of TRA, which was hired to oversee the work of the design firm and to manage the development of the Parking Garage Program. This potential conflict-of-interest situation was the result of a flawed privatization contract provision for the management of the MBTA's real estate interests between the parties.

3. UNEARNED \$275,000 WORK CREDIT GRANTED BY THE MBTA BECAUSE IT DID NOT PROPERLY MONITOR THE ACTIVITIES OF TRA **12**

Our review of tenant leases and licenses maintained by TRA disclosed that a credit of \$275,000 for the installation of fiber optic cable was incorrectly granted by TRA against the first year's license fees due from a national communications company. This unearned credit was incorrectly applied by TRA against the first year's license fee of \$604,234 owed by the company.

4. CONTRACT AWARD PROCESS COST THE AUTHORITY \$941,000 WHEN SERVICES WERE NOT AWARDED TO THE LOWEST-COST QUALIFIED BIDDER **13**

The MBTA awarded a five-year contract of \$6,691,000 for property management and real estate development services for the period August 1, 2001 to July 31, 2006. However, our review disclosed that the MBTA did not award the contract to the bidder having the lowest bid. Instead, the MBTA selected the bidder with the second-lowest bid, which cost the MBTA an additional \$941,000 over the five-year contract.

5. UPDATE OF PRIOR AUDIT RESULTS – MANAGEMENT OF ELEVATOR AND ESCALATOR MAINTENANCE CONTRACTS **16**

Our prior audit report No. 2000-0583-3 noted that, although the MBTA had incorporated our recommendations to improve the turnaround time and assessment of penalties for the untimely repairs of MBTA elevators and escalators in its new contract specifications, it was not clear that the MBTA was actually monitoring turnaround repair times and assessing such penalties to the contractor. During our follow-up review, we determined that the MBTA is now properly monitoring the turnaround time for the repair of its elevators and escalators and, where appropriate, levying and collecting fines from its contractor for poor work performance.

6. UPDATE OF PRIOR AUDIT RESULTS – RECOMMENDED CHANGES TO PRIVATIZATION CONTRACT TERMS FOR REAL ESTATE MANAGEMENT **16**

Our prior audit report No. 98-2513-7 noted that the MBTA needed to improve its oversight of TRA's real estate management activities under the original five-year privatization contract dated June 28, 1996. Specifically, we cited the MBTA for (a) paying commissions not fully earned by TRA and complicated and contradictory language contained within the contract regarding fees and commissions to be paid to TRA; (b) inadequate oversight for accounts receivable adjustments taken by TRA; and (c) procurements not made in an open and competitive manner. Although some corrective action was taken by the MBTA to eliminate contradictory contract language for commissions and fees to be paid, we noted a continued lack of oversight for accounts receivable adjustments and services being procured in a noncompetitive manner.

APPENDIX I **19**

PARKING GARAGE PROGRAM COSTS **19**

JANUARY 1997 TO SEPTEMBER 30, 1999 **19**

APPENDIX II **20**

MBTA Real Estate Services RFP Selection Process, November 28, 2000 **20**

INTRODUCTION

Background

Chapter 296 of the Acts of 1993, the Commonwealth's privatization law, outlines the process that must be followed by all agencies and applicable authorities seeking to outsource a service that is presently performed by state or authority employees. This law, which became effective on December 15, 1993, applies to all contracts with an aggregate value of \$100,000 or more.

The process that an agency must follow includes preparing a detailed written statement of services, estimating the most cost-effective method of providing those services with agency employees, selecting a contractor through an open and competitive bid process, and comparing the agency's in-house costs to the costs that would be incurred by outsourcing these services to a designated private contractor. The agency must also certify that the proposed service is at least equal in quality to the present service and that the contractor's compliance record regarding relevant regulatory statutes is satisfactory. Furthermore, the agency must ensure that the signed contract, if ultimately awarded, contains certain provisions regarding wages, health insurance, the hiring of qualified agency employees, nondiscrimination, and affirmative action.

On April 24, 1996, pursuant to Chapter 296, the Massachusetts Bay Transit Authority (MBTA) notified the Office of the State Auditor (OSA) of its intent to award a privatization contract for most of its real estate activities that, at the time, were being handled by its own employees. The functions proposed by the MBTA to be privatized included facilities management, disposition of property, and property development. The specific activities for these functions encompassed:

- Tenant administration and leasing for concessions, land leases, utility easements, and master lease agreements
- Disposition of surplus property
- Granting of licenses and permits for access and entry
- Establishment of joint development opportunities

Chapter 296 allows the OSA 30 days to either approve or reject an agency's contract. Accordingly, the OSA, after reviewing the MBTA's submission for compliance with certain

statutory provisions and the estimated costs to perform these services in-house versus the estimated costs to be incurred in the proposed privatization contract between the MBTA and Transit Realty Associates, L.L.C. (TRA), determined that the MBTA had complied with Chapter 296 of the Acts of 1993 in reaching its decision to privatize the management of its real estate activities.

