

**REPORT ON THE  
OCTOBER 2003 FINANCE  
PLAN FOR THE CENTRAL  
ARTERY/TUNNEL PROJECT**

*Federal Highway Administration*

*Report Number: MH-2004-061*

*Date Issued: June 4, 2004*




# Memorandum

U.S. Department of  
Transportation

Office of the Secretary  
of Transportation  
Office of Inspector General

Subject: **ACTION:** Report on the October 2003 Finance  
Plan for the Central Artery/Tunnel Project  
Report No. MH-2004-061

Date: June 4, 2004

From: Alexis M. Stefani   
Principal Assistant Inspector General  
for Auditing and Evaluation

Reply to  
Attn. of: JA-40

To: Federal Highway Administrator

This report presents the results of our audit of the Massachusetts Turnpike Authority's (Authority) October 2003 Finance Plan (the Plan) for the Central Artery/Tunnel project (project) in Boston, Massachusetts. Finance plans are intended to provide senior program and oversight officials with comprehensive information needed to make appropriate financial decisions about projects. In October 2000<sup>1</sup> Congress limited the total Federal financial contribution to the project to \$8.549 billion.<sup>2</sup> Congress also directed the Secretary of Transportation to withhold obligations of Federal funds and all project approvals until the Office of Inspector General (OIG) determines that the annual finance plan update is consistent with Federal Highway Administration (FHWA) guidance. Exhibit A contains background information regarding FHWA's finance plan guidance.

The project is replacing an elevated expressway through downtown Boston with 7.5 miles of tunnels, surface highways, and bridges, and creating an expanded underground expressway to relieve congestion. In December 2003, the project accomplished a significant milestone by opening the Initial Interstate 93 (I-93) southbound on schedule. The project is now in the final construction stages and was 93 percent complete at the end of March 2004. The Authority estimates a completion date of between May and November 2005.

The Authority estimates the project cost to be \$14.625 billion, and, as of March 31, 2004, \$13.065 billion had been expended on the project. The

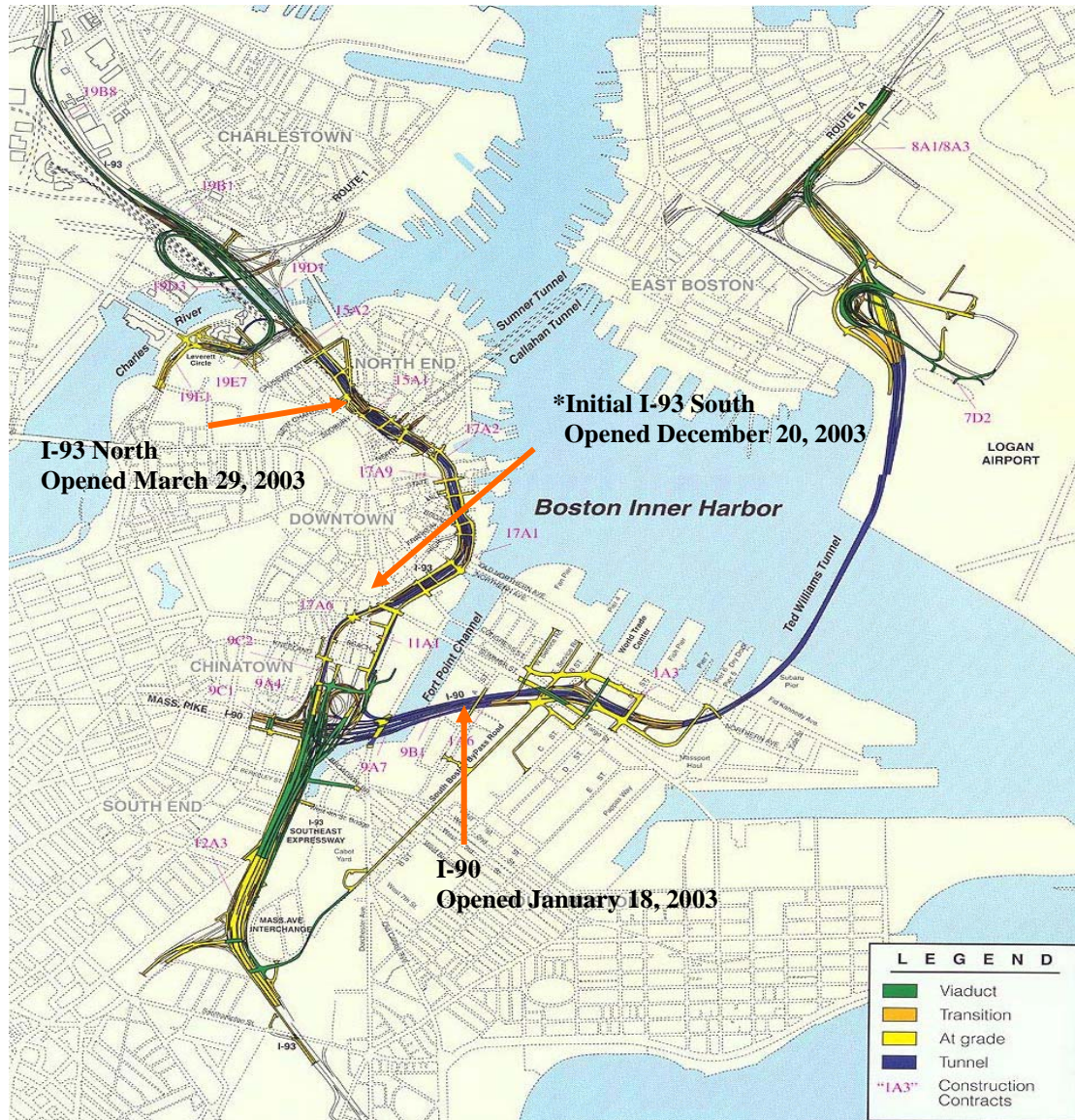
<sup>1</sup> Department of Transportation and Related Agencies Appropriations, 2001, Public Law No. 106-346, § 340 (d), 114 Stat. 1356A-32 (2000).

<sup>2</sup> At the end of March 2004, \$6.785 billion in Federal funds was authorized and \$6.538 billion in Federal funds was expended. In addition, the project expended \$1.5 billion in grant anticipation notes.

remaining project costs of \$1.56 billion include \$761 million for construction; \$338 million for other costs, such as insurance and design; \$283 million for claims and other contingencies; and \$178 million for project management.

As shown in Figure 1, three major milestones (the opening of I-90, I-93 north, and I-93 south) for the completion of I-90 and I-93 have been met.

**Figure 1. Completed I-90 and I-93 Roadway Milestones**



Source: Massachusetts Turnpike Authority

\* The Initial I-93 south opening excluded refurbishing the Dewey Square Tunnel.

Our objectives in reviewing the 2003 Finance Plan were to determine whether the estimated cost of the project is reasonable, identified funding is sufficient to meet the total estimated cost, project schedule is reasonable and the concerns raised in our prior report have been addressed, and cash flow and other project information are accurately presented. In addition, we evaluated the progress that FHWA and the Authority have made in recovering costs for design errors and omissions. Exhibit B describes our scope and methodology.

## RESULTS IN BRIEF

The project, which experienced significant schedule delays in the past, is scheduled to be completed between May and November 2005. The project was initially estimated to be completed by December 1998. We found that the Plan's schedule for completing the remaining two segments by November 2005 is reasonable and the schedule discloses milestone dates that take into account potential risks based on the project's past history of delays, as we recommended in our March 2003 report.<sup>3</sup> Ramp construction and demolition of the viaduct around the Fleet Center may be affected by the Democratic National Convention in July 2004; however, this work is not on the critical path and should not impact the project's schedule.

It is well known that the project has experienced significant cost increases from 1985 to 2000. However, we found that the October 2003 Plan fairly represents the project's cost, identifies adequate funding to cover the cost, and accurately presents cash flow. In 1985, the project was estimated to cost \$2.6 billion. However, costs have steadily escalated throughout the years increasing to \$13.5 billion in June 2000. The Plan now estimates the project's cost to be \$14.625 billion, as it did in the 2002 Finance Plan, and identifies financial commitments of \$8.549 billion in Federal funds and \$6.076 billion in state funds.

Although the total project cost did not change since the last plan, individual amounts budgeted did—primarily construction, project management, and the contingency. See Exhibit C for a comparison of project costs between the 2002 and 2003 Finance Plans and explanations of the differences.

We remain concerned, as we were last year, that the project's unresolved claims<sup>4</sup> represent a significant risk factor to the budget estimate. We found that the Plan did not correctly disclose the number of unresolved claims. For example, the Plan

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<sup>3</sup> Report on the October 2002 Finance Plan for the Central Artery/Tunnel Project, OIG Report No. IN-2003-039, March 31, 2003.

