PETITION AUDIT REPORT

CITY OF MIAMI

July 1, 2007 through June 30, 2012

Oklahoma State
Auditor & Inspector
Gary A. Jones, CPA, CFE

CITY OF MIAMI

OTTAWA COUNTY, OKLAHOMA

PETITION AUDIT REPORT

JULY 1, 2007 THROUGH JUNE 30, 2012

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Oklahoma State Auditor & Inspector

2300 N. Lincoln Blvd. • State Capitol, Room 100 • Oklahoma City, OK 73105 • Phone: 405.521.3495 • Fax: 405.521.3426

June 19, 2013

Citizens and Petitioners
City of Miami, Oklahoma

Transmitted herewith is the Petition Audit Report for the City of Miami and its public trusts.

Pursuant to **74 O.S. § 212(L)**, 10% of the registered voters of a political subdivision may request that our office audits the books and records of the political subdivision.

Pursuant to your request, and in accordance with those requirements, we performed a special audit for the period July 1, 2007 through June 30, 2012.

The objectives of our special audit primarily included, but were not limited to, the areas noted in your petition. Our findings and recommendations related to these objectives are presented in the accompanying report.

Because a special audit is not an audit conducted in accordance with generally accepted auditing standards, we do not express an opinion on the account balances or financial statements of the City or its public trusts.

Our goal is to promote accountability and fiscal integrity in state and local government. Maintaining our independence as we provide this service to the taxpayers of Oklahoma is of utmost importance.

We wish to take this opportunity to express our appreciation for the assistance and cooperation that most city officials and employees extended to our office during the course of our audit.

This report has been prepared for the citizens of Miami and for city and state officials with oversight responsibilities. This document is a public document pursuant to **51 O.S. § 24A.1, *et seq*.**

Sincerely,

GARY A. JONES, CPA, CFE
OKLAHOMA STATE AUDITOR & INSPECTOR

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OBJECTIVES

ELECTED OFFICIALS

AS OF JUNE 30, 2012

MAYOR

Kent Ketcher, April 2011 – present
Brent Brassfield, February 2004 – April 2011

MEMBERS OF THE CITY COUNCIL

Ward 1, Northeast ..... Rudy Schultz, May 2007 – present
Ward 2, Northwest ..... Scott Trussler, January 2004 – present
Ward 3, Southwest ..... Neal Johnson, May 2012 – present
..... Terry Atkinson, May 2000 – May 2012
Ward 4, Southeast ..... Joe Sharbutt, May 2012 – present
..... John Dalgarn, May 2006 – May 2012

APPOINTED OFFICIALS

AS OF JUNE 30, 2012

TREASURER

Rudy Schultz, May 2012 – present
Terry Atkinson, May 2001 – May 2012

CITY MANAGER

Jeff Bishop, June 2012 – present
Jeff Bishop, Interim, April 2012 – June 2012
Tim Wilson, Interim, May 2011 – April 2012
Huey Long, September 2008 – April 2011
Tim Wilson, Interim, December 2007 – September 2008
Michael Spurgeon, February 1998 – December 2007

MEMBERS OF THE PUBLIC UTILITY BOARD

Member ..... Bobby Carder, May 2005 – present
Member ..... Woody Painter, May 2002 – present
Member ..... Robert Tyson, May 2000 – present
Member ..... Randy Wilkins, May 2011 – present
..... Doug Weston, October 2004 – May 2011
Chairman ..... Scott Trussler, May 2012 – present
..... Terry Atkinson, December 2009 – May 2012
..... John Dalgarn, April 2007 – December 2009

Introduction

The municipal government of the City of Miami is organized under a home-rule charter, as allowed by **11 O.S. § 13-101**, based on the statutory Council-Manager form of government (at 11 O.S. § 10-101, *et. seq.*). While the City is subject to the provisions of other sections of Title 11 of the Oklahoma Statutes, it is primarily subject to the provisions of its charter, which can be amended only by an election of the voters of the city.

The City is governed by the City Council, a mayor, the Public Utility Board, and a city manager:

- The City Council consists of four members who are elected from wards.
- The mayor is elected at large and has a vote equal to the city councilors.
- The Public Utility Board is comprised of four members and a chairman. The members are appointed by the mayor and City Council for four-year terms; they are to be registered city voters, two from each of the two major political parties. The chairman is a city councilor who is appointed by the mayor with the approval of the Council, and he/she has voting power in the event of a tie vote.
- The city manager is appointed by the City Council and the Public Utility Board.

The city charter provides:

> The Public Utility Board shall have under its special charge the construction, development, maintenance and operation of the waterworks, electric (light) and power and the sewerage plants and systems owned by said City and they shall make and enforce all rules and regulations pertinent to their charge and manage the finances of said utility.

The mayor appoints, with the approval of the City Council, one city councilor to serve as a city treasurer. The Council and mayor appoint a person to serve as a city clerk. At the time of fieldwork, the Council contracted with an attorney or law firm – David Anderson, a private solo practitioner – for legal services. Anderson has now been appointed as a city employee.

City officials prepare an annual financial statement that presents the financial condition of the City at the close of each fiscal year, in accordance with the requirements of **68 O.S. § 3002**.

In addition, the City contracts with private, independent CPA firms to audit the City and most of its public trusts annually, as required by law, as well as to serve as accounting consultants for the City and some of its public trusts.

As of June 2012:

- Turner and Associates audited the City and most of its public trusts.
- Ober and Associates audits the Miami Industrial Development Authority, a public trust.
- Crawford and Associates serve as the City's accounting consultant.
- Carol Coiner, a local CPA, serves as the Miami Downtown Redevelopment Authority's accountant.

Notes

1. All dollar amounts included in this report are rounded to the nearest dollar unless full amounts needed to be specified.
2. Fiscal years in this report are abbreviated by using the ending calendar year. For example, the fiscal year of July 1, 2010, through June 30, 2011, would be identified as "FY11."
3. All material quoted in this report is written as it was originally written, regardless of grammar, spelling, or punctuation.

OBJECTIVE I: Review the planning/administration of the 2011 street improvement projects program.

Background

On July 27, 2010, city voters approved a 15-year .65% sales-tax increase to fund street improvements.

On August 15, the City/Special Utility Authority bid the 2010-11 street improvement projects program as 14 different parts.

On October 21, city officials opened the bids. Five companies submitted bids to provide asphalt paving and materials.

On November 1, the City Council approved bid awards, including potential asphalt work for the four companies that submitted the four lowest bids for that part of the projects. According to the minutes, the bids were approved in the City Council meeting, rather than in a Special Utility Authority meeting.

On November 9, the city councilors and mayor voted to issue $12.5 million in bonds through the Special Utility Authority (SUA) to fund the street improvements, which were to be paid with the increased sales-tax revenue. Payments for the street improvements were made from the proceeds of the SUA bonds. The approval of the bond issue was included in both the City Council meeting and in an SUA meeting.

Ultimately, Tri-State Asphalt, whose bid amounts for the asphalt work were generally the lowest, performed nearly all of that "Phase I" 2010-11 work.

Finding #1

The interim city manager waived certain bid specifications after the City/SUA awarded bids.

The bid documents specified, "*All* work performed *shall* meet ODOT standards" [*emphasis added*], and instructed bidders to reference the Oklahoma Department of Transportation's (ODOT's) Specification Book. The bid documents also provided specific, quantitative information regarding requirements for asphalt type, aggregate gradation, density, and compaction.