Effective June 28, 1996, the MBTA and TRA executed a five-year-contract to manage the aforementioned real estate activities. The signed contract, which expired on July 31, 2001, provided for the payment of the following fees and commissions:

Based Asset Management Fees:	\$6,178,000 (five-year total)
Lease Commissions and Fees:	6% of first year rent and 3% for each year thereafter, including renewals
Licenses and Leases One Year or Less:	One month's rent
New Income Production Fee:	5% of additional rent and other income
Incentive Bonus Fee:	10% of the excess of total revenue collected over a predetermined annual calculation base
Surplus Property Sales:	10% of gross sale price
Joint Development Fees:	5% of gross revenues, 10% of excess total revenue, and 10% of "value creation"
Feasibility Study Fees:	\$150 per hour for principal time, \$60 per hour for out-of-pocket expenses and third-party contract fees
Parking Garage Program:	Design and Engineering Fee-7% of the estimated construction cost

On July 16, 2001 the MBTA's Board of Directors awarded a new five-year contract to TRA to manage MBTA real estate activities effective August 1, 2001 through July 31, 2006.

Audit Scope, Objectives, and Methodology

Our audit, which covered the period July 1, 1996 to July 31, 2001, was conducted in accordance with applicable generally accepted government auditing standards for performance audits. The objectives of this audit were to review compliance with contract provisions in the following areas:

- Real estate activities, including joint development, sale of surplus properties, fees and commissions paid to TRA, parking garage program, and MBTA monitoring and oversight of TRA activities.
- The selection process for the awarding of the subsequent real estate management contract for the five-year period August 1, 2001 to July 31, 2006.
- In addition, we conducted a follow-up review of the conditions noted in our prior audit reports regarding the exceptions cited over questionable fees and commissions and contradictory contract language contained in the original real estate management contract between the MBTA and TRA dated June 28, 1996 (No. 98-2513-7) and the assessing and collecting of fines imposed by the MBTA for the untimely repair of elevators and escalators by its maintenance contractor (No. 2000-0583-3).

Our methodology included a review of leases; cash receipts and disbursements; executed contracts and licenses; MBTA and TRA correspondence; approved budgets and monthly operating reports; approved policies and procedures for the reporting on and monitoring of contract activities; and the selection process for awarding the latest five-year contract. In addition, we interviewed MBTA and TRA officials and personnel.

AUDIT RESULTS

1. OVER \$1.8 MILLION IN DESIGN AND DEVELOPMENT FEES SPENT ON A CANCELLED PARKING GARAGE PROGRAM

The Massachusetts Bay Transit Authority's (MBTA) contract with Transit Realty Associates, L.L.C. (TRA) provided for the planning, design, and construction of up to 5,000 commuter parking spaces as part of the MBTA's Parking Garage Program. The MBTA intended to develop these new parking garage spaces as part of its overall development program and its Central Artery Traffic Mitigation Plan. However, the MBTA cancelled this parking program after paying over \$1.8 million in design and development fees to TRA and other parties before a feasible financing plan was in place to ensure the operational viability of these facilities. (See Appendix I for Parking Garage Program Costs).

In Phase I of the Parking Garage Program, TRA was to initiate and complete a planning and design feasibility study based upon an initial parking site list and to analyze sites for the construction of approximately 5,000 garage parking spaces. This garage feasibility study included demographic and physical characteristics of each site; community and environmental concerns and impacts; financial feasibility projections, including parking rate analysis, suitability for concessions, and other related development issues; accessibility and potential traffic impacts; permitting requirements; nature and cost of required site improvements; and soil conditions, including geotechnical and potential environmental remediation issues.

According to the Service Agreement dated June 28, 1996 and the subsequent Notice to Proceed dated December 23, 1996 issued by the MBTA to TRA, the total cost of the garage feasibility study was not to exceed \$250,000, exclusive of the cost of any third-party site investigation authorized in writing by the MBTA. The maximum MBTA obligation for reimbursement of third party fees was \$100,000.