<sup>4</sup> The project defines an open claim as a request by a contractor to receive payment for additional costs, but the project has not yet concluded whether the claim has merit. The project defines an open issue as a contractor claim that the project deems as having merit. In this report, we will use the term "unresolved claims" to represent all open claims and issues.

reports 3,079 unresolved claims valued at \$627 million, as of July 2003. However, project records show that there were actually 4,667 unresolved claims or 1,588 more than reported. Also, we found the \$627 million reported in the Plan was not the estimated value of unresolved contractor claims, but rather the project's assessment of what it believed was the maximum amount contractors would propose for settlement. Further, the Authority reduced the amount needed to settle the \$627 million in unresolved claims to \$427 million,<sup>5</sup> based on its professional engineering judgment.

To determine the reasonableness of the \$427 million budgeted for unresolved claims, and to estimate the contractors' proposed amount of unresolved claims, we statistically sampled 124 out of approximately 4,700 unresolved claims as of July 2003. We estimated that the contractors' proposed amounts for the project's unresolved claims ranged from approximately \$487 million to \$797 million, with a best estimate of \$642 million.<sup>6</sup> Since the project's historical settlement rate has been approximately 50 percent of the contractor's proposed amounts, approximately \$400 million would be needed to cover the ultimate settlement of these claims, using the high end of the range as a worst case scenario. Because the project budgeted \$427 million, we believe this amount is sufficient to cover the project's exposure to unresolved claims.

In addition to the amount budgeted for unresolved claims, we determined that the \$127 million budgeted in the Plan for *future claims* is reasonable. We evaluated the total amounts budgeted for future claims for seven contracts that represented 75 percent of the remaining construction work, as of July 2003. We compared the 10.5 percent rate budgeted for future claims for these seven contracts to the project's 11 percent historical rate for future claims and concluded that the total amount budgeted in the Plan was sufficient. The remaining work is primarily surface work and is less risky than the complex tunneling and bridge work previously completed. In addition, the project has not used as much funds for future claims as anticipated. Although the project had estimated that, as of March 2004, a balance of \$66 million for future claims would be remaining from the \$127 million budgeted in the Plan, the project actually had \$93 million available.

Although the amounts budgeted for unresolved and future claims in the Plan are sufficient, progress made in settling claims, which is essential in minimizing the risk of cost growth, is not discussed in the Plan. We found that the number of unresolved claims actually increased from 4,667 unresolved claims as of July 2003 to 4,805 by March 2004.

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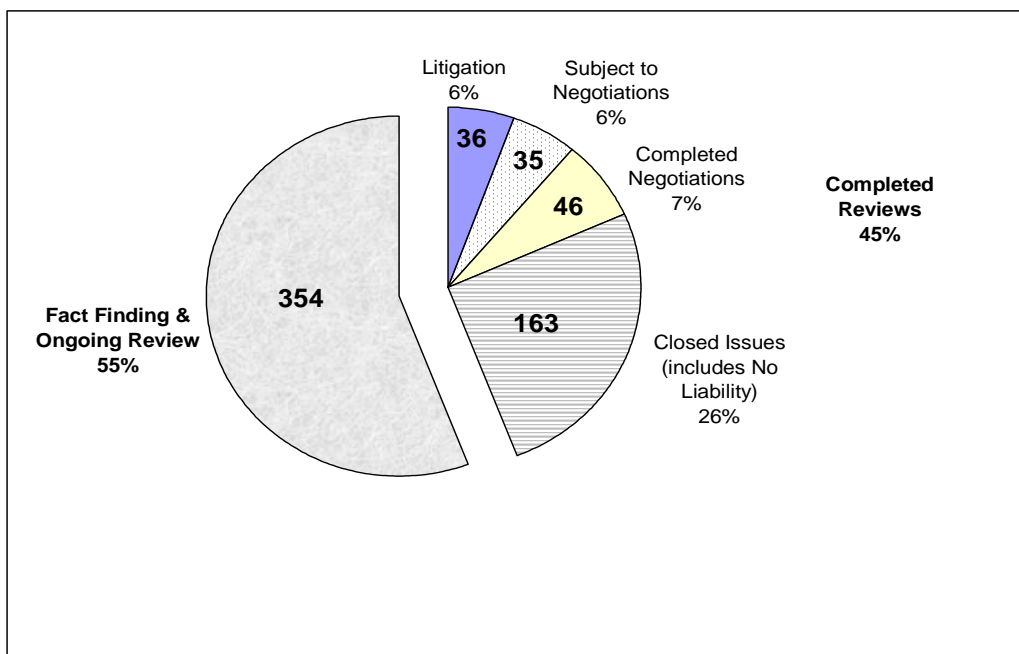
<sup>5</sup> The \$427 million budgeted includes \$304 million in the construction line item and \$123 million in the contingency line item.

<sup>6</sup> The projected estimates were based on using a 95-percent confidence level.

The Plan discloses the Authority may also be able to reduce project costs by aggressively pursuing opportunities to recover costs resulting from potential design errors and omissions already paid on previously approved change orders. The Authority did not include any potential cost recovery dollars in the Plan due to the uncertainty of these efforts. The Authority's cost recovery team (team) had identified in its March 31, 2004 Quarterly Report to FHWA, 634 potential cost recovery items valued at over \$744 million in construction change orders, and estimated that it would reach final settlement on these items by December 2004, if no litigation was required. The team has only recovered \$3.5 million from one design consultant and has not determined how much of the \$744 million in construction change orders might be recoverable. According to the team, only the portion of this amount related to design errors and omissions can be recovered.

We have serious reservations that the Authority will be able to achieve its December 2004 milestone of reaching final settlements, even if no litigation is required. The team still has a significant amount of work remaining to complete its efforts of identifying and recovering costs from design consultants responsible for errors or omissions. As shown in Figure 2, the team has 425 items to resolve (fact finding and ongoing reviews, subject to negotiations, and in litigation), or 67 percent of the 634 cost recovery items as of March 31, 2004. The team still has to complete its fact finding reviews on 354 items, and the remaining 71 items are being negotiated or litigated. The 425 items cover 24 individual design contracts and consultant firms.

**Figure 2. Status of Cost Recovery Items as of March 31, 2004**



Source: Cost Recovery Team

In addition to its efforts to recover design error and omission costs for the remaining 425 cost recovery items, the team is also involved in a lawsuit filed in March 2004 by the Authority and the Commonwealth against the Bechtel/Parsons Brinckerhoff (B/PB) joint venture. The lawsuit seeks recovery from the B/PB joint venture for damages of up to \$146 million for intentionally underestimating project costs. Accordingly, given the number of cost recovery items that have not been closed, and the complexity of the recovery process, the Authority needs to develop a more realistic milestone date for completing the cost recovery process.

Finally, the treatment of the proceeds from the planned sale of the project's headquarters building discussed in our audit reports on the October 2001 and October 2002 Finance Plans remains unresolved. In 1992, the project purchased its headquarters building for \$29 million. Of that amount, \$26 million or 90 percent was financed with Federal apportioned highway trust funds and \$3 million or 10 percent was financed with Commonwealth funds. According to the Plan, the project will receive \$97 million from the sale.<sup>7</sup> The project plans to re-invest \$94 million in net sales proceeds, including the \$87 million Federal share, in the project as Commonwealth funds.

FHWA has determined, and the Department's General Counsel has concurred, that the Federal share of the net sales proceeds are Commonwealth funds and, accordingly, can be used by the Commonwealth for its matching contribution. However, both we and GAO believe that these funds retain their Federal character and, as such, should only be used for this project or other Title 23 Federal Aid-Highway State eligible projects. In a follow-up legal opinion done at our request, GAO concluded that the Federal share of net proceeds did not count against the statutory cap on total Federal contributions established by the Fiscal Year 2001 DOT Appropriations Act. Exhibit D contains GAO's legal opinion.

Although using the sales proceeds will not count against the cap, treating proceeds as state funds could affect other projects nationwide. States are normally required to provide a matching contribution to the project, usually equal to 20 percent of the project cost. Under FHWA's interpretation, states may use their Federal share of proceeds from the sale of real property purchased with Federal funds to significantly reduce or even avoid having to make any direct investment of their own funds for a matching contribution. Further, under FHWA's interpretation, if a state uses the proceeds on a contract that is only funded with state funds, Federal construction requirements such as the Davis-Bacon and Related Acts, and Buy America would not apply. Given that there are differing opinions between the Department and GAO on how proceeds should be used, Congress may want to clarify how these funds should be treated.

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<sup>7</sup> Appraised value of \$102 million less \$5 million in transaction costs.

We recommended that the Authority amend the Plan to disclose the:

- Accurate number of unresolved claims, and how the estimated value of contractor claims was determined, and
- Progress made in settling the backlog of claims and new claims received.

We also recommended that FHWA ensure that the Authority:

- In developing the 2004 Finance Plan, establish and use a process for documenting the reasons for amounts assessed and budgeted for unresolved contractor claims, and
- Develop a more realistic milestone date for completing the cost recovery process and include the revised date in the next quarterly report to FHWA.

