



The Commonwealth of Massachusetts
Office of the Inspector General

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July 16, 2010

Mr. Jeffrey Mullan
Secretary
Massachusetts Department of Transportation
10 Park Plaza, Room 4150
Boston, MA 02116

Mr. Richard Davey
General Manager
Massachusetts Bay Transportation Authority
10 Park Plaza, Room 3910
Boston, MA 02116

Re: Procurement of paratransit vans with federal stimulus funds

Dear Sirs:

As you may know, the Massachusetts Office of the Inspector General (OIG) reviewed the Massachusetts Bay Transportation Authority's (MBTA) recent purchase of 108 paratransit vans made possible by the May 2009 receipt of a \$26.6 million grant from the Federal Transit Administration (FTA) under the American Recovery and Reinvestment Act (ARRA). The MBTA spent \$5.5 million of this grant for the recently purchased vans.

The OIG is reviewing ARRA-related grants to identify potential vulnerabilities to fraud, waste, and abuse and other risks that could negatively impact the accountability, transparency, and anti-fraud mandates contained in the statutory language and interpretive guidance of ARRA. This review should not be construed as an investigation of the program or a comprehensive programmatic review. The OIG intends these reviews to assist recipients of ARRA funding in identifying and addressing risks.

Background

The MBTA purchased the 108 vans for *The Ride* program in fall 2009. *The Ride* is the MBTA's paratransit program, providing door-to-door transportation to those who cannot

use fixed-route public transportation because of a physical, cognitive, or mental disability. *The Ride* complies with Americans with Disabilities Act (ADA) mandates. The MBTA purchased the vans for *The Ride* program from an Executive Office of Transportation (EOT)¹ contract called 2008DRAV. According to MBTA staff, the MBTA used the existing EOT contract rather than its own procurement process to expedite purchasing, since ARRA emphasized spending funds quickly. EOT issued this contract to purchase “demand response accessible vehicles” for use by various public and not-for-profit agencies.

EOT began the procurement of this contract by forming a Technical Advisory Committee (TAC), composed of EOT and MBTA staff, as well as representatives from Regional Transit Authorities and local Councils on Aging. The TAC prepared the Request for Response (RFR) for the contract in 2008.² The RFR solicited bids for four types of vans: type C (10-13 passenger minibuses); type D (16-20 passenger minibuses); type E (8-passenger single rear wheel vans); and type E2 (8-passenger dual rear wheel vans.)

In December 2008, EOT posted the RFR on Comm-PASS, the state’s online clearinghouse for posting solicitations for state contract bids. The RFR required bidders to respond by February 2009. After receiving RFR responses, EOT reconvened the TAC to act as an evaluation committee to review the responses and to choose the winning bids. In April 2009, EOT awarded a contract for type C and D vehicles to Quality Van Sales, Inc., and a contract for type E and E2 vehicles to Shepard Brothers, Inc. MBTA staff had participated throughout the procurement process.

With a portion of its ARRA grant, the MBTA chose to purchase 108 type E vans, the type used by *The Ride*. The OIG review focused on this ARRA-funded purchase.

The OIG review identified several problems with the EOT procurement process and with the MBTA receipt of these vehicles. The OIG has forwarded these procurement issues to the Operational Services Division (OSD), the state agency that oversees state procurement and contracting practices. The OIG’s preliminary review identified unclear RFR specifications, poor communication with bidders, a flawed bid evaluation process, weak control practices, policy violations, and arbitrary decision-making by both EOT and the MBTA. OSD has completed a preliminary review, and based on this review has similar concerns about MassDOT’s procurement practices.

The OIG believes the flaws in EOT and MBTA procurement practices undercut a fair and open process that may ultimately cost taxpayers more than \$700,000 over the life of

¹ EOT has since evolved into the Massachusetts Department of Transportation (MassDOT), the current state agency with a mandate over transportation issues.