TRA completed the Parking Garage Program - Final Analysis feasibility study and submitted it to the MBTA on October 30, 1997. This analysis identified the following six sites as being suitable for new parking garages: Natick Center, North Quincy, Oak Grove, Riverside, Salem

Depot, and Woodland. These six garages were projected to create approximately 2,777 new MBTA parking spaces. According to the Services Agreement dated June 28, 1996, "Phase 2 of the Parking Garage Program will begin when the Authority [MBTA] has made its decision on the method for financing one or more of the projects in the Parking Garage Program. During Phase 2, TRA will address community concerns; obtain necessary site approvals; and complete design for priority projects approved by the MBTA as part of the Parking Garage Program."

On April 16, 1998, the Board of Directors of the MBTA authorized TRA to expend an amount not to exceed \$1,500,000 for the permitting and design of these parking facilities. This amount was to be reimbursed to the MBTA from the proceeds of debt securities issued to finance the construction of the facilities. In the event that such financing did not occur, the MBTA agreed to reimburse TRA for its actual fees and expenses in an amount not to exceed \$1,500,000.

The MBTA authorized TRA to begin the design work on three of these six aforementioned sites, which was completed through various phases. The payments made to date are listed below:

North Quincy Station (95% Construction Design Phase)	\$ 877,294
Natick Center (100% Design Development Phase)	159,362
Salem Depot (100% Design Development Phase)	<u>182,507</u>
Total Design Fees	<u>\$1,219,163</u>

In addition, the MBTA incurred approximately \$616,355 in planning costs associated with the cancelled Parking Garage Program, as listed below:

Feasibility Study	\$ 227,268
Third-Party Reimbursements -Feasibility	78,160
Financial Advisors	86,425
Third-Party Reimbursements-Design	63,979
Legal Services-Financing	93,189
Financing Study	<u>67,334</u>
Total Planning Costs	<u>\$ 616,355</u>
Parking Garage Total	<u>\$1,835,518</u>

Included in these costs was an invoice for \$86,425 for parking garage financing consultant services submitted to the MBTA for payment. This invoice was to be paid by TRA from the MBTA's revenue account, which TRA maintained. However, neither the MBTA nor TRA could provide us with a signed contract or supporting documentation for the services billed.

In September 1998, TRA, acting on behalf of the MBTA, withdrew its environmental notification form with the Secretary of Environmental Affairs for the Salem Garage because of concerns raised by the City of Salem regarding the proposed facility's design, traffic flow, and non-linkage to other city developments.

On December 17, 1998, the Board of Directors of the MBTA authorized the General Manager to enter into any and all agreements necessary to develop and finance parking garages at the North Quincy and Natick Center stations; expend an amount not to exceed \$5,500,000 as an upfront contribution necessary to obtain favorable financing for this program; and enter into an agreement that binds the MBTA to reimburse the nonprofit corporation, which was established by the MBTA to construct and manage these garages, for any revenue shortfalls that may occur from the private parking spaces at the proposed North Quincy Garage as necessary to service and maintain the bonded debt for the facilities.

The MBTA's Chief Financial Officer stated that the key financing assumption for the Parking Garage Project was that the bonds issued would be rated as investment grade by the national bond ratings services, thereby ensuring a lower interest rate to be paid on the bonds, which would result in lower overall annual operating costs and make the project financially feasible. However, we were informed that the final bond ratings were projected as being non-investment grade, or so-called "junk" grade, and would require a higher rate of interest, thereby making the Parking Garage Program financially unfeasible. Furthermore, the MBTA indicated that poor operating results from its newly opened parking garage in Dedham called into question key assumptions that were made regarding the daily usage and rates that could be realized at these proposed garages. Therefore, the decision was made to cancel the Parking Garage Program due to these unforeseen financial problems. However, these issues should have been addressed by the TRA and reviewed by the MBTA and its financial

consultants during the Feasibility Study of Phase 1, and not after design services had begun in earnest during Phase 2.

According to the services agreement between the MBTA and TRA, Phase 2 of the Parking Garage Program was scheduled to begin after the MBTA had decided on the financing method for one or more of these projects in the Parking Garage Program. Since no final decision for financing the parking garages was ever made, Phase 2 of the Parking Garage Program, which included the design phase of the parking garages, should not have commenced. Nevertheless, the MBTA imprudently authorized TRA to proceed with the design phase and spent \$1,283,142 (\$1,219,163 Total Design Fees plus \$63,979 in Third Party Reimbursements-Design) without any additional parking spaces being constructed.