## **MANAGEMENT COMMENTS**

At a meeting held on May 24, 2004, FHWA and the Authority agreed to implement our recommendations contained in our May 20, 2004 draft report. On May 24, 2004, Authority officials provided FHWA with an amendment to the Plan with our recommended disclosures. The October 2003 Finance Plan, as amended, meets FHWA finance plan guidance and is otherwise satisfactory; therefore, we concur with FHWA's decision to approve the Plan.

The Authority agreed to develop a process for documenting the reasons for the amounts budgeted and assessed for unresolved contractor claims. This process will be used for the next finance plan update.

The Authority also agreed to develop a more realistic milestone date for completing the cost recovery process and include the revised date in the next quarterly report to FHWA. In a letter dated May 24, 2004, the Authority provided us updated status information identifying 713 potential cost recovery issues, up from the 634 identified as of March 31, 2004, and included in our draft report. Of the team's 713 issues, only 201 issues or 28 percent have yet to be evaluated. These issues relate mostly to eight major design contracts. The Authority's letter also clarified what the cost recovery team hopes to accomplish by the end of this year. The team expects to complete its fact finding and pre-litigation process for the remaining issues by December 31, 2004. During this process, additional cost recovery issues may arise within these eight design consultant contracts. Further, according to the team, final settlements may be delayed due to intergovernmental issues or the drafting of final settlement documents. As a result, not all cost recovery issues will be substantively settled by the end of this year. Accordingly,



at the May 24, 2004 meeting, the team agreed to revise the December 31, 2004 milestone as we recommended.

## **FINDINGS AND RECOMMENDATIONS**

We found that the Plan's project schedule is reasonable and the concerns raised in our prior report have been addressed. The Plan discloses milestone dates that take into account potential risks based on the project's past history of delays, as recommended in our March 2003 report, and we found the project schedule for completing the remaining two segments is reasonable.

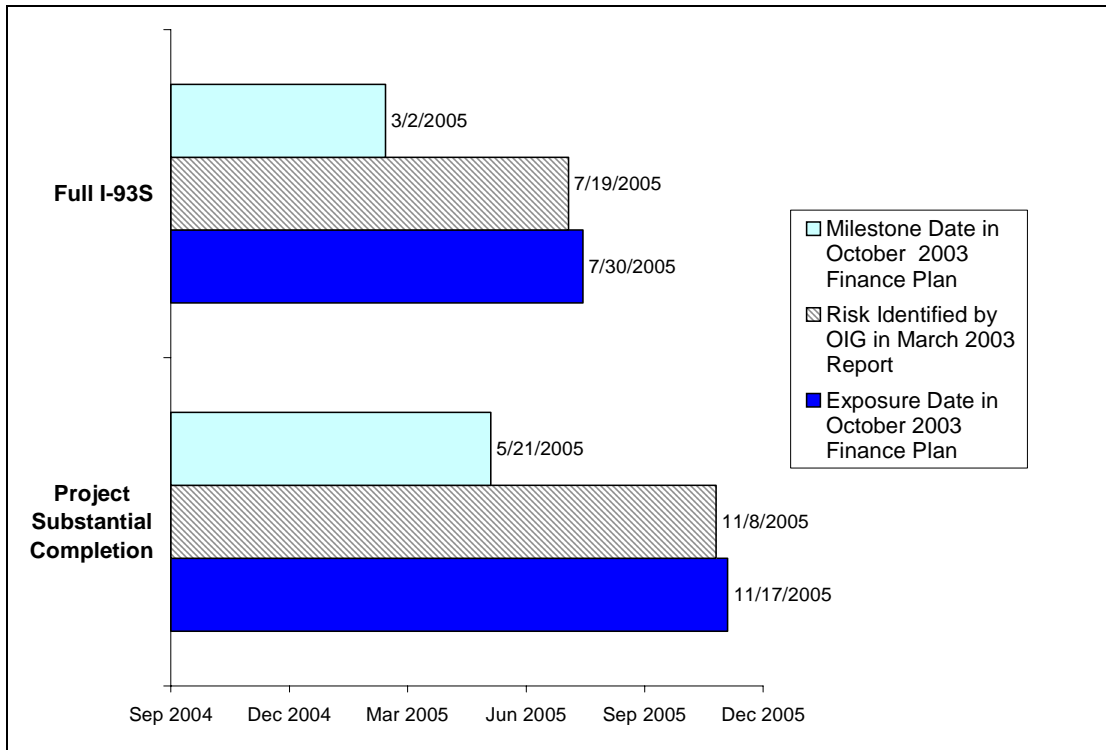
We also found that the October 2003 Plan fairly represents the project's cost, identifies adequate funding to cover the cost, and accurately presents cash flow. Specifically, the Plan estimates the project's cost to be \$14.625 billion, as it did in the 2002 Finance Plan, and identifies financial commitments of \$8.549 billion in Federal funds and \$6.076 billion in state funds. Although the total project cost did not change, in comparison to the 2002 Finance Plan, amounts budgeted for individual cost elements did—primarily construction, project management, and the contingency.

However, we remain concerned, as we were last year, that the project's unresolved claims represent a significant risk factor to the budget estimate. We found that the Plan did not correctly disclose the number of unresolved claims and the estimated value of these unresolved claims was not based on contractors' proposals. While the Plan recognizes many claims have been unresolved for long periods of time, it did not disclose the progress made in settling claims. Finally, the Authority is pursuing opportunities to recover costs resulting from potential design errors and omissions already paid on previously approved change orders. However, we have serious reservations that the Authority will be able to achieve its December 2004 milestone for reaching final settlements, even if no litigation is required.

**Schedule is Reasonable.** We found that the project schedule is reasonable based on the OIG Engineer Advisor's analyses of activities on the project's critical paths and production rates. Further, as we recommended in our March 2003 report, the Plan provides two milestone dates for the remaining segments. The first milestone is the expected completion date if the work goes as planned. The second milestone includes time for potential delays. The Plan's disclosure of these two dates provides a more reasonable estimate of when remaining segments will be completed because it takes into consideration potential risks based on the project's past history of delays.

Figure 3 shows the Plan's milestones and exposure dates for the two remaining segments.

**Figure 3. Plan's Milestones and Exposure Dates for Remaining Segments**



The Full I-93 southbound includes refurbishing the Dewey Square Tunnel that connects the I-93 tunnel north of Dewey Square to the I-93 completed highway south of Dewey Square. Project Substantial Completion will include finalizing construction of all roadways, activating and testing the final Integrated Project Control System<sup>8</sup> and the mechanical and electrical systems, and demolishing the remaining balance of the elevated roadway. Ramp construction and demolition of the viaduct around the Fleet Center may be affected by the Democratic National Convention in July 2004; however, this work is not on the critical path and should not impact the project's schedule.

**Risk of Cost Growth Due to Contractor Claims.**<sup>9</sup> In our March 2003 report, we expressed concern about the great deal of uncertainty that exists with the ultimate settlement of construction claims, which is likely to continue after the project is completed. In July 2003, the National Academy of Engineering reported that the project's unresolved claims represent a significant risk factor to the budget estimate.

<sup>8</sup> Integrated Project Control System is the traffic management and fire/life safety control system for operating the new roadway.

<sup>9</sup> The project defines an open claim as a request by a contractor to receive payment for additional costs, but the project has not yet concluded whether the claim has merit. The project defines an open issue as a contractor claim that the project deems as having merit. In this report, we will use the term "unresolved claims" to represent all open claims and issues.

As recommended in our March 2003 report, the Plan discloses that claims could cost more than anticipated. However, the Plan does not disclose the correct number of unresolved claims. The Plan reports 3,079 unresolved claims valued at \$627 million, as of July 2003. However, we found that project records show 4,667 unresolved claims, 1,588 more than reported in the Plan. Project officials stated this occurred because they inadvertently used the incorrect report as the source for the number of unresolved claims.

We also found the \$627 million reported was not the amount proposed by contractors for unresolved claims, but rather the project's assessment of what it believed was the maximum amount contractors would propose for settlement. However, the Authority did not include the \$627 million in the Plan but instead reduced the amount needed to settle the \$627 million in unresolved claims to \$427 million based on its professional engineering judgment. The \$427 million budgeted includes \$304 million in the construction line item and \$123 million in the contingency line item. However, we could not determine, based on project records, whether the Authority had accurately assessed the amount of its unresolved claims and budgeted sufficient funds to cover them because the project lacked a process for documenting its estimate of the value of claims. According to the American Institute of Certified Public Accountants' *Guide for Prospective Financial Information*, the process used to develop financial forecasts should provide adequate documentation of both the financial forecasts and the process used to develop them.

In its October 2003 report, Deloitte and Touche (D&T), the company that conducted the Commonwealth's independent assessment of the project's cost and schedule,<sup>10</sup> also found that the project did not adequately document the value of outstanding claims. Although D&T did not believe the project's cost estimate should be increased, it recommended that the project closely manage and monitor the settlement of claims so that project costs do not increase in the future.