Tim Wilson, who was the *assistant* city manager at the time of the bid award, wrote the specifications included in the bid documents.

In an addendum to the bid documents, city officials specified, "*All* materials, including asphalt and base materials, *must* meet density/compaction tests, or the contractor must remove and replace material (no penalties allowed, *must* meet density requirements)" [*emphasis added*].

ODOT's Standard Specifications set forth the following density requirements and pay scale:

Acceptance and pay adjustments will be based on tests by the Department and in accordance with the following schedule:

AVERAGE LOT DENSITY % OF MAXIMUM THEORETICAL DENSITY (ALD)	PAY ADJUSTMENT FACTOR (PAF)
Above 97	Unacceptable *
92 - 97	1.00
91 - 92	1.00-(0.07) (92-ALD)
88.1 - 91	0.93-(0.15) (91-ALD)
Below 88.1	Unacceptable *

Adjustment Payment = PAF x Contract Unit Price

* Unless otherwise directed by the Engineer, products testing in this range are unacceptable and shall be removed and replaced at no additional cost to the Department.

On May 16, 2011, Tri-State had an engineering firm perform roller tests on the first street that Tri-State repaired so that it could set a roller pattern for its work. The tests showed that the asphalt had an average density of 92-93%.

As Tri-State completed work on streets, another engineering firm performed roller tests on the asphalt to determine its average density. The City/SUA had awarded the test work to the independent engineering firm through a bid/RFP process.

As Tri-State submitted invoices for the 2011 street improvements, employees in the City's Engineering Department reviewed them in conjunction with the density tests to determine payment according to the density specifications.

On August 4, 2011, Mike Edwards, the manager of the Street Department, wrote a letter to Tri-State Asphalt; Tim Wilson; Joe Waldon, the assistant director of the Public Works Department; and Chuck Childs, the director of the Engineering Department. Edwards referenced Tri-State's May 16

roller tests and wrote, "Therefore it's my recommendation on milled streets if it meets 89% compaction we pay the full amount."

Childs responded by asking why the City should reduce the compaction requirement to 89%, since Tri-State had met the 92% requirement. He later suggested to Wilson that they needed to get a change order, approved by the Council, in order "to vary this addendum and project specifications to pay the contractor, for work completed, and future work."

The next day Wilson informed David Rountree, director of the Public Works Department, that Bill Adams, the owner of Tri-State, asked for something in writing "that states what we have been telling him because he says that our engineer scares him and he is afraid of not getting paid." Wilson asked Rountree to review a draft e-mail to Mr. Adams.

In the draft e-mail, Wilson wrote:

- "Mike Edwards has the authority to make decisions out in the field that may oppose what the specs or guidelines say."
- "Staff has met regarding the density on the paving of the milled streets and have agreed to a workable plan."
- "Notwithstanding, the city will require proper density on the reconstructed streets/chemically treated streets per ODOT standards."

Rountree suggested that Wilson change the sentence, "Mike Edwards has the authority to make decisions *out in the field* that may *oppose what the specs or guidelines say*," to, "Mike Edwards has the authority to make decisions *with you and/or other contractors in the field* that may *modify our agreement*" [*emphasis added*]. Wilson made the changes and sent the e-mail to Mr. Adams.

Later that day, Wilson wrote to Edwards, Rountree, Waldon, and Childs:

- "I want to get our contractor Tri-State paid as quickly as possible."
- "I do not want us to get so hung up on polices that we are not paying our contractors."
- "I think we all agree that there are issues that arise out in the field where we have to be somewhat flexible."

According to Wilson, the specifications in the bid documents were "guidelines," not "requirements". He said that he allowed Tri-State to deviate from the specifications, because some streets had concrete under the old asphalt. When Tri-State was preparing the asphalt, it was vibrating the concrete, which was damaging surrounding infrastructure and utilities.

We observed the language used in the bid proposal did not use ambiguous or vague terms that could be read to mean something more flexible, but rather terms such as "shall" and "must" were common.

According to Mr. Adams, city officials instructed Tri-State not to turn on the vibrators on its rollers after vibrations broke some water lines. He said that the streets did not have good road bases, so Tri-State sometimes met compaction requirements in some places on a street, but not in other places on the same street.

According to employees of the Engineering Department, they were not aware of infrastructure damage resulting from Tri-State's work. As some of the City's water system infrastructure is quite old, the damage to water lines is not out of the realm of possibility.

We inquired about work orders and/or other documentation concerning two water line ruptures that were alleged to be related to Tri-State's milling and resurfacing activity. One work order was found for a residential address, but no documentation was found for repairs to a second location, although some city employees remembered the incident.

According to three of the other four bidders, the use of ODOT specifications in the bid documents affected their bids:

- "If I'd known that the specs would be waived, yes, it would've impacted my bid. When anyone tells me they're going by ODOT specs, my price goes up every time. They're stricter guidelines; you can expect to be tested and will have to be right."
- "It definitely dictated the price."
- "There were a lot of stringent inspections because ODOT doesn't really have the specs for curbs and sidewalks."

Finding #2 **The City/SUA paid the contractor more than the project specifications indicated.**

The Engineering Department recommended that the City/SUA not pay Tri-State the full amounts of at least 25 of its invoices because of asphalt density percentages. The Department recommended that the City/SUA not pay at least four of the invoices at all.

Of those 25 invoices, half of them were paid in full or nearly in full. For the other half, the City/SUA paid the amounts recommended by the Engineering Department.

On those 25 invoices:

- Tri-State invoiced $814,148.
- The Engineering Department recommended $624,500 be paid.
- The City/SUA ultimately paid Tri-State $800,739.

The City ultimately paid Tri-State a total of $1,337,315 for the street work. The City paid the company at least $176,239 more than it should have per the bid specifications (*based on the 25 invoices noted above*). That amount would have been more than the *change order* limit allowed by the Public Competitive Bidding Act, which could have required a re-bid of the project, *provided* the City had properly executed a contract to begin with (see Finding #4).[1]

Finding #3 **The City Council and mayor discussed invoice payments in executive session, a *potential* Open Meeting violation.**

The agenda for the September 6, 2011 Council meeting, included a proposed executive session for "discussion between Council and City Attorney concerning a pending claim, investigation or action, to-wit: payment of claims to Tri-State Asphalt."

The agenda listed several items after the proposed executive session. None pertained to "claims to Tri-State," but one was for possible approval of a "change order to the requirements for overlaying the milled streets."

Following the executive session, the Council and mayor did not take action on the proposed change order. However, they voted unanimously to "approve payment of claims 26 and 26a-f (Street Project) which had been pulled earlier for more discussion."

"Claims 26 and 26a-f" referred to seven invoices from Tri-State that totaled $273,483. City officials originally included them on the "consent agenda" with all other monthly payments to be approved by the Council and mayor in one vote.

According to Mike Romero, the City's chief financial officer at the time, he brought those invoices to the attention of David Anderson, the city attorney, when he (Romero) became aware of the Engineering Department's issues with the street project.

[1] 61 O.S. § 121(B)

According to Anderson, the invoices were discussed in executive session, because there was a possibility that the City could have a legal claim against Tri-State if the company was not performing the street-improvement work as it was supposed to be. The Council had to decide if the City should pay the invoices in full or in reduced amounts.