Recommendation

The MBTA should:

- Review the causes of the apparent breakdown in its decision-making process that resulted in \$1,283,142 being spent on the design of these parking garages before it was confirmed that the facilities were actually financially feasible.
- Obtain an executed contract and other sufficient supporting documentation to determine the actual services to be performed, and the appropriateness of the amount charged, for the questioned payment of \$86,425 to its parking garage financing consultant. If the MBTA is unable to satisfy themselves as to the appropriateness of the services rendered for this expense, it should seek restitution from TRA and/or the consultant.

Auditee's Response

In its response the MBTA stated, in part:

The draft audit report criticizes the MBTA for authorizing Phase II of the Parking Program before a method of financing had been selected. Exhibit A.4 of the Services Agreement listed several alternative-financing methods. Prior to proceeding with Phase II, the MBTA had made a determination to pursue one of these options, project-based financing. This is evidenced by the April 16, 1998 Board vote, which authorized \$1.5 million for design and permitting costs, and contemplated reimbursement to the MBTA from the proceeds of just such a financing. The MBTA acted in accordance with the terms of the Services Agreement and Board authorization in approving Phase II of the parking program....

As intended, the feasibility study successfully screened nearly two dozen sites suggested by the MBTA to determine those that were most feasible for potential parking garage construction. The study also developed a financial model which showed that, with certain levels of capital and/or credit support from the MBTA and a critical mass of projects, a project based financing could meet basic financial underwriting criteria....

After determining to move forward with the project based financing approach, the MBTA prudently obtained independent legal, financial, and market analysis. The efforts involved MBTA's bond counsel, a major Wall Street investment banking firm... a nationally recognized expert in creative infrastructure financing..., and an independent assessment of market demand and parking rates.... The MBTA also authorized TRA to proceed with design, in order to establish firm construction pricing (Guaranteed Maximum Price), which is an essential element of establishing project feasibility, and project permitting (for which effort, despite the successful permitting of the North Quincy and Natick garages, TRA received no compensation). MBTA's methods and expenditures for due diligence were prudent and consistent with established standards for capital market transactions.

Through its independent due diligence efforts, MBTA carefully evaluated a multitude of financing scenarios, and determined the minimum level of capital support required of the MBTA to achieve investment grade financing. Due to changing financial circumstances and its evolving capital investment priorities, the MBTA used this information to make an informed and reasoned business decision not to proceed with the parking program.

Auditor's Reply

We reiterate that the MBTA could have developed reliable cost estimates to construct these parking garages without authorizing \$1.2 million in detailed design fees. For example, the MBTA could have determined reasonable cost estimates to construct these new facilities by using recent actual construction costs incurred to build a similar parking facility by the MBTA at Route 128 in Dedham. These per-square-foot costs could have been extrapolated to the proposed facility at North Quincy to formulate an approximate construction cost and determine the financial feasibility of this project. Instead, the MBTA chose to pay for 95% of detailed construction design plans simply to determine a more precise cost figure. However, the inability of these proposed garages to realize either the projected per-day parking fees or percentage of capacity utilization guaranteed that the needed cash flow for debt service at any reasonable cost estimate would never be realized. This fact should have been readily apparent to the MBTA long before the Phase 2 design work was begun.

2. MBTA AWARDED \$1.2 MILLION IN PARKING GARAGE DESIGN FEES IN A NON-COMPETITIVE MANNER

Our review of the costs associated with the MBTA's cancelled Parking Garage Program revealed that the MBTA paid approximately \$1.2 million in design fees under a contract that it awarded noncompetitively. In addition, we noted that the firm receiving these fees, Engineers Design Group, L.L.C (EDG), is owned by a principal of TRA, which was hired to oversee the work of the design firm and to manage the development of the Parking Garage Program. This potential conflict-of-interest situation was the result of a flawed privatization contract provision for the management of MBTA's real estate interests between the parties.

This management contract delegated the responsibility for procuring all necessary design services to TRA, who in turn designated EDG as the designer. Exhibit A-4 of the management services contract states, in part.

The Authority will utilize Contractor [TRA] as its exclusive designer, developer, and manager of the Authority's new parking garages until at least 5,000 additional parking spaces have been constructed or are under construction....

Furthermore, Section B-3 of the Contractor's Compensation Section states, in part:

The company or companies providing such services [design] will receive an aggregate fee (the Design and Engineering Fee) equal to seven percent (7%) of the Estimated Construction Cost....