² The FTA required EOT to rebid this contract in 2008 because of technical problems with a predecessor contract. According to EOT staff, the FTA informed EOT that the failure of this earlier contract to specify a maximum number of vehicles to be purchased violated FTA rules triggering a rebid.

the contract. Based on these findings, the OIG recommends that MassDOT rebid this contract as soon as practicable before the contract term ends in April 2012. The OIG further recommends that MassDOT improve its procurement practices and make them compliant with state policy, sound business practice, and where necessary, ARRA requirements.

EOT (MassDOT) Findings

Finding 1: EOT failed to ensure that the RFR clearly delineated between mandatory and preferred requirements.

The TAC, which included MBTA staff, met numerous times in 2008 to develop the RFR specification requirements. Unfortunately, the resulting RFR did not prioritize the RFR technical requirements. This left potential bidders with no option but to submit bids that attempted to meet every requirement equally, regardless of relative importance. OSD guidelines recommend distinguishing between mandatory and preferred requirements since this delineation provides guidance to bidders on how to be fully responsive to RFR requirements. Without this guidance, bidders may believe they will be unresponsive if even minor deviations are proposed. Since EOT did not distinguish between requirements, TAC members and bidders had different perceptions about how requirements would be evaluated.

Evaluators gave certain RFR requirements greater weight based on subjective opinion. This illustrates that either EOT intended that certain requirements carry more weight but failed to provide this information to bidders or that EOT conducted an evaluation process devoid of reasonable and consistent standards. In either case, EOT undermined fair and open competition.

Moreover, EOT eventually awarded a contract to a bidder whose proposal did not meet all specification requirements. The OIG spoke with one bidder that stated that it might have submitted a different bid had it known that EOT considered requirements open for negotiation. EOT undermined the procurement when it failed to establish the rules-of-the-game by officially delineating between mandatory and preferred requirements and informing bidders of such. As a result, EOT's RFR:

- Created a burden on bidders to comply with requirements that EOT ultimately did not require.
- Deterred prospective bidders; compromised the level playing field by not communicating to bidders that EOT did not necessarily expect all requirements to be met.
- Burdened EOT's evaluators and contract end users with the responsibility to evaluate and review bidder compliance with 30 pages of mandatory requirements; a lengthy, resource intensive, and ultimately superfluous process.
- Created a confused and subjective procurement process that deterred accountability and transparency leading to vulnerability to fraud, waste, and abuse.

Finding 2: EOT's evaluation committee deviated from the bid evaluation criteria contained in the RFR, in violation of OSD policy.

OSD notes that agencies have great flexibility in developing evaluation criteria, but recommends, as a best practice, that the criteria be included in an RFR, so potential bidders know how their responses will be measured. OSD policy requires that evaluation criteria be developed before the evaluation process to protect the integrity of the process. The RFR in question listed several evaluation criteria, including:

- Complete compliance with all technical specifications.
- Ability to furnish between four and ten business references.
- Capability to deliver a large quantity of vehicles.
- Per vehicle cost.
- Value-Added Components.

Despite being listed in the RFR, the evaluation committee did not consistently apply these criteria to the bids submitted and, based on the results of the process, developed additional criteria. As discussed in the next finding, each member of the evaluation committee used their own subjective criteria to identify which bids they believed best met the RFR's technical requirements. The chair of the evaluation committee had almost sole responsibility to review the proposals based on the RFR evaluation criteria. The chair informed the committee if a proposal did not fully meet any of these criteria. EOT documents do not identify how the chair or the committee determined compliance with any of the RFR evaluation criteria including the last two ill-defined criteria: "capability to deliver a large quantity of vehicles" and "value-added components."

Committee members reviewed bids for general compliance with technical requirements based on their own individual understanding of which requirements had the greatest value and/or that EOT considered mandatory. EOT did not require and members may not have had vendor van schematics or detailed design drawings from which a reasonable determination of technical compliance could be made. The vans ultimately purchased by the MBTA did not meet all of the technical requirements.