The Open Meeting Act specifies the permitted reasons for executive session that include "a pending investigation, claim, or action…(in which) disclosure will seriously impair the ability of the public body…" to conduct their meeting "in the public interest." There was no actual or *formal* legal claim pending at the time of the executive session. There was a dispute, both external (with the contractor) and internal (between City departments) concerning the proper amounts to be paid on pending invoices.

Finding #4 **The City did not properly follow the Public Competitive Bidding Act's requirements regarding contracts, bonds, and affidavits.**

Bid Affidavits

Only one of the 13 bidders on the street-improvement project submitted a non-collusion affidavit with its bid, and none included a business-relationships affidavit.

Bid Bonds

According to the bid documents, bidders were not required to obtain bid bonds. As a result, none of the 13 bidders did so.

The purpose of bid bonds is to guarantee that winning bidders will honor their bids and sign all contract documents once they are awarded contracts. They protect the City from financial loss if the winning bidders do not honor their bids.

According to Randy Hinds, the director of the City's Purchasing Department, his department modeled the bid process on the way that the Oklahoma Office of Management and Enterprise Services awards annual statewide contracts. The Purchasing Department did not require bid bonds because "it would have been difficult to figure five percent because it was basically impossible to get exact dollar amounts for the parts of the project because of the way the specifications were written."

The Oklahoma Supreme Court has explicitly held that public entities cannot waive bonding requirements under the Public Competitive Bidding Act[2].

Project Bonds

According to the bid documents, all winning bidders were required to obtain maintenance bonds, and the winning bidder of one of the 14 project parts was required to obtain a performance bond, in addition to the maintenance bond.

Nine of thirteen winning bidders subsequently submitted proof of obtaining maintenance bonds; two submitted proof of obtaining performance bonds; only one submitted proof of obtaining a payment bond.

The purpose of performance bonds is to guarantee that the contractors will complete the projects according to the terms of the contract, protecting the City from financial loss if the contractors do not complete the project on time or at the specified costs[3].

The purpose of payment bonds is to guarantee that the contractors will pay their subcontractors and suppliers, protecting the City from being sued by subcontractors or suppliers that contractors do not properly pay[4].

The purpose of maintenance bonds is to guarantee that the contractors will stand by their work in the future, protecting the City from financial loss if materials or workmanship later prove to have been defective[5].

Project Contracts

Hinds wrote in letters to the winning bidders, "The bid documents will act as your contract."

The purpose of a contract is to clearly stipulate what is expected and required of both the contractor and the City in the way of work, payment, time, and other matters, legally protecting the City once work commences.

The Public Competitive Bidding Act defines "contract" and "bidding documents" separately[6] and requires – for contracts exceeding $50,000 –

[2] 1975 OK 75
[3] 1995 OK AG 31
[4] *Id.*
[5] *Id.*

the execution of a written contract "embodying the terms set forth in the bidding documents" before work is begun.[7]

Finding #5 **The city attorney advised the City Council and mayor to retroactively approve contracts after taxpayers served the City with a legal notice.**

On September 26, 2011, an attorney sent a "Taxpayer Demand – Qui Tam Notice" regarding the street project to city officials on behalf of some Miami residents/taxpayers.

On November 7, City Attorney Anderson asked the Council and mayor to retroactively approve contracts – back-dated to more than one year earlier – with the companies that had won the street-project bids. The Council and mayor did so.

The contracts "authorized" Wilson "to depart from technical specifications if he shall determine, in his sole and binding discretion, that adherence to a technical specification will diminish the value or quality of the work product in a manner contrary to the public interest."

Anderson also asked the Council and mayor to authorize him to seek a declaratory ruling from a judge regarding the City's actions with respect to the street project. The Council and mayor did so.

On November 15, Anderson wrote to Wilson, "I urge you to get all of the contractors to sign off on those contracts approved last week. I have to file the Declaratory Judgment Action no later than November 23rd, 2011, and I *really* need those contracts in the bag before I file." Anderson copied his e-mail to Mayor Kent Ketcher.

On November 23, Anderson filed the request for a declaratory judgment in district court.

Finding #6 **An allegation concerning a 2010 engineering study was not substantiated.**

Within weeks of voters approving the tax increase for street improvements in 2010, city officials commissioned an engineering firm to study the streets and provide a report on the costs and means of repairing them. It

[6] 61 O.S. § 102, supported by § 113(A)
[7] 61 O.S. §§ 103(A), 113(A)

was alleged that this engineering study had cost $300,000 but had been ignored by the City administration.

City officials released the bid notice for the 2011 street projects program before receiving the engineering study, and they held the pre-bid meeting for the project two days after then assistant city manager Wilson had received the engineering report.

According to EST, Inc., the engineering firm contracted, the City paid $21,616 for the study, which included ten pages of information on eleven specific streets. The report provided surface and subsurface information for the streets based on engineering exploration, as well as recommendations for repairing them based on the study performed.

We found the EST study only included a few of the streets worked on in the 2011 street projects program. Nine of the eleven streets listed in the study were for the more expensive street ***reconstruction*** projects included in the 2012 and 2013 street improvements programs, ***not*** the comparatively simpler milling and asphalt overlay projects included in the 2011 program.

Consequently, we concluded that the late arrival of the 2010 engineering study was not a significant issue and that the allegation was not substantiated.

Finding #7 **The former interim city manager had a prior business relationship to the winning contractor.**

In 1995, former assistant city manager Wilson, Bill Adams, and three others, incorporated Wilson Paving & Construction. Mr. Adams and the other three owners also owned Tri-State Asphalt at the time.

In 1999, Wilson sold his share of Wilson Paving & Construction to the other co-owners, who merged the business with Tri-State Asphalt. Following the sale of his interest in the paving business, Wilson became a city employee in April 1999.

According to Mr. Adams, Wilson did not give Tri-State Asphalt any preferential treatment. In fact, he felt that their past business relationship was a hindrance to Tri-State, because Wilson was hesitant for the City to contract with the company because of the appearance of impropriety. We had no way to independently verify or corroborate Mr. Adams' statement.

We observed that during the four-year period prior to 2011, Tri-State Asphalt had been a regular supplier and/or contractor, being paid a total of $378,204, averaging approximately $94,500 annually. However, the City had not done substantial street repairs, construction or reconstruction for some time prior to the extensive work done in 2011.

During the 12-month period of Wilson's second tenure as an interim city manager, the City paid Tri-State Asphalt a total of $1,221,039. At first glance, the increase may be considered significant, but the new sales tax and bond issue for street improvements resulted in the dramatic increase in asphalt expenditures in FY11 and early FY12, and the actual bid award had occurred under former city manager Huey Long, while Wilson was still assistant city manager.

During our interviews, it was indicated that the somewhat relaxed or "fluid" interpretation of bid specifications had not been unique to the 2011 street projects program. According to those interviews, similar situations had occurred in the past and adjustments and modifications had been utilized as deemed necessary, under a philosophy of "that's the way we've always done it." The relatively larger than normal amounts expended for the 2011 projects made this situation seem unusual by comparison.

Conclusions

The information developed during our audit was insufficient to substantiate the allegation that Wilson's prior business relationship with Tri-State Asphalt resulted in improper special or favorable treatment for the contractor.

However, the explanations provided by Wilson and the contractor for the leniency in applying bid specifications, i.e. that unexpected "soft spot" repairs or alleged damage to water lines, required some flexibility in payments, *appeared insufficient to justify the modification of bid specs,* since "soft spot" repairs were a *known issue* and included in the 2010 bid process under bids C11-14 and C11-16.