To determine the reasonableness of the \$427 million budgeted for unresolved claims, and to estimate the contractors' proposed amount of unresolved claims, we statistically sampled 124 out of approximately 4,700 unresolved claims as of July 2003. We estimated that the contractors' proposed amounts for the project's unresolved claims ranged from approximately \$487 million to \$797 million, with a best estimate of \$642 million.<sup>11</sup> Since the project's historical settlement rate has been approximately 50 percent of the contractor's proposed amounts, approximately \$400 million would be needed to cover the ultimate settlement of these claims, using the high end of the range as a worst case scenario. Because the

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<sup>10</sup> Deloitte and Touche, Central Artery/Tunnel Project, CSU10 - Project Assessment, October 17, 2003.

<sup>11</sup> The projected estimates were based on using a 95 percent confidence level.

project budgeted \$427 million, we believe this amount is sufficient to cover the project's exposure to unresolved claims.

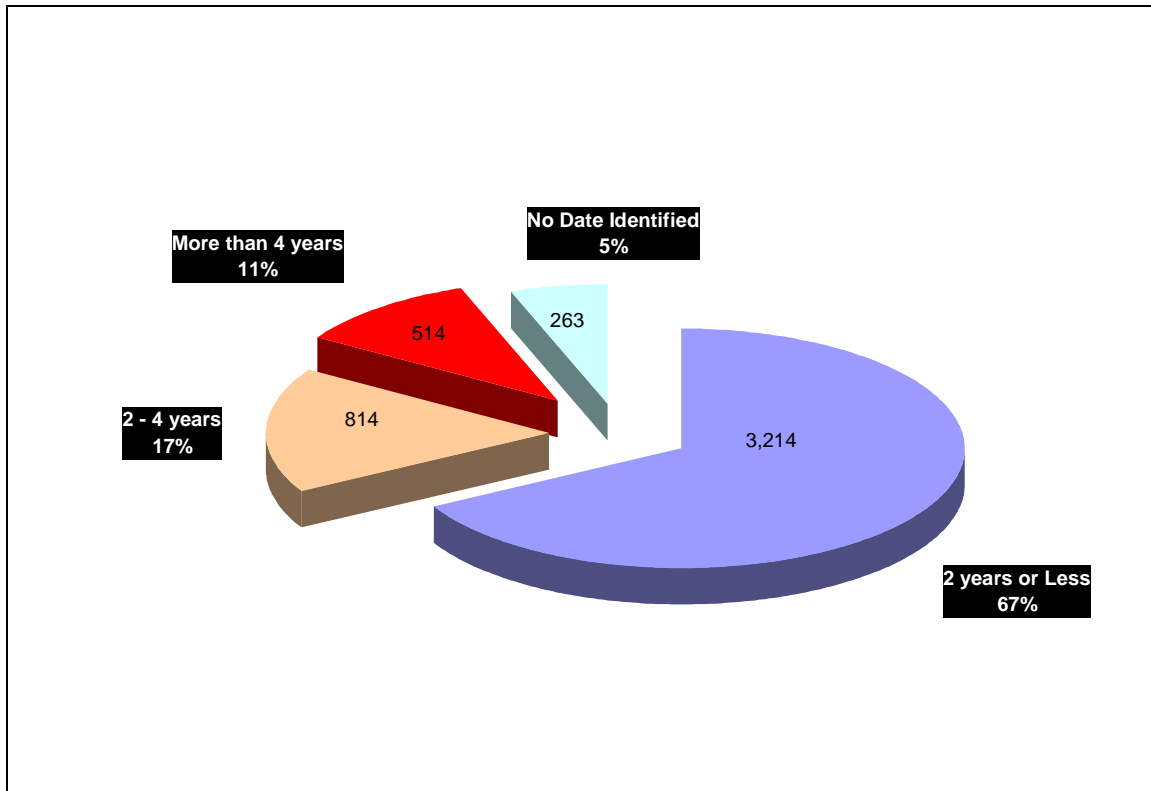
In addition to the amount budgeted for unresolved claims, we determined that the \$127 million budgeted for future claims is reasonable. The Project budgeted \$127 million, or 11 percent, of the \$1.2 billion in remaining construction work as of May 2003, in the construction line item for any future claims. To determine whether the amount budgeted for future claims was reasonable, we evaluated the total amounts budgeted for future claims for seven contracts. These contracts were less than 80 percent complete as of July 2003, and represented 75 percent of the remaining construction work and 81 percent of the total amount budgeted for future claims. We compared the 10.5 percent rate budgeted for future claims for these seven contracts to the project's 11 percent historical rate for future claims and concluded that the total amount budgeted in the Plan was sufficient because the remaining work is primarily surface work and is less risky than the complex tunneling and bridge work previously completed.

Further, the total amount of remaining construction work has decreased from \$1.2 billion, as of May 2003, to \$761 million, as of March 2004. In addition, the project has not used as much funds for future claims as anticipated. Although the project had estimated that, as of March 2004, a balance of \$66 million for future claims would be remaining from the \$127 million budgeted in the Plan, the project actually had \$93 million available.

Although amounts budgeted in the Plan for unresolved and future claims are sufficient, progress in settling claims, which is essential in minimizing the risk of cost growth, is not discussed in the 2003 Finance Plan. We found that the number of claims has continued to grow despite project efforts to resolve claims. For example, from August through December 2003, an average of 418 new claims was received and an average of 406 claims was resolved. As a result, the total number of unresolved claims as of March 2004 has increased to 4,805.

As shown in Figure 4, 514, or 11 percent of 4,805 unresolved claims, were over 4 years old. A February 2003 National Academy of Engineering report stated that claims that have been pending for long periods of time could be more expensive than anticipated if the cost of interest is included in the settlement. The report also cited the increasing difficulty of finding documentation and recollecting details as the issues age, as well as the loss of institutional memory, which may diminish as the project nears completion and key project staff begin to leave.

**Figure 4. Aging of Unresolved Claims  
as of March 2004**



Source: Massachusetts Turnpike Authority

Although the project is expected to be completed between May and November 2005, the project faces challenges in resolving all claims by these dates. For example, the project identified three contracts, with unresolved claims as of March 2004, totaling almost \$31 million, that had not reached final settlement 8, 16, and 20 months after each contract's substantial completion date.

In December 2002, the Authority Chairman directed the project's Claims and Changes Department to establish a plan to resolve the pending backlog of unresolved claims. To accomplish this task, the Claims and Changes Department developed an expedited closeout plan, and increased its staff from 84 in June 2003 to 111 in November 2003 to handle its workload of outstanding claims. As of March 2004, the Claims and Changes Department estimated that it would resolve the 4,805 unresolved claims for 18 contracts by December 2005.

**Funding and Cash Flow is Adequate.** We found that the Plan identifies adequate funding to cover the \$14.625 billion cost of the project and financial commitments of \$8.549 billion in Federal funds and \$6.076 billion in state funds. However, the treatment of the proceeds from the planned sale of the project's headquarters building discussed in our audit reports on the October 2001 and October 2002 Finance Plans remains unresolved.

- Cash Flow Accurately Presented - Based on our review of the Plan's cash flow exhibits, the Commonwealth's Executive Office of Administration and Finance and FHWA's assessment, the Plan accurately presents the project's cash flow by cost element and funding. The Commonwealth certified that the funding sources identified in the Plan were sufficient to meet the project cost and, if the final project cost increased, the Authority identified other funding sources to pay for those additional costs. For example, the Plan noted that the Authority estimates that the sale or lease of real estate could generate an additional \$84 million in revenues.
- Sale of the Project Headquarters Building – In 1992, the project purchased its headquarters building for \$29 million. Of that amount, \$26 million or 90 percent was financed with Federal apportioned highway trust funds and \$3 million or 10 percent was financed with Commonwealth funds. According to the Plan, the project will receive \$97 million from the sale.<sup>12</sup> The project plans to re-invest \$94 million in net sales proceeds, including the \$87 million Federal share, in the project as Commonwealth funds.

FHWA has determined, and the Department's General Counsel has concurred, that the Federal share of the net sales proceeds are Commonwealth funds and, accordingly, can be used by the Commonwealth for its matching contribution. However, both we and GAO believe that these funds retain their Federal character and, as such, should only be used for this project or other Title 23 Federal Aid-Highway State eligible projects. In its legal opinion, GAO concluded that states may neither convert Federal money to state money by buying and selling property nor use the Federal share of recaptured funds to reduce or avoid their obligation to provide its matching funds.

In February 2003, we then asked GAO for a follow-up legal opinion on whether the Federal share of the \$97 million in net proceeds counted against the statutory cap on total Federal contributions established by the Fiscal Year 2001 DOT Appropriations Act. On January 22, 2004, GAO concluded that the cap only applies to apportioned funds, and the Federal share of the net proceeds did not constitute apportioned funds.