Since the RFR's requirements all appeared mandatory, the bidders had a right to expect that all responses would be evaluated fully. Bidders have a right to expect, and EOT had a responsibility to provide, a fair and open process. To ensure accountability and transparency, all parties involved and the public should be able to determine the basis upon which EOT chose a particular bid.

Finding 3: The evaluation committee did not follow OSD guidance requiring a quantifiable scoring method.

The OIG review found that EOT failed to provide the evaluation committee with guidelines concerning how bids would be weighted and/or considered. Contrary to OSD

guidelines, the committee did not develop any quantitative scoring for each bid. Instead, as discussed previously, committee members reviewed bid proposals individually based on their own subjective criteria and then reported their opinions to the committee as a whole. The committee as a whole discussed any issues members raised and according to EOT and MBTA staff, the committee recommended contract awards based on a consensus of opinion rather than any measurable rationale.

This lack of an objective and uniform evaluation process may have compromised the fairness of the competition. For example, the RFR specifications required that the type E van have both a minimum spacing requirement for three wheelchairs, along with a maximum vehicle length of 250 inches. One bidder claimed that it could not meet both requirements and proposed a vehicle with two, not three, wheelchair positions. The committee rejected this proposal because it failed to meet specification requirements³ yet accepted other proposals that failed to meet requirements.

In another example, the evaluation committee based its award recommendation for the type E2 van solely on the grounds that the bidder had provided “exemplary service” under a previous EOT contract. The committee made this decision despite there being lower bids from qualified bidders and the fact that the bid was for vehicles, not services. Under OSD rules, EOT did not have to choose the lowest priced bid, but did have an obligation to explain how its choice provided the best value for the taxpayers. EOT did not provide this explanation. The lowest bidder, not chosen by EOT, also had a previous EOT contract and EOT did not suggest that this bidder had performed unsatisfactorily under that prior contract. In accordance with OSD rules, EOT should have explained why it chose to award to other than the lowest bidder and how it determined that this bidder offered the best value.

The decision not to choose the lowest price bid (but rather the third lowest out of five bidders) for this van type increased contract costs by \$153,900 (based on the maximum number of type E2 vans projected for purchase under the contract.)

Finding 4: The EOT evaluation committee inadequately documented its evaluation process in violation of OSD policy and sound business practice.

There exists no recorded committee vote, record of to what extent committee members participated in the evaluation process, or list of which members concurred with the committee decisions. The only evaluation process record is a summary prepared by the evaluation committee chair. No meeting minutes exist, and EOT did not require individual members to prepare evaluation sheets or any other individualized proposal evaluations. Any notes taken by committee members have been retained by them or have been destroyed in violation of the public records law.

³ Interestingly, *The Ride* service providers informed the OIG that they rarely need three wheelchair positions, and that all three are used only a few times each year.

EOT failed to follow OSD rules that require the evaluation committee to use standardized written evaluation or scoring forms that identify the criteria to be reviewed and the evaluation methodology to be used by the committee members. This method creates consistency and promotes objectivity. Formal written evaluations would also have provided an audit trail, thereby creating an accountable and transparent process.

Finding 5: EOT awarded a contract for vehicles that did not meet RFR technical requirements.

EOT awarded the contract for type E vans to a bidder that did not meet a number of mandatory RFR requirements. For example:

- EOT specifications for the type E van contained a maximum vehicle length requirement of 250 inches. However, the OIG found that the vehicle provided by the winning bidder measured 252 inches. Ironically, during the question and answer portion of the process, this bidder had requested that EOT include a maximum length.
- The winning bidder's van also had a total wheelchair space that measured 147 inches – three inches below the minimum 150 inch RFR specification requirement.
- Several bidders requested an approved equal for the so-called “step edge” during the RFR question and answer process. The step edge is the yellow rubber strip located on the edge of the steps leading into the van. The RFR required that the step edge extend “3 inches in the vertical and horizontal plane.” One bidder requested that EOT accept the “industry standard” sized step edging of two and one-half inches horizontally by one and one-half inches vertically. EOT denied this request and also denied requests made by other bidders. However, the OIG found that the winning bidder failed to meet the step edge size specified by EOT, providing a step edge of three inches horizontally by only one inch vertically.