The MBTA utilizes a Request for Qualifications process to procure design and engineering services for its capital construction projects awarded and managed in-house. This process involves public advertisement of the work requested; screening committees to rank and select the preferred designer; and a negotiation process to establish a mutually agreed upon design fee. However, the process used by the MBTA under this management contract to procure needed design services for the proposed Parking Garage Program was contrary to this established practice. In fact, the inclusion of these two aforementioned sections of the management services contract designating TRA as the designer and establishing the fee in advance effectively circumvented the requirements of procuring these services in an open and competitive manner.

Also, by designating EDG as the design engineer, TRA may have created a possible conflict of interest in that its oversight of the activities of the designer may not have been as objective as would be expected if a non-related party had competitively secured the design work. Moreover, since TRA was charged with structuring and completing the due diligence portion of the Parking Garage Program, including market feasibility and pro forma operating and debt service projections, it was placed in the conflicting position of rendering an opinion as to the viability of the Parking Garage Program while simultaneously profiting from its eventual development. It is unclear what effect, if any, this potential conflict of interest had on the ultimate failure of the program and spending \$1.8 million (\$1.2 million in design fees and \$600,000 in feasibility studies and consultant costs) of taxpayers' funds. (See Appendix I for Total Parking Garage Program Costs).

Recommendation

The MBTA should ensure that all future procurements for professional services are done in an open and competitive manner. Furthermore, although the new real estate management contract does not include a component for a second attempt to develop parking garages by TRA, the MBTA should refrain from delegating its oversight and decision-making responsibilities for proposed development projects to any entity whose actions may result in a potential conflict of interest.

Auditee's Response

In its response the MBTA stated, in part:

The report states that the Services Agreement "delegated the responsibility for procuring all necessary design services to TRA, who in turn designated EDG as the designer." In fact, in response to a requirement of the RFP, which led to the Services Agreement, TRA proposed EDG as a named member of its team. As part of its evaluation of TRA's proposal, MBTA evaluated EDG's qualifications to perform the requested design services. MBTA publicly advertised for parking garage design services, and competitively selected EDG to perform the desired services as part of the TRA team. However, in the future, the MBTA will insure that procurement of real estate management services will be segregated from design/engineering services. As indicated in the report, this change has taken effect with the current real estate management contract.

The report compares the MBTA's procurement method for garage design services to one of several standard procurement methods that is typically used for site-specific contracting. The MBTA regularly procures, as does the Commonwealth pursuant to legislative authorization, design and other consulting services on an "as needed" basis for project locations and scopes that have yet to be determined.

The report states that TRA's oversight of EDG's design services may not have been as rigorous as it might have been had the designer been an unrelated third party. In fact, TRA's oversight was extremely rigorous since a significant portion (ultimately, 100%) of TRA's development fee for the garages was made contingent on keeping construction costs below a pre-defined threshold. In effect, TRA's ability to profit from its efforts to build garages on behalf of MBTA was made contingent on extremely close coordination with, and extraordinary performance by, EDG.

The report recommends that MBTA "refrain from delegating its oversight and decision making responsibilities...." In fact, as evidenced by MBTA's ultimate decision not to proceed with the parking program, all of TRA's activities have been and continue to be subject to rigorous MBTA oversight, with all final decisions made by the MBTA's management and Board of Directors.

Auditor's Reply

Contrary to the MBTA assertions, the awarding of these design services was not done in an open and competitive manner. In fact, by utilizing the RFP process for the real estate management contract as a prerequisite to participate in the garage program design section of the contract, the MBTA excluded all those design firms that were not contractually linked to real estate management firms. The effect of this process was to exclude some firms to the benefit of others, thereby not ensuring an open and competitive process for all firms to participate. We are gratified that the MBTA will discontinue this process of linking real estate management services from any future design engineering services. Finally, the major portion of TRA's development fees payable under the garage program was a 5.5% master development fee, which was based on the sum of the estimated construction cost, the design and engineering fee, and the construction management fee, which is contrary to the MBTA's assertion that "100% of TRA's development fees were contingent upon keeping construction costs below a predefined threshold." In fact, the only portion of TRA's fee that was predicated on controlling project costs was its Savings Incentive Fee, which was equal to 20% of the savings realized in actual construction costs versus the budgeted construction costs.

3. UNEARNED \$275,000 WORK CREDIT GRANTED BY THE MBTA BECAUSE IT DID NOT PROPERLY MONITOR THE ACTIVITIES OF TRA

Our review of tenant leases and licenses maintained by TRA disclosed that a credit of \$275,000 for the installation of fiber optic cable was incorrectly granted by TRA against the first year's license fees due from a national communications company. This unearned credit was applied by TRA against the first year's license fee of \$604,234 owed by the company, which made a net payment of only \$329,234.