There were multiple examples of noncompliance with the Public Competitive Bidding Act of the 2011 street improvements program. To modify bid specifications, *after an award decision*, raises a host of potential issues, including legal issues, issues of fairness with regard to other bidders, potential disagreements concerning the costs or impacts or applicability of those modifications, and potential allegations of "favoritism."

Instead of contracting for engineering to prepare project specifications for the 2011 street projects program, the former city manager (Huey Long), in an apparent effort to reduce costs, delegated the writing of the bid specifications to Wilson, then the assistant city manager, who utilized specifications from Oklahoma Department of Transportation (ODOT). This use of generic specifications appeared to have contributed to the internal disagreements between various City departments and the controversy regarding the 2010-11 street improvements.

A lack of understanding of Public Competitive Bidding Act provisions appeared to contribute to other noncompliance regarding required contracts, affidavits and various bonds for other contractors and contracts related to the 2011 street projects program, in addition to the Tri-State contract.

Subsequent Events

Due to several factors, including the Taxpayer Demand – Qui Tam Notice mentioned in Finding #5, the hiring of a new city manager, and the difficulties arising from the 2011 street projects program, we reviewed the present bid records and procedures that have been implemented since our initial fieldwork.

We found the bid documentation, processes and procedures used for the 2012 and the upcoming 2013 street programs to be much improved, with bid specifications that included anticipated potential modifications or alternatives for bidders to consider in their bid proposals and estimates, additional levels of administrative and legal review, and checklists to verify that all required documentation has been obtained.

Commendation

We *commend* the engineering staff for raising the bid specification issue in 2011.

We also *commend* the responses of the city staff, including the engineering, public works and finance/purchasing departments for the significant improvements in the City/SUA's bid records and procedures for the 2012 and 2013 street projects programs, in order to comply with the statutory provisions and requirements of the Title 61 Public Competitive Bidding Act.

OBJECTIVE II: Review operations of the Coleman Theatre.

Background

George Coleman was a mining-company executive and president of First National Bank in Miami in the early 1900s. He commissioned the construction of the Coleman Theatre, which opened in 1929. His family donated it to the City 60 years later.

The Miami Downtown Redevelopment Authority (MDRA) is responsible for the operation of the theater. MDRA was established as a public trust "to promote the development of charitable, scientific, cultural, and educational activities," and it registered as a charitable 501(c)3 organization in 2010. Its beneficiary is the City, and the City Council appoints MDRA's trustees. As of April 2012, the trustees were:

- Brent Brassfield
- Donna Hale
- Charlene Lingo
- William Osborn
- Loretta Robinson
- Greg Smith
- Ron Stowell

The "Friends of the Coleman" is an organization that was established "to promote the Coleman Theatre, to assist in the renovation, repairs, maintenance, and improvements of the physical facilities, and in promotion of the Coleman Theatre." The organization was proposed in 1990, with its first by-laws adopted in August 1994. It operates under the authority of and as a committee of the MDRA.

The theater has approximately two performances per month, and it is considered a tourist attraction on Route 66. The MDRA collects rents for storefront properties that are part of the Coleman building and also rents the ballroom for weddings, as well as proms and other events. Barbara Smith has served as the executive director of the theater since 2004.

The City subsidizes the theater with $50,000 each year. Additionally, the City does not charge for the theatre's utilities, which totaled approximately $97,600 annually, as of January 2011, according to Jill Fitzgibbon, the City's budget/finance director.

Finding #1 **Internal controls for collections from donations, ticket sales, rentals, and concessions were inconsistent and insufficient to provide assurance that all collections were subsequently deposited or recorded.**

At the time of fieldwork and based on interviews with Ms. Smith and others:

- There is no consistent, designed system for complete receipting or recording of the various types of revenue collected at the Coleman Theatre.
- Receipts are not issued for all collections.
- Mode of payment is not recorded for ticket sales. The ticket system defaults to record "cash" as the mode of payment recorded on the ticketing system, whether the payment was by cash, check, or credit card.
- There is no cash register for concession sales or other means of recording individual sales. Concession sales are only recorded in total and not by individual sale transaction at the time of occurrence.
- Receipts are sporadically issued for some cash or check donations, with donors paying by check considered to "have the check for their receipt" as a record, and/or only when receipts are requested.
- Rents from storefront rental properties are not receipted, based on the "check copy as a receipt" rationale.
- Cash donations placed in the donor box by visitors are not receipted, since these donations are "anonymous."
- Since there are not original receipt records of some kind for each and every collection, no reconciliations of the mode of payment (cash, check, or credit card) can be done to determine that the amounts deposited at the bank included ALL collections from each and every source.
- Due to the limited number of personnel (some being volunteer staff), there is an inadequate segregation of duties over revenue/donation collections, and a lack of independent supervisory review, with the executive director performing some of the collection, recording, reporting duties directly.

Some of the basic principles of internal control include daily deposits (or deposit by the next business day); complete transaction records (receipts) of sources of revenue and donations collected on a daily basis as they

occur; full reconciliation procedures to match the amounts deposited (including the *mode of payment* - cash, check, credit card) with the transaction records of collections; complete reports of transaction activity, preferably on a daily basis; and periodic review by knowledgeable personnel that have not handled any aspect of a transaction (segregation of duties).

Finding #2 **Internal controls over financial records were inadequate, resulting in significant omissions in financial and/or tax reporting.**

According to an undated, but apparently early, "financial policy statement" supplied by Ms. Smith, the MRDA was operating with two separate funds. One was an "operating fund" with accounting service provided by the City. The other was a "renovation fund" with accounting service provided by the Miami Chamber of Commerce.

The early "financial policy statement" did not address the operations of the Friends organization/committee. The Friends has operated with various bank accounts, depending on the projects or fundraisers open at the time. At the time of fieldwork, there were four accounts (Performance, Chair, Checking, and Ballroom), but previously the Friends had as many as seven accounts open, according to our interviews.

Prior to 2010, city officials omitted the Friends activity from the City's Comprehensive Annual Financial Report, but they began properly including it with MDRA's activity that year.

In July 2011, city officials contracted with a local certified public accountant to help maintain MDRA records and financial reporting.

The Friends organization also kept records related to the theatre's numerous renovation projects, including information about grants, donations, and costs. As of May 2012, MDRA's treasurer also served as the Friends' bookkeeper. She kept records using QuickBooks accounting software. Since July 2011, she also input MDRA's transactions. She provided the MDRA and the Friends data to the MDRA accountant, who generated a monthly financial statement of the combined amounts.

The MDRA accountant noticed that the theatre's major renovations were not reflected on the MDRA/Friend's tax return, which BKD, an independent CPA firm had prepared.

Interviews indicated that in the past, Charles Tomlin, the City's former CFO, provided fixed-asset information to BKD. However, no other city employee continued providing that information to the firm after his employment ended. According to the City's present accounting firm's fixed-asset schedule, the theatre has had renovations totaling approximately $4.4 million.

Finding #3 **The Miami Downtown Redevelopment Authority has obtained loans without approval from the City Council and mayor, contrary to Title 60 statute.**

On August 5, 2005, the MDRA obtained a $120,000 loan from First National Bank to purchase new seats for the theatre. On August 19, 2010, the MDRA obtained a $150,000 loan to make renovations to the theatre.

The City Council did not approve the two loans, as required by law[8]. According to David Anderson, the city attorney, the MDRA had previously obtained similar loans, but had paid off those loans prior to our audit period.