Although using the sales proceeds will not count against the cap, treating proceeds as state funds could affect other projects nationwide. States are normally required to provide a matching contribution to the project, usually equal to 20 percent of the project cost.

Under FHWA's interpretation, states may use their Federal share of proceeds from the sale of real property purchased with Federal funds to significantly

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<sup>12</sup> Appraised value of \$102 million less \$5 million in transaction costs.

reduce or even avoid having to make any direct investment of their own funds for a matching contribution. Further, under FHWA's interpretation, if a state uses the proceeds on a contract that is only funded with state funds, Federal construction requirements such as the Davis-Bacon and Related Acts, and Buy America would not apply. Given that there are differing opinions between the Department and GAO on how proceeds should be used, Congress may want to clarify how these funds should be treated.

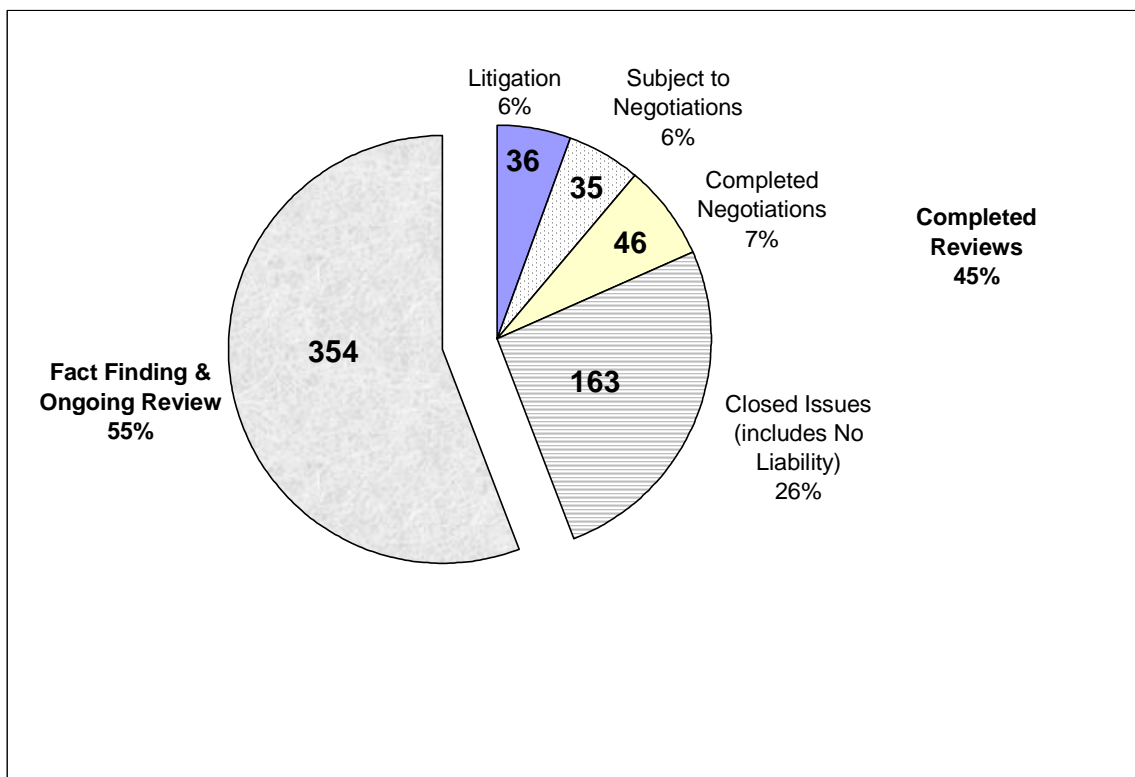
**Cost Recovery for Consultant Design Errors or Omissions.** In our March 2003 report, we reported that the project might be able to reduce project costs by aggressively pursuing opportunities to recover payments on some previously approved change orders. We reported that the project has had an FHWA-approved Cost Recovery Program since 1994 that allowed the project to approve change orders, pay the consultant contractor for the work, and seek reimbursement from FHWA, before determining whether the changes were, in fact, due to design errors. We concluded that the Cost Recovery Program had not resulted in the timely resolution of most items. For example, 8 years of cost recovery efforts, as of March 31, 2003, led to only \$30,000 in recoveries from a single consultant, even though 76 cost recovery items, involving \$53.7 million in change orders, had been resolved. At that time, the project had approximately 295 unresolved change orders in the Cost Recovery Program, valued at \$188 million.

Since January 2003, significant attention has been focused on opportunities to recover costs paid for change orders that might have been caused by errors or omissions by the project's design consultants. The Authority created a team to identify, evaluate, negotiate, and resolve potential claims against the project's design and management professionals. The team established a new cost recovery program that FHWA's Massachusetts Division office approved in September 2003. These initiatives are steps in the right direction.

The Plan discloses the Authority may also be able to reduce project costs by aggressively pursuing opportunities to recover costs resulting from potential design errors and omissions already paid on previously approved change orders. However, the Authority did not include any potential cost recovery dollars in the Plan due to the uncertainty of these efforts. The Authority's cost recovery team (team) had identified 634 potential cost recovery items in its Third Quarterly Report to FHWA, valued at over \$744 million in construction change orders, and estimated that it would reach final settlement on these items by December 2004, if no litigation was required. The team has only recovered \$3.5 million from one design consultant and has not yet determined how much of the \$744 million in construction change orders might be recoverable. According to the team, only the portion of this amount related to design errors and omissions can be recovered.

We have serious reservations that the Authority will be able to achieve its December 2004 milestone of reaching final settlements, even if no litigation is required. The team still has a significant amount of work remaining to complete its efforts of identifying and recovering costs from design consultants responsible for errors or omissions. As shown in Figure 5, the team has 425 items to resolve (fact finding and ongoing reviews, subject to negotiations, and in litigation), or 67 percent of the 634 cost recovery items as of March 31, 2004. The team still has to complete its fact finding reviews on 354 items, and the remaining 71 items are being negotiated or litigated. The 425 cover 24 individual design contracts and consultant firms.

**Figure 5. Status of Cost Recovery Items as of March 31, 2004**



Source: Cost Recovery Team

In addition to its efforts to recover design error and omission costs for the remaining 425 cost recovery items, the team is also involved in a lawsuit filed in March 2004 by the Authority and the Commonwealth against the Bechtel/Parsons Brinckerhoff (B/PB) joint venture. The lawsuit seeks recovery from the B/PB joint venture for damages of up to \$146 million for intentionally underestimating project costs.

The complexity of negotiations and settlements may also hamper the team's efforts to recover costs. For example, the Massachusetts Highway Department



(MHD) held up its approval of the team's tentative \$3.5 million final settlement with one design consultant from January to April 2004 because it disagreed with the language in the settlement document. Also, in February 2004, the team could not reach an agreement with another design consultant, which resulted in the team filing a lawsuit against that consultant. The team also anticipates other cost recovery efforts will be referred for litigation.

Finally, recovery could be seriously delayed because of legal issues regarding the use of the project's Owner-Controlled Insurance Program (OCIP) by design consultants to pay for settlements of outstanding design errors and omissions. According to team members, the Bechtel/Parsons Brinkerhoff joint venture and the insurance companies that manage the project's OCIP policies have advised design consultants that any independent settlements with the team for design errors and omissions fall outside the project's OCIP coverage, and, therefore, the insurance companies will not abide by the settlement agreements.

Accordingly, given the number of cost recovery items that have not been closed and the complexity of the recovery process, the Authority needs to develop a more realistic milestone date for completing the cost recovery process.

## **CONCLUSIONS AND RECOMMENDATIONS**

In view of the foregoing, we are prepared to conclude that the finance plan is consistent with FHWA guidance, contingent on the project amending the finance plan to disclose the:

1. Accurate number of unresolved claims, and how the estimated value of contractor claims was determined, and
2. Progress made in settling the backlog of claims and new claims received.

In addition, we recommend that FHWA ensure that the Authority:

3. In developing the 2004 Finance Plan, establish and use a process for documenting the reasons for amounts assessed and budgeted for unresolved contractor claims.
4. Develop a more realistic milestone date for completing the cost recovery process in the next quarterly report to FHWA.

## **MANAGEMENT COMMENTS**

At a meeting held on May 24, 2004, FHWA and the Authority agreed to implement our recommendations contained in our May 20, 2004 draft report. On

May 24, 2004, Authority officials provided FHWA with an amendment to the Plan with our recommended disclosures. The October 2003 Finance Plan, as amended, meets FHWA finance plan guidance and is otherwise satisfactory; therefore, we concur with FHWA's decision to approve the Plan.

The Authority agreed to develop a process for documenting the reasons for the amounts budgeted and assessed for unresolved contractor claims. This process will be used for the next finance plan update.