Although this bid failed to meet mandatory requirements, EOT nevertheless awarded the contract to this vendor. In fact, none of the submitted bids appeared to have met all specification requirements. Despite this, the evaluation committee did not explain why one proposal that deviated from the mandatory specifications merited rejection and one did not. EOT staff informed the OIG that the committee did not consider, for example, the two inch deviation in van length by the winning bidder to be significant. While these two inches may not render a van unusable for its intended purpose, EOT considered the length requirement important enough to dictate a maximum length, only to then ignore it when awarding the contract.

MBTA Findings

Finding 6: All MBTA vans purchased with ARRA funds are in the possession of *The Ride* service vendors.

The OIG confirmed that all 108 ARRA-funded vans are in the possession of *The Ride* providers. OIG staff confirmed this by making site visits to the three providers and matching vehicle identification numbers (VINs) against MBTA inventory and van manufacturer purchase and sale records. As the OIG only conducted an inventory check, OIG staff did not verify whether these vans have been placed in service by the providers. However, all providers informed the OIG that these vans have been placed in service.

Finding 7: The MBTA accepted vans that failed to meet RFR requirements.

As mentioned in previous findings, vans purchased under the EOT contract failed to meet all required RFR requirements. Although the MBTA used an EOT contract to purchase vans, the MBTA still had a responsibility to ensure that it obtained vans with all required features. Also, by not checking specification compliance, the MBTA cannot know with certainty whether the vans comply with applicable law, regulations, and customer concerns regarding ADA and safety standards that are essential for *The Ride*.

Upon delivery of the vans from the manufacturer to the *Ride* service providers, the MBTA required the providers to inspect the vehicle against an MBTA checklist that included such items as tire pressure, bumpers, door operation, fluid levels, wire and exhaust harnesses, brakes, suspension, drive shaft operation, heater, radio, wiper, horn, interior and exterior lights, lift operation, and the presence of safety equipment. However, the checklist did not include any checks to ensure that the delivered vehicles conformed to contract and ADA requirements.

On two separate occasions, MBTA staff told the OIG that they inspected the first group of vans delivered to each of the three service providers. According to the MBTA, its inspection included a number of the same items included in the service provider checklist. However, only one service provider could confirm that MBTA staff had been on-site during van delivery. This conflicting testimony raises questions about the coordination and control of the inspection process as well as its thoroughness.

Regardless of the actual time spent in the field, MBTA staff should have verified that the vans met contract requirements and should have independently inspected at least a sample of the new vans based on the checklist given to providers. MBTA staff informed the OIG that they visited the van manufacturer in New York State to observe the production process; an additional review/quality control step that also failed to identify deviations from specification requirements.

The MBTA purchased and owns these vans worth approximately \$5.5 million. The agency should have ensured that it got what it paid for, rather than relying almost entirely on the service providers for this verification. The OIG believes that the responsibility for this assurance rests with the MBTA, even if it purchased the vans through another agency's contract.

Finding 8: The timing of the MBTA decision to purchase the vans undercut a fair and open procurement of *The Ride* service.

Historically, *The Ride's* service providers had the responsibility to provide most vehicles used for the program using basic specification requirements provided by the MBTA. In mid-2008, the MBTA began the process to re-procure provider services. The Request for Proposals (RFP) required providers to supply 209 vans, of which 96 had to be new. The RFP process attracted little competition and the MBTA awarded three provider contracts to incumbents at significantly higher cost than previous contracts. As discussed in a recent report issued by the State Auditor, *The Ride* costs are increasing dramatically due in part to limited market competition.