On April 18, 2011, the City Council and mayor voted to retroactively "ratify" the two loans. At that time, the 2005 loan had a balance of $84,000 and the 2010 loan had a balance of $110,000.

Conclusions Due to the public/private partnership arrangement(s), various groups and individuals kept different theater records and did not combine them or compare them to ensure that they were accurate or complete.

Inadequate oversight by the MDRA board and the City allowed imprudent financial management and inadequate accounting procedures and policies to become prevalent and continue for an unknown period of time, potentially since the beginning of the Coleman Theatre restoration project.

The MDRA did not properly obtain the approval of the City Council before obtaining capital loans. This omission required the City Council to subsequently ratify those loans "after the fact," which is legally acceptable[9], but indicates the lack of responsible administration or oversight in prior years.

[8] 60 O.S. § 176 (A)(3)
[9] 1991 OK 97

Recommendations The entire accounting system for the Coleman Theatre operations should be evaluated by the City's accounting consultant for improvements in internal control over collections, disbursements, and financial reporting.

The City Council, mayor, and city administration should exercise more timely oversight and review of the City's public trusts that Title 60 statutes and prudent administration require. See also our finding regarding the number of Title 60 public trusts under "Other Issues."

OBJECTIVE III: Review the administration of the City retirement plan.

Background

One petition concern requested a review of the City's retirement system, in particular the City's "self-funded" retirement plan. As of June 2012, the City had four pension plans:

- Miami City Employees Retirement System – a single employer, defined-benefit plan for all employees, except police and fire.
- Oklahoma Police Pension and Retirement System (OPPRS) – for its police officers, a statewide multiple employer plan.
- Oklahoma Firefighters Pension and Retirement System (OFPRS) – for its firefighters, a statewide multiple employer plan.
- A "retirement" deferred compensation plan administered by the International City/County Management Association (ICMA).

As the police and firefighters systems are plans administered by the State of Oklahoma, this petition objective was concerned with the local municipal system and an allegation about the ICMA plan.

For information purposes, a defined benefit plan is one that is structured to provide a specific pension benefit, based on certain criteria, such as years of service, age, amount of salary (usually an average), etc. Generally, the *employer* bears the investment risk, meaning if the investment returns (to help fund benefits) do not meet expectations, then the employer must contribute more to the plan in order to fund the "defined benefits."

Potentially inadequate funding of State and local public sector defined benefit plans has been at issue for many years. The investment effects of the 2008 economic downturn and the approaching retirement age of many "baby-boomer" plan participants have increased concerns, similar to the concerns of inadequate funding of federal Social Security benefits.

The Miami City Employees Retirement System is a single employer plan for a relatively small municipality, which bears all the costs of administering the plan, all the investment risks and all the funding risks associated with far larger public employee pension plans.

Finding #1 **The City's local retirement system is underfunded.**

Because the City has a defined-benefit plan, the Government Accounting Standards Board requires city officials to obtain an actuarial valuation report every two years. The report highlights how much the City should contribute to the plan to keep it funded at "normal pension costs" (i.e., for current benefits) and to provide for the current amortization of its "unfunded" portion.

The FY10 and FY12 actuarial reports on the City's plan found as follows:

Years	*Unfunded* liability	Funded Ratio	Percent of covered payroll
FYs 08 & 09	$3,213,120	70.6%	68.3%
FYs 10 & 11	$3,942,130	67.6%	82.6%

According to the FY12 actuarial report, the "peak" funded ratio occurred in 1994, at 87.4%, and has been declined since. In 1994, the unfunded liability was projected to be $550,268, versus nearly $3.94 million in the most recent fiscal years reported above.

Many factors contribute to the above estimates and projections, including the assumed average rate of return over a future period of time. The City's policy is a "7%" assumed rate of return on investments, which is on the *conservative* end of the range used by pension fund administrators. However, a failure of even 1 or 2 percentage points (5% to 6% actual future returns, instead of the assumed 7%) can have a significant impact on the funding of a defined benefit plan over time.

The FY10 actuarial report recommended that the City contribute 9.48% of payroll and that each employee contribute three percent to fully amortize its unfunded liability over a 30-year period. However, city officials budgeted for a contribution rate of nine percent in FY09 and FY10.

The FY12 actuarial report recommended that the City contribute 10.6% of payroll. City officials budgeted for 10.6% for FY13, the present fiscal year.

Conclusion The City's retirement system is underfunded, which was disclosed in the City's audited Comprehensive Annual Financial Report, *a circumstance which is not unique to the City of Miami*. As of FY13, the City was contributing the amount that its actuary recommended for "normal funding" to its retirement system.

Subsequent Event

As of April 1, 2013, the City has merged its single employer plan with the Oklahoma Municipal Retirement Fund, a public sector multi-employer plan associated with the Oklahoma Municipal League.

We concur with this action. The risks and costs of a relatively small single employer plan were too significant for the City of Miami's plan to be considered sustainable over the long-term. Both the City and its employee participants should benefit from the decision.

Finding #2

The City Council and mayor increased the former interim city manager's early-retirement benefits, but an allegation concerning a double payment of retirement benefits was not substantiated.

Employees in the City's retirement system are eligible to retire at the age of 65. Employees whose employments end prior to vesting (at 10 years of service credit) are paid the total amount that they contributed to their retirement plans, plus five percent "per annum, compounded annually." These employees do not receive any of the funds that the City contributed to their plans.

On May 2, 2011, the City Council and mayor named Tim Wilson as the interim city manager. Three months later, they approved a contract for him that specified:

- The City would pay a sum equal to 18% of his salary (which was $90,000 per year) into his ICMA retirement plan.
- When his employment ended, the City would pay him a sum equal to 12% of his base salary ("the employee 3% paid into the City's retirement plan plus the 9% portion the City contributed"), plus "interest and investment profits", "dating back to his employment start date of 4/05/99."

On October 3, 2011, the City Council and mayor approved a budget amendment that would transfer $106,848 in "Unbudgeted Revenue received from the State of Oklahoma for reimbursement of expenses incurred in FY 10/11" to *the City's retirement account*. However, the meeting minutes reflected that the amendment was for "Tim Wilson Retirement to ICMA."

According to the City's Human Resources Department as of April 2013, city officials had not actually transferred the money as approved. This appeared to be a misunderstanding of how the future Wilson retirement

payment would be made, and the action was not subsequently completed as initially considered.

On April 2, 2012, Mayor Kent Ketcher signed an amendment to the City's retirement system that allowed Wilson to receive a lump-sum payment of $110,905. The city attorney advised the councilors that he believed that the Council's earlier vote was sufficient for Mayor Ketcher to sign the amendment, although he encouraged them to address it again during another meeting if any of them preferred.

Wilson's last day of employment was April 5, 2012. The City ultimately paid him $110,905 (78% of which was a taxable distribution) from the City's retirement fund. Since Wilson had become vested under the terms of the retirement plan (service credit of at least 10 years), the amendment to the retirement plan was to allow payment of those vested benefits to Wilson in a manner different (including the City's contributions) from what had been previously established for plan participants.

This type of discriminatory payment in favor of highly paid employees and/or managers is prohibited by IRS rules and regulations for *private sector employers*, but state and local public sector employers are *generally exempt* from such rules and regulations found in the Employee Retirement Income Security Act of 1974 (ERISA).