The Authority also agreed to develop a more realistic milestone date for completing the cost recovery process and include the revised date in the next quarterly report to FHWA. In a letter dated May 24, 2004, the Authority provided us updated status information identifying 713 potential cost recovery issues, up from the 634 identified as of March 31, 2004, and included in our draft report. Of the team's 713 issues, only 201 issues or 28 percent have yet to be evaluated. These issues relate mostly to eight major design contracts. The Authority's letter also clarified what the cost recovery team hopes to accomplish by the end of this year. The team expects to complete its fact finding and pre-litigation process for the remaining issues by December 31, 2004. During this process, additional cost recovery issues may arise within these eight design consultant contracts. Further, according to the team, final settlements may be delayed due to intergovernmental issues or the drafting of final settlement documents. As a result, not all cost recovery issues will be substantively settled by the end of this year. Accordingly, at the May 24, 2004 meeting, the team agreed to revise the December 31, 2004 milestone as we recommended.

## **ACTION REQUIRED**

In accordance with Department of Transportation Order 8000.1C, within 30 days, please provide the specific actions taken or planned, including specific target dates to implement recommendations 3 and 4.

We appreciate the courtesies and cooperation provided by FHWA and project representatives during this audit. If you have any questions concerning this report, please call me at (202) 366-1992 or Debra Ritt, Assistant Inspector General for Surface and Maritime Programs, at (202) 366-5630.

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## EXHIBIT A. BACKGROUND

Under the provisions of the Transportation Equity Act for the 21<sup>st</sup> Century, all recipients of Federal highway funds with an estimated project cost of \$1 billion or more must submit an annual finance plan to the Secretary of Transportation. Finance plans are intended to provide senior program and oversight officials with comprehensive information needed to make appropriate financial decisions regarding the projects.

On May 23, 2000, the Federal Highway Administration (FHWA) issued guidance to ensure that finance plans reflect the total cost and revenue requirements of a project and provide a reasonable assurance that there will be sufficient financial resources available to complete the project as planned. FHWA's guidance requires that finance plans and annual updates include the following elements.

- **Cost Estimate.** All costs and the value of all resources that will be used to complete the project.
- **Implementation Plan.** A project schedule and cost-to-complete, in annual increments in year of expenditure dollars.
- **Construction Financing and Revenues.** All funding sources that will be used to meet project obligations, clearly described as committed or anticipated amounts, with an evaluation of the likelihood of the anticipated amounts being realized.
- **Cash Flow.** The annual cash income and disbursements on the project.
- **Other Factors.** Other data relevant to program and oversight officials.

The guidance also requires that finance plans be prepared in accordance with recognized reporting standards, such as the American Institute of Certified Public Accountants' *Guide for Prospective Financial Information*.

In October 2000, in the aftermath of a \$1.4 billion cost increase earlier that year, Congress limited the total Federal financial contribution to the project to \$8.549 billion, and required that the Office of Inspector General review all finance plans to determine whether they comply with FHWA finance plan guidance. Congress also directed that, in order to receive Federal funding, each annual finance plan must show that the state:

- is complying with a June 22, 2000, partnership agreement with FHWA,

- is complying with the requirement for a balanced statewide program, and
- will spend no less than \$400 million each year on the Statewide Road and Bridge Program outside the project.

## **EXHIBIT B. SCOPE AND METHODOLOGY**

To determine whether the October 2003 Finance Plan (Plan) complied with Federal Highway Administration's (FHWA) guidelines, we compared the Plan with the applicable guidance. We also reviewed the Plan's cost, funding, cash flow, schedule, and disclosure statements for project cost risks due to contractor claims and cost recovery. We updated prior finance plan audit work to establish a baseline of audit coverage and to identify any major changes in presentation or Plan contents made by the project since our last report.

To evaluate the Plan's cost estimate, we analyzed any significant cost increases and the underlying assumptions for those increases, and reviewed the independent cost assessments developed by Deloitte and Touche (D&T) and FHWA. Where necessary, we obtained explanations for any major difference. We also reviewed the National Academy of Engineering reports, dated February 2003 and July 2003 on the project's cost and schedule update process. We reviewed the Plan's cash flow exhibits, D&T's report, and FHWA's assessment documentation to determine whether the Plan accurately presented the project's cash flow. We contacted Commonwealth officials and reviewed relevant documentation to assess the Plan's financing requirements, cash flow, and other relevant factors. In addition, we evaluated the January 22, 2004 General Accounting Office's legal opinion related to the project's anticipated sale of the headquarters building to determine its impact on the Plan's funding sources.

To evaluate the reasonableness of the project's revised schedule, the OIG Engineer Advisor analyzed activities included in the project's critical paths and the production rates for several construction contracts.

To evaluate the Plan's budgeted amount for unresolved claims, we randomly selected 124<sup>1</sup> unresolved claims out of approximately 4,700 unresolved claims as of July 2003 and estimated the range of the total value of contractors' proposed amounts. We applied the upper limit of \$797 million from our estimate, as a worst case scenario, to the project's historical settlement rate of approximately 50 percent and compared this amount to the budgeted amount. To determine whether the project could document its assessed and budgeted values, we judgmentally selected 11 contractor proposals covering 149 unresolved claims and interviewed project management officials from the Massachusetts Turnpike Authority and the Bechtel/Parsons Brinkerhoff joint venture. We also reviewed documentation provided by the Authority to determine the age of unresolved

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<sup>1</sup> However, 71 claims were eliminated from the sample because they were administrative adjustments made by the project or were already settled.

claims, progress made in settling claims since the 2002 Finance Plan, and whether the amount budgeted for future claims was reasonable.

In determining whether any progress had been made in recovering costs from design errors and omissions, we interviewed staff from FHWA and the cost recovery team (team). We also reviewed documents related to cost recovery issues, such as the team's Revised Cost Recovery Program and its inventory of cost recovery items, Quarterly Reports to FHWA, and FHWA reviews of the team's activities.

Our audit was conducted at the FHWA Massachusetts Division Office in Cambridge, Massachusetts; the Massachusetts Turnpike Authority and the Central Artery Project Offices in Boston, Massachusetts; and FHWA Headquarters in Washington, DC. Our audit was conducted from October 2003 to May 2004 in accordance with Government Auditing Standards prescribed by the Comptroller General of the United States.

We followed up on prior audit recommendations made in our March 2003 report on the October 2002 Finance Plan to determine whether the concerns raised in our March 2003 report have been addressed.<sup>2</sup>

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<sup>2</sup> Report on the October 2002 Finance Plan for the Central Artery/Tunnel Project, OIG Report No. IN-2003-039, March 31, 2003.

## EXHIBIT C. COMPARISON OF PROJECT COSTS

### Comparison of Project Costs Reported in the 2002 and 2003 Finance Plans (\$ in millions)

Elements	2002 Finance Plan	2003 Finance Plan	Changes	Explanations
Construction <sup>1</sup>	\$9,342	\$9,417	\$75	Increases for new contracts issued and decreases to future allowance, other contract costs, police details, and settlement of claims.
Force Accounts	603	602	(1)	Decreases to third-party costs.
Right-of-Way (ROW)	593	607	14	Increases for an ROW settlement and decreases to miscellaneous items.
Section Design Consultant	1,041	1,049	8	Increases for I-90 and I-93 delays.
Project Management (Bechtel/Parsons Brinckerhoff Joint Venture) <sup>2</sup>	1,956	1,983	27	Increases to staff to review contractor claims, and overtime due to I-90 and I-93 delays.
Project Management (Mass. Turnpike Authority) & Mass. Highway Department <sup>3</sup>	120	156	36	Add new staff and extend services of current staff to review and resolve claims, and add cost recovery team expenses.
Insurance Premiums	635	615	(20)	Savings from lowering future risk of workmen's compensation, planned sale of workmen's compensation claims, and reimbursements received.
Contingency <sup>4</sup>	<u>335</u>	<u>196</u>	<u>(139)</u>	Decrease is attributable to offsetting increases above.
<b>TOTAL</b>	<b><u>\$14,625</u></b>	<b><u>\$14,625</u></b>	<b><u>\$ 0</u></b>	

<sup>1</sup> The construction item in the 2003 Finance Plan includes \$304 million for the settlement of current claims and \$127 million for future claims.

<sup>2</sup> Project Management services provided by the joint venture include design services, procurement, construction, and construction management services.

<sup>3</sup> Project Management services provided by the MTA and MHD include overall project management, contractor claims and cost recovery administration, and outside auditing.

<sup>4</sup> The contingency item in 2003 Finance Plan includes \$123 million for the mutual settlement of all current claims.