According to Exhibit B of Section 2.4 of the contract between the communications company and the MBTA, "In order to obtain the rent credit Licensee shall submit invoices from its contractor(s) and suppliers detailing the labor and materials costs with respect to the MBTA infrastructure to the MBTA." However, the communications company claimed this unearned credit without submitting any invoices from TRA and before the work was even begun. Yet TRA granted, and the MBTA approved, this credit without ensuring that the work was actually done and that the costs claimed by the communications company were fully documented. This situation resulted from the MBTA's inability to properly oversee the activities of TRA and to review the tenant billings for compliance with major lease terms. We brought the subject of this unearned credit of \$275,000 to the attention of TRA's Director of Asset Management who, upon review of the contract terms, billed the communications company for repayment of the \$275,000 on January 22, 2001. The TRA received repayment of these funds in full on March 19, 2001.

Recommendation

The MBTA's Director of Real Estate should:

- Review tenant billings and payments monthly to ensure that they are in agreement with the terms of the leases.
- Require that all necessary documentation for all rent adjustments be provided by TRA to the MBTA for review and approval prior to making actual adjustments to tenants' accounts.

Auditee's Response

In its response the MBTA stated, in part:

Although the draft audit report correctly cites that a rent credit was allowed (and subsequently corrected) by TRA prior to the receipt of required documentation, it fails to note that, through TRA's aggressive collection efforts, the net amount (minus the credit) of the rental payment in question, . . . was paid to the MBTA (more than three months before the payment was due)."

Auditor's Reply

Once again, we urge the MBTA's Director of Real Estate to ensure that all proposed credits are fully documented and approved before being issued by TRA.

4. CONTRACT AWARD PROCESS COST THE AUTHORITY \$941,000 WHEN SERVICES WERE NOT AWARDED TO THE LOWEST-COST QUALIFIED BIDDER

Our review disclosed that when the MBTA awarded a five-year contract of \$6,691,000 for property management and real estate development services, it did not award the contract to the qualified bidder having the lowest cost. Instead, the MBTA selected the next lowest cost bidder, which will cost the MBTA an additional \$941,000 over the five-year contract.

On August 16, 2000, the MBTA sought proposals for the delivery of property management and real estate development services for a five-year period beginning on August 1, 2001 and ending on July 31, 2006. The response to the Request for Proposals was due at the MBTA on October 13, 2000 and was subsequently extended to October 27, 2000.

The winning proposal was to be selected after competing under the following selection and evaluation criteria:

EEO/DBE Compliance	Pass/Fail
Price Proposal	60%
Management Team Approach	25%
Experience	10%
Quality and Responsiveness of the Proposal	5%

After a pre-proposal conference on August 31, 2000, in which certain attendees voiced concerns over the high percentage of points (60 out of a total 100) allocated to price proposal, the MBTA decided to revise the selection criteria and prospective bidders were notified of this change by an addendum dated September 29, 2000. The revised selection criteria was the following:

EEO/DBE Compliance	Pass/Fail
Price Proposal	40%
Effectiveness of Management Plan	30%
Qualifications and Experience	15%
General Evaluation	15%

The result of this change to the selection criteria was to diminish the importance of the sealed bid price submitted by the bidders (from 60% to 40%) of the total score and to increase the more subjective elements of the selection criteria, such as “General Evaluation,” which increased in importance from only 5% to 15% of the total score.

Subsequently, three firms submitted their management proposals and sealed bids to the MBTA by the October 23, 2000 deadline. On November 28, 2000, a selection committee comprising five members from various MBTA departments interviewed representatives of the three firms. The voting members of the selection committee then independently reviewed these proposals and ranked each according to the revised selection criteria. Upon completion of this technical evaluation phase and in accordance with the revised selection procedures, the low bidder was awarded the full 40 points, and the remaining bidders were scored according to the percentage by which they exceeded the low bid. Price scores were added to technical scores, and bidders were ranked based upon total calculated scores.

Ultimately, the firm that was awarded the highest number of points by the selection committee was TRA, the current holder of the expiring contract for management services for the MBTA’s real estate activities. However, TRA’s bid was not the lowest bid received.

In fact, the firm that ranked second bid \$941,000 less than TRA, yet failed to win the selection process due to the revised bid criteria.

Subsequently, this five-year contract for property management and real estate development was awarded to TRA by the MBTA Board of Directors on July 16, 2001. The final selection committee rankings are presented in Appendix No. II.