Conclusion Wilson apparently did not receive double payments of "retirement" benefits, one from the City's retirement system and one from his ICMA account. Instead, he received what had accumulated for him in the City's retirement system between April 5, 1999, and June 30, 2011, and what had accumulated in his ICMA account from July 1, 2011, through April 5, 2012.

Finding #3 **The City Council and mayor never actually voted on the Wilson amendments to the retirement plan in an open meeting.**

We observed the Council's votes on October 3, 2011, were to approve an amendment to the *City's budget* and to amend Wilson's *employment contract*. While the Council's intent may have been to uniquely pay Wilson for certain retirement benefits, they did not actually vote to amend the *City's retirement plan* in October 2011. Instead, only the mayor signed his approval for the amendments to the plan in April 2012.

Conclusion This could be construed as another potential Open Meeting compliance issue.

OBJECTIVE IV: Review the administration of FEMA Disaster Assistance Grant Funds.

Background

In FY08 and FY09, the City of Miami received Disaster Assistance funds that the Federal Emergency Management Agency (FEMA) awarded as a result of the 2007 flood disaster.

The 2007 flood was a major disaster, and officials from FEMA and the Oklahoma Department of Emergency Management (OEM) were on the scene to evaluate and process "Project Worksheets."

Project Worksheets are the FEMA forms that state and local public entities use to request FEMA funding and assistance. The public entity applicant, in this case, the City, accumulates its records of disaster-related expenditures including vendor invoices, estimates, and records of city labor and equipment charges.

Project Worksheets include the signatures of a city employee/representative as well as an OEM or FEMA official. Generally, FEMA disaster assistance is split: 75% paid by the federal government, 12.5% paid by the state government, and 12.5% paid by the local government. This split is based on *estimated* costs, which in turn are based on the documentation provided. The cost estimates are subject to review and can be increased or decreased.

The City's FY09 independent audit reported that 60% of FEMA-related expenses in the auditor's test sample did not have adequate supporting documentation. As a result, the auditor questioned $86,019 of these expenses.

In particular, we reviewed an allegation that certain "heavy equipment" had been moved into a likely flood area, allegedly to incur "damages," and thereby inflate potential FEMA and state reimbursement for the 2007 flood disaster.

Finding

The City has improved its recordkeeping with regard to its FEMA disaster assistance program.

The City's FY10 audit reported that city officials implemented a system in which they filed all FEMA-related documentation in a central location, maintained by specific project, for a seven-year period. Generally, under

OMB Circular A-102, local government sub-grantees must retain grant records for a period of three years beyond the date of closeout of a grant program, so the City's current policy exceeds the minimum required by FEMA.

We followed up on the FY10 audit comment by reviewing documentation compiled by Glenda Longan, the City's Director of Emergency Management. No exceptions were noted in the FEMA expenditure records reviewed by our audit team.

Finding **An allegation regarding FEMA reimbursements for "heavy equipment" damages was not substantiated.**

Ms. Longan supplied our team with a spreadsheet summary of the 2007 flood-related Project Worksheets. The spreadsheet was divided into categories, including police, parks, fire, utilities, recreation, and general. The summary included detailed information of Project Worksheet numbers, project descriptions, the "original" amounts requested, and the revised amounts approved.

The summary indicated that the City applied for approximately $2,733,000 in disaster assistance and that FEMA "approved" approximately $1,972,000, a *reduction* of approximately $761,000. The reductions were scattered throughout the summary of Project Worksheets, but the largest were related to certain police, fire, and parks facilities, particularly the police weapons practice range(s), fire station contents and repair, horse barns, "Expo" building, the parks office, and the parks shop.

We noted the following equipment items were listed under the "General" category:

Project Description	Original Project Worksheet Amount	Revised Project Worksheet Amount
Vehicle damage	$4,423	$4,423
Poly Cart replacement	$4,275	$4,275
Pickup-truck damage	$2,746	$3,041
Backhoe damage	$2,500	$2,500
Totals	$13,944	$14,239

In addition, we tested/traced to the City's "flood fund" records for the FEMA funds received for all Project Worksheets with charges in excess of $3,000 and did not note any exceptions.

We reviewed the "Flood Fund" account for significant unusual expenditures and did not note any. There did not appear to be any FEMA reimbursements or applications for "heavy equipment" damage, other than the single backhoe-damage request.

Conclusion Based on the records and procedures reviewed, the allegation regarding "heavy equipment" damage was not substantiated. The City's response to the FY09 audit finding addressed the documentation issue, as noted by the FY10 audit report and our review.

Recommendation No recommendation is provided for this finding.

OBJECTIVE V: Review the administration of loans from the Oklahoma Water Resources Board

Background

The Oklahoma Water Resources Board (OWRB) is a state agency. Its Financial Assistance Division provides funding for the improvement of water and wastewater facilities by offering long-term, low interest loans; emergency grants for "infrastructure crises that could threaten life, health, or property;" and Rural Economic Action Plan grants to communities with populations of less than 1,750 people for infrastructure improvements.

Political subdivisions of the state that may apply for assistance are:

- Counties and municipalities
- Rural water, sewer, and irrigation districts
- Water-conservation districts
- Public trust authorities
- School districts

The Financial Assistance Division has three loan programs: the Financial Assistance Program, the Drinking Water State Revolving Fund, and the Clean Water State Revolving Fund.

The Office of State Auditor and Inspector reviewed the City's notes payable to the OWRB, Series 2003 to present.

Finding

No irregularities or questionable transactions related to the OWRB loans were noted.

The Office of State Auditor reviewed the OWRB's records regarding the City's loans and the City's debt instruments and did not note any unusual terms or purposes for the related note proceeds.

The OWRB has made eight loans to the City:

	Purpose	Loan Amount	Outstanding*
1	Sewer-system improvements	$4.53 million	$0
2	Sewer-plant improvements	$9.26 million	$0
3	Refinance prior loan	$3.02 million	$2,121,780
4	Refinance prior loan	$1.76 million	$1,012,000
5	Refinance prior loan	$2.74 million	$1,948,220
6	Refinance prior loan	$1.56 million	$957,323
7	Water-plant construction	$1.57 million	$1,116,416
8	Refinance prior loan	$563,000	$411,455
	Total		$7,567,194

*As of April 2012

As of June 2012, the City's OWRB loan balance was $7,567,194. As noted above, some loans were used to refinance the outstanding principal amounts of earlier OWRB construction loans, which were obtained to make improvements to the City's wastewater system.

Conclusion The City's notes payable to OWRB appeared to be properly supported and recorded in the financial records. It did not appear that the financing was handled under any special or unusual circumstances.

Recommendation No recommendation is provided for this finding.

OTHER ISSUES: Title 60 public trusts

Background

Title 60 public trusts are essentially "alter egos" of "the state or of any county or municipality…" These public trusts came into existence in the 1950s and 1960s largely to circumvent an early state constitutional prohibition (formerly found in Article 10 § 27) against "revenue" bonds. This former prohibition has since been removed or at least modified for incorporated municipalities by State Question 626, passed in 1990.

Another purpose was to avoid a different state constitutional provision (found in Article 10 § 26) that prohibited the state, a county or, a municipality to incur debt without a vote of the citizens. Public trusts are sometimes described as "alternative methods of financing" provided to the state, counties or municipalities by the legislature through Title 60 statutes.