## EXHIBIT D. GAO RESPONSE TO OIG LETTER



United States General Accounting Office Washington, DC 20548  
United States General Accounting Office  
Washington, DC 20548

B-290744

January 22, 2004

The Honorable Kenneth M. Mead  
Inspector General  
Department of Transportation

Subject: Application of Cap on Boston Central Artery/Tunnel Project Funding to Reinvested Proceeds from Highway Property Sales

Dear Mr. Mead:

This responds to your letter dated February 20, 2003, requesting our views on the application of our opinion of September 13, 2002, addressed to Senator John McCain, to funding issues associated with the Boston Central Artery Tunnel (CA/T) project. See B-290744, Sept. 13, 2002. Specifically, you note that the Commonwealth of Massachusetts is planning to sell the CA/T project headquarters building as excess property, and that this property was purchased in part with federal highway trust funds and in part with state funds. You ask if, in the event of such a sale, the portion of the proceeds reflecting the federal contribution to the purchase should be viewed as federal rather than state funds under § 156 of title 23, U.S.C., which was the subject of our September 13 opinion. Assuming that the funds retain their federal character under 23 U.S.C. § 156, you ask whether, upon reinvestment in the CA/T project, the funds would be subject to a statutory provision that caps total federal contributions to the Boston Central Artery/Tunnel (CA/T) project at \$8.549 billion. See Department of Transportation and Related Agencies Appropriations Act, 2001, § 340(d), Pub. L. 106-346 (Appendix-H.R. 5394, § 340) (114 Stat. 1356A-32 (2000))(hereinafter the FY 2001 DOT Act).

It remains our view that the proportionate federal share of proceeds from the anticipated sale of the CA/T project headquarters retains its character as federal funds under 23 U.S.C. § 156, based on the rationale in our opinion in B-290744, Sept. 13, 2002. However, for the reasons set forth hereafter, we believe that if such funds were reinvested in the CA/T project, they would not count against the \$8.549 billion statutory cap established by § 340(d) of the FY 2001 DOT Act.

**Exhibit D. GAO Response to OIG Letter**



## Background

Originally proposed as a project to construct a third harbor tunnel from Boston to Logan Airport, the CA/T project grew by 1985 into a single proposal to reroute, below ground level, several interstate highways (I-90, I-93, and I-95) through Boston. The estimated cost of the project in 1985 was \$2.6 billion. In 1987, the CA/T project was approved, with funding based on 90 percent federal and 10 percent state cost sharing. According to recent estimates the project is expect to cost more than \$14 billion.

Concerned with the need for fiscal discipline, Congress imposed an \$8.549 billion cap on “federal contributions” to the project. *See* § 304(d) of the FY 2001 DOT Act. In imposing the cap, Congress mandated that your office review each annual update of the project finance plan to determine whether it is consistent with FHWA guidelines. You state that the guidance requires that the finance plan identify all costs and resources that will be used to complete the project and all funding sources that will be used to meet project obligations. The plan must conform to recognized accounting and reporting standards and, of course, with the law. Until your office approves the annual plan update, the Secretary of Transportation may not obligate federal funds or give project approvals for the CA/T project.

In your March 2003 report reviewing the October 2002 draft finance plan, you found it necessary to identify how funds are to be counted in calculating whether the cap has been reached.<sup>1</sup> In the report, you stated that the Commonwealth of Massachusetts has been considering a proposal to sell the CA/T project’s headquarters building, which sits on a portion of a larger tract that was purchased for \$29 million in 1992, and to reinvest the proceeds in the project. You noted that, of the \$29 million originally paid to purchase the property, \$26 million came from federal funds and \$3 million came from state funds. You also stated that, given appreciation in the value of the property, the net proceeds from the sale would be approximately \$97 million, of which the state plans to reinvest \$86 million in the CA/T project. Prorated on the basis of the original federal contribution, the federal share of the \$86 million in net proceeds would exceed \$77 million. If this amount were treated as a federal contribution that counts against the cap, the cap would be exceeded. (Your March 2003 report notes that only \$7 million of the \$86 million in proceeds could be reapplied to the project without exceeding the cap).

For purposes of your approval of the October 2002 plan, you required that the state’s plan be amended to disclose an unresolved legal issue surrounding the treatment of the proceeds from the planned sale. Concurrently, you requested our opinion concerning this matter.

In the course of preparing our opinion we solicited the views of the Department of Transportation, which provided us with its position in correspondence dated March 28 and May 21, 2003.

<sup>1</sup> See *Report on the October 2002 Finance Plan for the Central Artery/Tunnel Project*, US Department of Transportation Office of the Inspector General, March 31, 2003 (hereinafter “March 2003 report”).

## Legal Issues

As noted in your March 2003 report, the applicability of the CA/T cap to proceeds from the proposed property sale turns on two issues. The first issue is whether the federal government retains an interest in the sales proceeds in an amount proportionate to its contribution to the purchase price. If it does not, all of the proceeds resulting from the sale would be state funds and, if reinvested in the CA/T project, such funds would not be subject to the cap. If, however, the federal share of the proceeds from the sale retains its character as federal funds, the critical issue is whether this amount is a federal contribution subject to the \$8.549 cap in § 304(d) of the FY 2001 DOT Act.

With respect to the first issue, DOT maintains, as it did during consideration of our September 13, 2002, opinion, that states are allowed to treat the proceeds of excess property sales as state funds pursuant to 23 U.S.C. § 156, irrespective of the initial federal contribution to the purchase. Under 23 U.S.C. § 156, and in particular, § 156(c), states disposing of excess property acquired by federal highway trust (title 23) funds are authorized to use the “federal share” of such funds for “projects eligible under this title.” In our September 13 opinion, we recognized that § 156 authorizes states to apply the federal share of proceeds from excess property sales to other title 23 projects *in lieu* of returning those funds to the Highway Trust Fund. However, we disagreed with DOT’s view that a state’s purchase and sale of real property paid for largely with federal funds extinguishes the federal interest in the sale proceeds. Based on the plain language of § 156 and the absence of any indication that Congress intended to change long-standing administrative recognition of a retained federal interest in excess property sales,<sup>2</sup> we concluded that § 156 simply allows states to reapply the proceeds of such sales to other eligible projects; it does not extinguish the continuing federal interest in, or the federal character of, such proceeds.

DOT’s May 21 letter essentially elaborates on the same arguments that we considered and rejected in our September 13 legal opinion. In our view, there is nothing in DOT’s letter that would justify changing the conclusions we reached in that opinion. Accordingly, it remains our view that under § 156 the federal share of proceeds resulting from the sale of excess property retains its character as federal funds.

Under our September 13 opinion, the federal share of proceeds from the sale of the CA/T project headquarters could be reapplied to any eligible title 23 project, including the CA/T project, without the need to return such amounts to the Federal Highway Trust Fund. However, as we held in that opinion, the portion of the proceeds representing the federal share would retain its status as federal funds, thus giving rise to the second issue, as to whether this amount is a federal contribution subject to the cap in the FY 2001 DOT Act.

As noted previously, § 340(d) of the FY 2001 DOT Act, imposed a cap on “[t]otal Federal contributions to the Central Artery/Tunnel project” of \$8.549 billion. DOT

<sup>2</sup>See DOT’s implementation of the Common Rule, 49 C.F.R. § 1831.

maintains that, even if it were to accept GAO's view that the federal government maintains a continuing interest in excess property sales proceeds (which, as stated above, it does not), the CA/T cap applies only to federal funds directly apportioned to the states under title 23. DOT argues that this construction is supported by the language of other subsections in § 340, which refer to "apportioned" funds, and to the conference report accompanying the FY 2001 DOT Act, which describes § 340 in general as pertaining to funds "apportioned" to the Commonwealth of Massachusetts and the Central Artery/Tunnel project. H.R. Conf. Rep. No. 106-940, at 149 (2000). Funds obtained through the sale of excess property are not apportioned funds and are not, the argument goes, subject to the cap. DOT further points to the "factual record" behind the cap, noting that the dollar amount of the cap (\$8.549 billion) was based on calculations provided by FHWA, which were derived from funds obligated or expected to be obligated, and not from proceeds or net income that might be realized from the sale of property. In this connection, DOT also points to a partnership agreement negotiated between the Commonwealth of Massachusetts and FHWA in June 2000, which established a cap of \$8,549 billion and related the cap to the maximum obligational authority that would be made available for the project.

## Analysis

As framed above, the issue in this opinion turns on the proper interpretation and application of the language in § 340(d) of the FY 2001 DOT Act, which provides: "That total Federal contributions to the Central Artery/Tunnel project shall not exceed \$8,549,000,000." Specifically, the question is whether the term "total Federal contributions" applies only to apportioned funds, as urged by DOT, or any federal funds applied to the CA/T project, which would include the federal share realized from the sale of the headquarters building. We would agree that if the cap only applies to apportioned funds, it would not include any amount resulting from such a sale.