The Legislature has enacted the Uniform Procurement Act, Chapter 30B of the Massachusetts General Laws, which requires state agencies and cities and towns to procure services from the lowest-priced responsible and responsive bidders. However, neither the Legislature nor the Executive Office of Transportation and Construction (EOTC) have issued laws or regulations requiring this practice at the MBTA.

Recommendation

EOTC should ensure that the MBTA procures services from qualified contractors at the lowest possible cost. To achieve this goal, EOTC should recommend that the MBTA be subject to the provisions of the Uniform Procurement Act, which would help reduce the cost of MBTA services and provide the MBTA with a standard means of procuring services. Furthermore, the proper duties of any selection review committee established by the MBTA should be strictly limited to determining only that each bidder possesses the necessary qualifications and experience to perform the needed services. Once the bidders have been determined qualified by the selection committee, the lowest bid should be the sole deciding factor. This system will ensure that all future procurements by the MBTA are done in the most open, unbiased, and cost-effective manner possible.

Auditee's Response

In its response, the MBTA stated, in part:

The MBTA did award a five-year contract in the amount of \$6,691,000 to Transit Realty Associates, which was the second lowest bidder.

The criteria developed by the evaluation committee was not simply cost based. The evaluation committee determined the qualification and experience and the ability to maximize revenue together was as important as price. The evaluation committee overwhelmingly selected TRA. However, due to the Auditor's recommendation, the

MBTA has changed its selection procedures to a phase one pre-qualification and phase two cost proposal procedure.

Auditor's Reply

The MBTA's decision to adopt our recommendation and alter its selection committee's role to that of contractor pre-qualification only should help ensure that all future contracts will be awarded in an open and competitive manner and to the lowest cost-qualified bidder.

5. UPDATE OF PRIOR AUDIT RESULTS – MANAGEMENT OF ELEVATOR AND ESCALATOR MAINTENANCE CONTRACTS

Our prior audit report No. 2000-0583-3 noted that, although the MBTA had incorporated our recommendations to improve the turnaround time and assessment of penalties for the untimely repairs in the new contract specifications, due to the newness of the contract it was unclear whether the MBTA was actually monitoring turnaround repair times and assessing penalties to the contractor.

Our follow-up review determined that as of July 31, 2001, the MBTA was properly monitoring the repair activities of its contractor and properly levying and collecting fines for poor repair performance. In fact, the MBTA has cited the current contractor for 52 service infractions since the inception of the contract in December 1999 through July 2001. These 52 infractions resulted in the MBTA's assessing fines totaling \$61,949 and collecting refunds of \$50,524 as of July 2001.

Auditee's Response

The Authority acknowledges recognition by the auditors that the escalators and elevators are being properly monitored.

6. UPDATE OF PRIOR AUDIT RESULTS – RECOMMENDED CHANGES TO PRIVATIZATION CONTRACT TERMS FOR REAL ESTATE MANAGEMENT

Our prior audit report No. 98-2513-7 noted that the MBTA needed to improve its oversight of the real estate management activities of TRA under the original five-year privatization contract dated June 28, 1996. Specifically, the MBTA was cited for (a) paying commissions not fully earned by TRA and complicated and contradictory language contained within the

contract regarding fees and commissions to be paid to TRA; (b) inadequate oversight for accounts receivable adjustments taken by TRA; and (c) procurements not made in an open and competitive manner. The current status of the corrective action taken by the MBTA follows:

a. Commissions and Fees

Our prior audit noted that the contractor received leasing commissions for more than the three years proposed under the original management contract because the MBTA had revised the contract to allow for the payment of lease commissions to run concurrently with the lease term, in some instances for up to 40 years. In addition, our prior audit report questioned the manner in which certain fees were earned and calculated due to contradictory and ambiguous language within the management contract, and we urged the MBTA to amend these contract provisions.

Our follow-up review indicated that the current management contract awarded by the MBTA caps these commission payments at five years, regardless of the length of the lease. Also, we found no indication of commissions paid to TRA for work not performed during our follow-up review, which indicates that the MBTA is more closely monitoring the payment requests submitted by the contractor. Furthermore, we found that the MBTA has acted to eliminate the earning and payment of New Income Production Fees and Incentive Bonus Fees from the new management contract.

b. Oversight of TRA-Initiated Transactions

Our prior audit indicated that the MBTA did not adequately oversee certain accounts receivable adjustments initiated by TRA. Our follow-up review noted a similar occurrence (see Audit Result No. 3) in which a credit was authorized by TRA and inappropriately applied against a communications company's rental charges.

c. MBTA Did Not Award Concessions Contract in an Open and Competitive Manner

Our prior audit revealed that the MBTA awarded a concession license without seeking competitive bids from other companies. During our follow-up review we determined that

the MBTA continued this improper practice of awarding contracts on a noncompetitive basis. Specifically, as noted in Audit Result No. 2, the MBTA authorized approximately \$1.2 million in design fees for the canceled Parking Garage Program to a design firm owned by one of the principals of TRA without soliciting competing proposals from other design firms.