Shortly after the contract award, in an attempt to lower costs, the MBTA negotiated with the service providers to amend the agreement so that the MBTA, rather than the providers, would purchase the 96 new vans required in the RFP. (The MBTA increased this number to 108 to include projected ridership increases.) The MBTA's receipt of ARRA funds prompted this re-negotiation of the service contract. According to the MBTA, this re-negotiation shifted nearly \$6 million in service provider costs to the MBTA which in turn absorbed these "contract savings" by using \$5.5 million in ARRA funds.

Although the MBTA reduced service provider costs, albeit temporarily, this action may have compromised the competitiveness of the service provider procurement process. The RFP issued by the MBTA in 2008 for *The Ride* service called for the providers to continue to provide most of the service vehicles. New market entrants may have been discouraged by this requirement, because they did not have access to the capital necessary to acquire a large fleet or expand existing fleets with significant numbers of new vans. Also, the incumbent providers already had possession of sizeable *Ride*-ready fleets, providing them an advantage over any competition.

The MBTA decision to purchase about half of the vans for the providers fundamentally altered the terms of the RFP --- after the competition ended. There might have been new entrants to the market had it been known in the market that the requirement to provide a portion of the fleet had changed. All other factors being equal, providers with smaller fleets might have considered submitting proposals to the MBTA, since much less up-front capital would have been needed. In any event, the MBTA decision, had it been made before the MBTA issued the service provider RFP, could have helped to level the playing field for the competition and reduce the cost of *The Ride* service.

Finding 9: The MBTA may need to incur significant costs in the near future to maintain van fleet size.

According to MBTA staff, the MBTA has not determined whether it has permanently changed its policy regarding the provision of *Ride* vehicles. So it is unclear how the MBTA plans to fund future vehicle purchases. Based on MBTA projections, within two years the MBTA will be in the position of having to purchase new vehicles for *The Ride* as current vehicles are decommissioned and ridership increases require fleet growth. Furthermore,

since the MBTA decided to purchase a large number of vehicles at the same time, they will all age out of the program at the same time. This will produce a situation in approximately six years where a sizeable portion of the van fleet will need to be replaced at once triggering a spike in MBTA costs. It does not appear that the MBTA has considered how it will address this large future funding need.

Finding 10: The MBTA's use of ARRA funds may have led to the premature decommissioning of serviceable vans.

The MBTA decision to purchase vans at the beginning of its five-year service contract for *The Ride* may have resulted in waste, since it appears the agency purchased more vans than are currently needed to provide the service. Since the MBTA purchased 108 new vans at the beginning of the contract, rather than requiring the three service providers to purchase these vans over the life of the contract, the MBTA may have encouraged providers to prematurely take older vans out of service. Specifically, the OIG found that one provider retired a number of vans before the MBTA's "6 year 9 month or 200,000-mile" retirement guideline. This vendor stated it retired a number of *Ride* vans it owned (but which the MBTA paid for in whole or in part) only because the MBTA provided the new ARRA-funded vehicles.

Finding 11: The MBTA violated its own surplus material policy.

The receipt of the new vans enabled the service providers to decommission older vans that had reached the end of their useful lives per MBTA contract guidelines. The MBTA owned a small number of these vans. The MBTA chose to dispose of six of these surplus vans by transferring them to the Metro-West Regional Transit Authority (MWRTA) for \$6.00 (\$1.00 per van).

Although the MBTA transferred the vans to another public entity, this transfer appears to have violated the MBTA policy for the disposal of scrap, obsolete, and surplus materials. This policy states that: "to increase the efficiency of our operations and realize a potential source of revenue, scrap and obsolete/surplus material and equipment is sold to the highest bidder by the MBTA." There is no provision in the policy for making below-cost intergovernmental transfers. While the OIG recognizes that a legitimate public purpose may have been served by the transfer, the MBTA nevertheless violated its own policy. (OSD guidelines do not apply to the MBTA.)