The City's FY10 audited financial report lists five "component unit" public trusts in the footnotes:

1. Miami Special Utility Authority (1980)
2. Miami Industrial and Public Facilities Authority (1968)
3. Miami Downtown Redevelopment Authority (1987)
4. Miami Development Authority (2005)
5. Miami Education Facilities Authority (2008)

The City Council serves "ex officio" as the board of trustees for only the Special Utility Authority, i.e. the first public trust listed above. "Ex officio" is Latin for "by reason of office" or words to that effect. The City Council appoints a separate governing body for each of the other four entities.

In addition, the city's charter created a "Public Utility Board" which is *another* apparent administrative board *not generally found* in Oklahoma municipalities.

Finding

The City of Miami has more than the usual number of public trust authorities for municipalities of similar size.

Over a period of decades, the City has created multiple public trust authorities with often similar "boilerplate" trust indenture language and for similarly broadly described trust purposes, creating an administrative environment that appears needlessly overlapping, redundant, potentially

confusing, and likely causing additional legal, accounting, and administrative expense.

As noted above, the original purpose of public trust authorities was to circumvent certain state constitutional prohibitions, including a "back door" method to legalize "revenue" bonds for state government or local governments and to legally incur debt without a vote of the citizens.

Since public trust authorities are used as "alternative methods of financing," municipalities will generally include all or most of their enterprise funds, such as their various utility services, airport operations or other revenue producing activities in a public trust to provide the "revenues" to pay the debt service for "revenue" bonds.

Since the trust indenture language for creating public trusts tends to be similar, it is generally unnecessary to create a separate public trust for any new proposed activity. The purpose(s) of a public trust, as described in the trust indenture, can simply be amended to include a new purpose (such as "educational facilities"), if necessary.

Recommendations

1. The City should consider merging some and/or most of its public trusts to eliminate duplication and reduce administrative overhead, while providing clearer lines of authority and administration over the City's various utilities, enterprise funds, and financing operations.

2. The City may consider amending its city charter to combine its Public Utility Board and Public Utility Fund with its Special Utility Authority. Doing so should reduce administrative overhead and merge similar functions for its public utilities.

Subsequent Event

In November 2012, the City Council took action to transfer the water, sewer, and electric utilities operations and funds to the Special Utility Authority, which previously had only operated the "solid waste/sanitation" utility service.

The Council acted based on legal counsel interpretation of charter provisions and a 1981 ordinance leasing utility operations to the SUA. We concur with this decision, but would recommend it to be ratified by a city charter amendment to either abolish or redefine the purpose of the Public Utility Board.

OTHER ISSUE: Open Meeting Act Compliance

Background

Oklahoma's Open Meeting Act:

- Specifies certain purposes for which a city council may meet in executive session[10]
- Prohibits a majority of city councilors from discussing public business outside of a public meeting[11]

Finding #1

The City Council and mayor discussed business in executive session that is questionably not in compliance with the Open Meeting Act.

At the September 7 and October 18, 2010 meetings, the City Council and mayor met in executive session to discuss "the Coleman Convention Center and Pocket Park Project(s) and the Professional Services Agreement with Crafton, Tull & Sparks".

At the February 7, February 22, March 7, March 14, March 21, April 18, and May 2, 2011 meetings, the City Council and mayor met in executive session to discuss "contractual claims related to the Coleman Project," sometimes "related to drainage issues." The Council and mayor had discussed the subject in open session at the January 17 meeting, the minutes of which reflected, "Tim Wilson discussed Tri-State Inspector and Architect input on the possible raising of the floor and related cost. Mentioned were $10,000 for a design, along with $100,000-$150,000 range for the work. No action was taken at this time."

At the July 5, 2011 meeting, the Council and mayor met in executive session to discuss "possible remedies concerning conditions at 408 K Street NW."

Also, as noted in Objective I, the Council and mayor discussed the dispute over Tri-State invoice payments in executive session on September 6, 2011.

According to David Anderson, the city attorney, the topic of "the Coleman Convention Center and Pocket Park Project(s) and the Professional Services Agreement with Crafton, Tull, & Sparks" was discussed in executive session because an issue suddenly arose with respect to a

[10] 25 O.S. § 307(B)
[11] 25 O.S. §§ 303, 304

specific part of a contract that the City had with Crafton, Tull, & Sparks that could have given the City grounds to institute a legal action against a contractor that had performed work on a Convention Center project.

Finding #2 **A majority of city councilors may have discussed city business outside of a public meeting.**

On December 2, 2010, one city councilor wrote to Huey Long, the city manager, "If you think I need to do some advance work in the form of conversations with the other Council members, let me know."

On June 8, 2011, the same councilor wrote to Tim Wilson, the city manager, in an e-mail that was copied to the other city councilors and the mayor, "Terry and John said they were not in favor of giving the $1000 stipend to employees that received raises recently."

On February 12, 2012, the mayor wrote to the city councilors, Mr. Wilson, Mr. Anderson, and the city clerk, regarding a proposal by Mr. Anderson to limit public comments at Council meetings, "Below is what I am thinking for our 'Citizens' Input' Agenda item. Please read, delete or change any of the language with your thoughts." Mr. Anderson replied "to all" with his suggestion, and a councilor then replied "to all" with his feedback.

Finding #3 **We noted one instance in which trust authority business was conducted in a City Council meeting.**

Based on our review of board minutes of the street improvements bid process in the fall of 2010, the bid award occurred in the November 1 *City Council* meeting. The street improvements were being funded by the bond proceeds from a Special Utility Authority bond issue, with a dedicated sales tax to pay for the 2010 bond issue. Consequently, the bids should have been considered and approved in a SUA board meeting and not in the City Council meeting.

Conclusions As noted in the street improvements findings, ordinary "contractual claims" do not appear to be a topic that the Council could discuss in executive session. Likewise, *without additional information*, "the Coleman Convention Center," "Pocket Park Project(s)," "remedies concerning conditions at" a particular street, and a "professional-services agreement" did not appear to be topics that the Council could discuss in executive session.

The mayor and a city councilor discussed with the other councilors by e-mail the City's policy regarding public comments at meetings.

Additionally, a city councilor at least *suggested* discussing city business with a majority of other councilors on occasions in 2010 and 2011, which the Open Meeting Act prohibits.

Recommendations

1. City officials should discuss in executive session only topics that the Open Meeting Act specifically allows and only when absolutely necessary. The legal basis for proposed executive sessions should be clearly articulated on meeting agendas.

2. No city councilor should discuss the same city business with more than one other councilor outside of a public meeting.

DISCLAIMER In this report, there may be references to state statutes and legal authorities that appear to be potentially relevant to the issues reviewed by the Office of State Auditor and Inspector. The State Auditor and Inspector has no jurisdiction, authority, purpose, or intent by the issuance of this report to determine the guilt, innocence, culpability, or liability, if any, of any person or entity for any act, omission, or transaction reviewed. Such determinations are within the exclusive jurisdiction of regulatory, law-enforcement, and judicial authorities designated by law.