Recommendation

The MBTA should exert greater oversight of TRA initiated credits applied to MBTA accounts receivable balances to ensure that all credits so applied are authorized, correct, and have been properly earned. Furthermore, the MBTA should cease awarding contracts in a noncompetitive manner.

Auditee's Response

As indicated, the new management contract addresses previous concerns regarding payment of commissions and fees.

APPENDIX I

PARKING GARAGE PROGRAM COSTS

JANUARY 1997 TO SEPTEMBER 30, 1999

DATE	PAYER	AMOUNT	PURPOSE
01-07-97	Transit Realty Associates, 66C	\$ 41,331	Parking Garage Feasibility Study
03-28-97	Transit Realty Associates, 66C	123,638	Parking Garage Feasibility Study
05-23-97	Transit Realty Associates, 66C	34,048	Parking Garage Feasibility Study
08-22-97	Transit Realty Associates, 66C	39,410	Third-Party Costs
10-06-97	Transit Realty Associates, 66C	25,011	Third-Party Costs
12-31-97	Transit Realty Associates, 66C	4,690	Third-Party Costs
03-23-98	Transit Realty Associates, 66C	3,240	Third-Party Costs
07-30-98	Transit Realty Associates, 66C	<u>34,060</u>	Third-Party Costs
	Total Feasibility Study	<u>\$ 305,428</u>	
07-22-98	Adelphi Capital, 66C	<u>\$ 86,425</u>	Parking Garage Finance and Development Program
06-11-98	EDG Group, 66C	\$ 540,798	Design – No. Quincy
06-11-98	EDG Group, 66C	68,298	Design – Natick
06-11-98	EDG Group, 66C	78,217	Design – Salem
10-02-98	EDG Group, 66C	336,496	Design – No. Quincy
10-02-98	EDG Group, 66C	91,064	Design – Natick
10-02-98	EDG Group, 66C	<u>104,290</u>	Design – Salem
	Total Design	<u>\$1,219,163</u>	
10-02-98	Transit Realty Associates, 66C	\$ 12,998	Third-Party Costs – Salem
10-02-98	Transit Realty Associates, 66C	7,940	Third-Party Costs – No. Quincy
10-03-98	Transit Realty Associates, 66C	16,813	Third-Party Costs – Natick
11-23-98	Transit Realty Associates, 66C	<u>26,228</u>	Third-Party Costs – Salem
	Total Third-Party Costs	<u>\$ 63,979</u>	
6/97 – 9/99	Mintz, Levin, Cohn, Ferris, Glovsky	<u>\$ 93,189</u>	TRA Parking Program – Legal
9/98 – 6/99	Wilbur Smith Associates	<u>67,334</u>	Parking Program
		<u>\$1,835,518</u>	

APPENDIX II

MBTA Real Estate Services RFP Selection Process, November 28, 2000

SUMMARY EVALUATION FORM

Proposer	Codman Companies					Asset Performance Management						Transit Realty Associates						
Rater	A	B	C	D	E	Rater	A	B	C	D	E	Rater	A	B	C	C	E	Rater
Criteria						Average						Average						Average
Qualifications and Experience (15 Points)	14	7	13	10	7		13	12	11	12	14		15	15	14	14	15	
Effectiveness of Management Plan (30 Points)	19	10	20	20	12		30	25	26	28	27		20	20	24	25	24	
Price Proposal (40 Points)	40	40	40	40	40	40	12.75	12.75	12.75	12.75	12.75	12.75	33.45	33.45	33.45	33.45	33.45	33.45
General Evaluation (15 Points)	8	5	11	9	6		13	15	12	13	15		9	5	13	11	10	
DBE and EEO Compliance (Pass/Fail)	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
TOTAL	81	62	84	79	65	74.2	68.75	64.75	61.75	65.75	68.75	65.95	77.45	73.45	84.45	83.45	82.45	80.25

Note:

1. Price proposals were opened in order of presentation by General Counsel at 3:45 pm.
2. The bid prices were as follows: Codman Companies (\$5,750,000); Asset Performance Management (\$9,667,500); and Transit Realty Associates (\$6,691,000).