As always, when a matter of statutory construction arises, the starting point must be the statutory language itself. While section 340 does not explicitly define the term "total Federal contributions," it does use other terms to set forth the intended scope of the limitations established by that section that are consistent with a congressional purpose to subject new federal dollars for the project to the cap. For example, § 340(a) directs the Secretary to withhold the obligation of federal funds "apportioned" under certain sections of title 23 to the Commonwealth of Massachusetts unless the Secretary determines that the Commonwealth has met specified criteria.<sup>3</sup> Section 340(b) uses several different terms in referring to the limitations imposed by that section. It provides that after June 22, 2000, the Secretary may not approve advance construction in excess of a specified amount and, more importantly, the conversion of advance construction to "obligation authority" may not cause the "Federal share of funding for the Central Artery/Tunnel project to exceed \$8,549,000,000."

<sup>3</sup> Other references to apportioned funds are found in §§ 340(c) and (e).

While none of these terms in question —“funds apportioned to the Commonwealth of Massachusetts,” “obligation authority,” “total Federal contributions,” and “Federal share”— are specifically defined in the statute, two of these terms do have a generally understood meaning that helps to inform us as to the intended and most logical meaning of the term “total Federal contributions.” These two terms, “apportioned” and “obligation authority,” refer to the amount of newly appropriated highway funds that are allocated annually to the Commonwealth of Massachusetts. See 23 U.S.C. §§ 104 and 105. In light of the large and growing cost of the CA/T project, Congress presumably wanted to ensure that the project would not continue to receive additional amounts of appropriated funds which, if added to prior federal expenditures on the project, would cause the \$8.549 billion cap to be exceeded. In this respect, it is not insignificant in our view that the cap on total federal contributions to the CA/T project is contained in an appropriations measure.

In addition, we believe that the legislative history of the provision supports our reading of the term “total Federal contributions” as applying to newly apportioned funds. The adoption of the cap resulted from several years of congressional concern with fiscal mismanagement of CA/T project funds and the impact that the magnitude of the CA/T project was having on assistance received by communities outside Boston.<sup>4</sup> The House version of what became the FY 2001 DOT Act contained a provision prohibiting any federal official from authorizing project approvals or advance construction authority for the project during FY 2001. H. R. 4475, 106th Cong., 2d Sess., § 336 (engrossed version as agreed to by the House, May 19, 2000). Senator McCain added an amendment to the Senate version of the bill precluding the expenditure of administrative funds for project approvals or advance construction authority “until the Secretary of Transportation and the State of Massachusetts have entered into a written agreement that limits the total federal contribution to the project to not more than \$8.549 billion.” Amendment No. 3441, 146 Cong. Rec. S5183 (daily ed. June 15, 2000). Senator McCain noted that the House provision would effectively halt the project while his proposal would not. On the floor of the Senate, Senator McCain explained his proposed amendment as intended to codify a promise made by then Secretary of Transportation Rodney Slater during a May 3, 2000 hearing that DOT and Massachusetts would enter into a written agreement to cap the federal contribution to the project at \$8.549 billion. *Id.* (146 Cong. Rec. S5183).

As explained at length in DOT’s letter to us dated May 21, 2003, the \$8,549 billion figure Congress used for the cap was apparently derived from FHWA’s calculations, which were based on amounts detailed in the Finance Plan update submitted by the state on March 15, 2000. That document showed federal obligations of \$7,049 billion plus grant anticipation notes of \$1.5 billion. The documents we reviewed indicate that FHWA’s calculation included the amount of federally obligated funds for the CA/T project, that is, the amount of funds subject to apportionment. There was no indication that the cap was intended to include any proceeds or net profits that might

<sup>4</sup> At least as early as 1995 an attempt was made to include in the Department of Transportation and Related Agencies Appropriations Act, 1995, language that would have prohibited the Secretary from authorizing additional CA/T funding until Massachusetts submitted and the Secretary approved a suitable funding plan, which was to be updated bi-annually. 141 Cong. Rec. 20,150 (1995).

be realized from the sale of previously acquired property; nor is it logical to believe that in calculating the cap FHWA would have included such amounts because of its understanding at the time that the proceeds of such sale should be treated as state, not federal funds.<sup>5</sup>

We recognize that, for the purpose of determining what Congress intended when it established the \$8.549 billion cap on “total Federal contributions,” the basis on which FHWA calculated the cap is not necessarily controlling. However, there are clear indications from the Act and its legislative history that suggest that Congress was aware of and accepted FHWA’s view when the cap was enacted. First, § 340(a)(1) of the Act states that the Secretary shall withhold the obligation of apportioned funds and all project approvals for the CA/T project unless the Secretary determines that the Commonwealth of Massachusetts is in full compliance with the June 2000 partnership agreement mentioned previously. The partnership agreement between the State and FHWA specifically states “the maximum level of Federal-aid highway obligation authority... and funding available for the CA/T Project shall not exceed \$8.549 billion.” The partnership agreement went on to state that advance construction funds could not be applied to the project if it would bring the obligation authority total above the amount of the cap. Thus, the partnership agreement, which Congress relied on and in fact incorporated by reference into the statute, implicitly recognized that the cap applied to federally obligated funds, i.e. funds that are subject to apportionment. In fact, the conference report on the legislation specifically states, “[Section] 340 pertains to funds apportioned to the Commonwealth of Massachusetts and the Central Artery/Tunnel project.” H.R. Conf. Rep. No. 106-940, at 149 (2000).

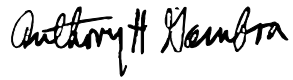
While we recognize that the statutory language imposing a cap on “total Federal contributions” could be interpreted more broadly, we find ample support for DOT’s view that, given the context of the statutory language, the legislative history and the historical record, the cap only applies to apportioned funds. As we stated in our September 13, 2002 opinion, as a general proposition, an agency’s interpretation of a statute it is charged with administering is entitled to deference, unless the agency’s interpretation is unreasonable and constitutes an impermissible construction of the statute. B-290744, Sept. 13, 2002, at 7. Clearly, that is not the case here. Accordingly, since the federal share of the proceeds that would result from the sale of the project headquarters building is not subject to apportionment, it is our view that such federal share should not be counted against the statutory \$8.549 billion cap.

Finally, in a related question you asked whether Massachusetts would be eligible for federal funding to reimburse costs associated with leasing space for the project office if Massachusetts leases the property back after it is sold. Asked about this, FHWA responded that because FHWA has already participated in the cost of housing the project headquarters, it would not participate in any subsequent costs arising from the sale and leaseback of those premises because, in FHWA’s view, this would

<sup>5</sup>Our decision that the federal share of proceeds from the sale of property purchased with highway funds should not be treated as state funds was issued on September 13, 2002, which was after the enactment of § 340 on October 23, 2000.

constitute double payment. FHWA has informed the Massachusetts Transportation Authority of its positions in this regard and has been informed by the state that it will not seek reimbursement of such costs. For that reason, we believe that the question concerning leaseback costs is moot.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Anthony H. Gamboa". The signature is written in a cursive, slightly slanted style.

Anthony H. Gamboa  
General Counsel

cc: The Honorable John McCain  
United States Senate

## EXHIBIT E. CONTRIBUTORS TO THIS REPORT

### THE FOLLOWING INDIVIDUALS CONTRIBUTED TO THIS REPORT.

<u>Name</u>	<u>Title</u>
Debra S. Ritt	Assistant Inspector General for Surface and Maritime Programs
Richard Kaplan	Program Director
George Lavanco	Project Manager
Laurence Burke	Senior Analyst
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Rodolfo Pérez	Engineer Advisor
Petra Rose	OIG Statistician
Thomas Lehrich	Chief Counsel
Seth Kaufman	Associate Counsel
Harriet Lambert	Writer-Editor

## Attachment

The following page contains versions of charts and tables contained in the preceding audit that are more easily read by screen readers. These pages were not part of the original audit report.



**Figure 1. Completed I-90 and I-93 Roadway Milestones**

<b>Major Roadways</b>	<b>Opened on</b>
I-90	January 18, 2003
I-93 North	March 29, 2003
Initial I-93 South	December 20, 2003

**Figures 2. and 5. Status of Cost Recovery Items as of March 31, 2004**

<b>Status of Cost Recovery Items</b>	<b>Number of Items</b>	<b>Percentage</b>
Fact Finding & Ongoing Reviews	354	55
Completed Reviews includes following items	280	45
Litigation	36	6
Subject to Negotiations	35	6
Completed Negotiations	46	7
Closed Issues (includes No Liability)	163	26

**Figure 3. Plan's Milestones and Exposure Dates for Remaining Segments**

<b>Plan's Milestones and Exposure Dates</b>	<b>Full I-93 S</b>	<b>Project Substantial Completion</b>
Milestone Date in October 2003 Finance Plan	3/2/2005	5/21/2005
Risk Identified by OIG in March 2003 Report	7/19/2005	11/8/2004
Exposure Date in October 2003 Finance Plan	7/30/2005	11/17/2005

**Figure 4. Aging of Unresolved Claims as of March 2004**

<b>Aging of Unresolved Claims</b>	<b>Number of Claims</b>	<b>Percentage</b>
More than 4 years	514	11
2-4 years	814	17
2 years of Less	3,214	67
No Date Identified	263	5