The disposal of other similar vans owned by the service providers (but paid for in large part by the MBTA) garnered between \$1,000 and \$2,000 per van for the providers. The service providers recently disposed of 28 surplus *Ride* vans, with a total estimated market value of between \$28,000 and \$56,000. As the MBTA now owns 108 new vans, it should ensure that a robust policy is in place to address future asset disposal when these vans are decommissioned, as the surplus value could exceed \$200,000.

Conclusion

The OIG began this review by looking into the ARRA-funded MBTA purchase of vans using a pre-existing EOT contract. As a result, a number of the ARRA-mandated accountability and transparency provisions may not have been known at the time of the EOT contract award. Arguably, since EOT did not directly receive ARRA funds for this van purchase, the ARRA provisions would not have applied regardless.

EOT's procurement appeared plagued by the use of unclear specifications, a weak and arbitrary proposal evaluation process, a failure to follow OSD rules, and a poorly documented process. This resulted in the purchase of vans that did not meet specification requirements and that could ultimately cost taxpayers \$700,000 more than necessary. EOT cannot adequately justify the contract award and EOT procurement administration does not provide adequate assurance that taxpayers received the best value.

A case in point is EOT's determination that a two inch variance in van length did not significantly deviate from the specifications. This allowed EOT to justify a portion of the contract award to an incumbent vendor whom EOT staff had familiarity but that offered a higher priced van that failed to meet specifications. This two inch variance may have no impact on the quality and function for the van. However, EOT presumably specified a mandatory length requirement in the RFR for a purpose. Regardless of the reason, EOT's willingness to consider a deviation should have been communicated to all bidders. As it stood, EOT's acceptance of the nonconforming vans was prejudicial to competition.

A formal and objective evaluation process would have predetermined which specification requirements had priority and would have considered the merits, for example, of a two inch deviation in relation to the rationale for setting a maximum length in the first place. Bidders and evaluation committee members alike would have known EOT's rules and applied them consistently. Letting all parties know in advance the criteria for award helps to ensure a fair and open process and helps to eliminate collusion and other abuses that could lead to a favored vendor or proposal. Under the procurement conducted by EOT, bidders and evaluation committee members had no guidance regarding the extent that a proposal could deviate from the mandatory specifications. As a result, the evaluation committee inserted subjective determinations in the midst of the evaluation process.

Compounding the problem is EOT's relatively undocumented evaluation process where subjective criteria came into play, including prior EOT contractual relationships with certain bidders. According to EOT staff, they believed that some of the bidders had previously provided good products and service at a fair price, and as a result those deciding the contract award seem to have been favorably predisposed toward these bidders. As a result, although not one bidder submitted a proposal that fully met mandatory RFR specification requirements for the type E vans used by the MBTA, EOT awarded the contract to the incumbent vendor at a higher price because this vendor offered the "best value." This lack of transparency in the process and EOT's apparent predisposition to

Mr. Jeffrey Mullan and Mr. Richard Davey
July 16, 2010
Page 11

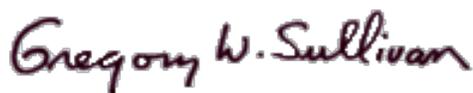
award the contract to the incumbent create an appearance issue that casts doubt on the integrity of this procurement.

For these reasons the OIG recommends a detailed OSD review, that MassDOT and the MBTA revisit how they conduct procurements, and that MassDOT rebid the 2008DRAV contract as soon as practicable.

The findings herein will hopefully be used by both agencies to strengthen their procurement processes. The OIG has forwarded the findings to OSD for a final determination, and further recommends that MassDOT seek OSD's assistance to review its procurement practices generally and obtain additional training or assistance as necessary.

The OIG appreciates the cooperation of MassDOT and the MBTA in this review of ARRA funding, and looks forward to working with these agencies in the future to strengthen their procurement policies and internal controls. Please do not hesitate to contact Deputy Inspector General Neil Cohen with any questions or concerns you may have.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory Sullivan
Inspector General

cc: Ellen Bickelman, State Purchasing Agent
Jeffrey Simon, Director, MA Recovery & Reinvestment Office