APPENDIX

CITY'S RESPONSE

David E. Anderson, City Attorney
Krista Duhon, Paralegal
City of Miami
129 5th Avenue NW
P.O. Box 1288
Miami, OK 74354

City Attorney 918-541-2335
Paralegal 918-541-2336
Attorney Cell 918-919-2023
Fax 918-542-6845
danderson@miamiokla.net
kduhon@miamiokla.net

Date: Wednesday, June 19, 2013

To: Rick Riffe, Oklahoma State Auditor and Inspector's Office

Re: City of Miami, Oklahoma, Petition Audit Report
(July 1, 2007 through June 30, 2012)

Dear Mr. Rick Riffe:

This is a response on behalf of the City of Miami, Oklahoma, to the draft Petition Audit Report. I provide this response as the City Attorney at the direction of the Mayor and in consultation with the City Manager, Jeff Bishop. During the term of the Petition Audit report the City was served by six (6) different individuals elected to serve as City Council members, four (4) different individuals serving as City Manager or Acting City Manager, and two (2) individuals serving as City Attorney. The City employed various individuals to manage or supervise the various municipal departments. The City also employed or contracted with different individuals throughout the audit period to provide financial advice, assistance with legal compliance, and accounting and audit services, including but not limited to regular consultation with *Crawford & Associates, PC*, CPA's in government accounting, and *Turner & Associates, PLC*, a CPA firm in Vinita, Oklahoma. This response should not be construed as constituting the personal or official position of those elected or appointed officials, employees and contract agents, each of whom may have their own opinion on these matters.

Given that two of the family groups who promoted the Petition drive for the Audit also brought *Qui Tam* (taxpayer) claims against the City and its officials, some individuals associated with City government may have experienced some initial misgivings about the Petition Audit. Nonetheless, the City Manager, Jeff Bishop, promptly provided full cooperation by City staff. It is my observation and opinion that the Petition Audit process has largely been a positive experience for the City of Miami. The Petition Audit provided the City government with the opportunity to review historical management practices, many of which became established and entrenched over past decades, and to reconsider and reform some of those practices in the public interest. I wish to take this opportunity to express appreciation for the assistance and helpful attitude that the employees of the State Auditor's office extended to the City during the course of the audit.

I will address the five (5) specific objectives of the Petition Audit Report as well as the two (2) other issues described therein. Given that lawyers may (and usually do) disagree on the application of any particular law, I will simply state that my legal opinion on any particular topic may or may not coincide with that of the field agents who conducted this audit. However, I will not become bogged down with the details of any such differing professional opinions. Rather, I will attempt to give a constructive response to each topic in a spirit of cooperation and mutual concern for legal compliance and the public interest of the citizens of Miami.

Petition Audit Finding #1 regarding the 2011 Street Improvement Program

The interim city manager waived certain bid specifications after the City/SUA awarded bids.

On July 27th, 2010, city voters approved a .65% sales tax increase to fund street improvements. City Manager Huey Long directed staff to prepare bid packets for the first phase of the newly-funded street program. Assistant City Manager Tim Wilson wrote the specifications included in the bid documents. He modeled the bid specifications on Oklahoma Department of Transportation (ODOT) state highway regulations. Those ODOT regulations included requirements for average lot density of asphalt, and they provided a payment adjustment factor.

Independent contractor Tri-State Asphalt completed work on portions of City streets and submitted invoices for payment. Some of the work utilized a mill-and-overlay technique. In certain cases some of the work performed did not meet ODOT state highway regulations for average lot density requirements. The Street Department manager made certain decisions in the field and thereafter recommended full payment based on practical concerns and unforeseen conditions. The City Engineer reviewed the invoices and recommended a payment adjustment based on ODOT highway standards. The City Manager supported the Street Department manager's opinion and recommended full payment of the invoices.

Although the representations allegedly made in the field by the Street Department manager, or the Assistant City Manager, may have been construed by some as a waiver of bid specifications, this assessment suggests only one possible conclusion. The same facts also support a conclusion that the Street Department personnel and the Assistant City Manager simply believed that the contractor had made the best possible compactive efforts under the circumstances in the field and that further efforts would actually damage the street and/or utility infrastructure. In this analysis, *the City Council did not in any sense waive bid specifications when making full payment*; rather, the City Council exercised its lawful prerogative to compromise competing contractual claims in the face of conflicting evidence and professional opinions.

Nonetheless, the current management and leadership of the City have responded with more cautiously drafted bid proposals and bid approval requirements for the ongoing street improvement program to avoid the practices that led to the allegations which fueled this portion of the Petition Audit.

Petition Audit Finding #2 regarding the 2011 Street Improvement Program

The City / SUA paid the contractor more than the project specifications indicated.

Please see the response to Finding #1, above. The City Attorney gave the City leadership a prompt and full presentation of the evidence related to the disputed street project invoices. The City leadership had options. First, they could pay the invoices subject to the ODOT payment adjustment factors despite the advice given to them by the City Manager concerning the practical conditions in the field at the time the work was performed. In such case the City had to accept the possibility (or likelihood) of civil litigation during which the City would have to cope with the adverse testimony of its own managers and employees. Second, the City leadership could compromise the legal claim for payment of the invoices. Oklahoma law certainly does not require the filing of an actual lawsuit prior to the compromise of competing claims by a governing body. In this case the City leadership acted in what they believed to be the public interest. This decision was made in a public forum following the lawful posting of meeting notice and pursuant to a posted agenda item.

Petition Audit Finding #3 regarding the 2011 Street Improvement Program

The City Council and mayor discussed invoice payments in executive session, a *potential* Open Meeting violation.

Please consider the analysis and response provided above. I will decline to address those factual issues related to Michael Romero, the former City comptroller and CFO, due to pending and ongoing litigation between Mr. Romero and the City.

The State Auditor indicates that the City may have committed a *potential* Open Meeting violation by discussing the disputed street program invoices in executive session. However, the question of the payment of those invoices required the consideration of competing legal claims and contradictory statements by senior staff. Those matters were under formal investigation by the City Attorney. There was the very real possibility of civil claim against the City or by the City. In fact, that prognostication was accurate … a *Qui Tam* claim was soon asserted against the City.

I respectfully disagree with the suggestion that the executive session constituted a potential Open Meeting Act violation. I direct the reader to the formal written opinion issued by the Oklahoma Attorney General at 2005 OK AG 29, in which the second of two questions was "*May a public body convene in executive session under Section 307(B)(4) only if a specific claim or legal action has been officially filed, or is the mere threat or possibility of a claim or legal action sufficient to enter into a closed session?*" .

At paragraph 9, the Attorney General noted that: " *We note at the outset that "pending" investigations, claims, and actions must refer to a wider class of things than those already in existence; otherwise, the term "pending" would be superfluous. ... The first definition connotes something already in existence, while the second includes things not yet existing. Thus, "pending" can refer to an investigation, claim or action which either presently exists or is merely potential or anticipated*" (emphasis added to original). At paragraph 12, the AG answered succinctly that "[t]*o answer your question, a 'pending' claim can refer to litigation or an administrative action that either presently exists or is merely potential or anticipated*" (emphasis added to original). However, the opinion of the State Auditor has led to heightened internal scrutiny of proposed future executive sessions.

Petition Audit Finding #4 regarding the 2011 Street Improvement Program

The City did not properly follow the Public Competitive Bidding Act's requirements regarding contracts, bonds and affidavits.

According to the City Purchasing Officer, his department modeled the bid process on the way that the Oklahoma Office of Management and Enterprise Services awards annual statewide contracts. The written bid documents contained all of the requirements and specifications for the street program work, and those bid documents were signed by both the City and the contractors. There was both formal offer and acceptance of the contract terms established by those signed, written instruments.

However, the present City Manager subsequently required that bid packets include a separate written instrument which must be signed by all parties following the award of bids by the governing body. Further, the City Manager requires the Purchasing Agent to obtain a formal review of the bid packets, including contracts, bonds and affidavits, before a notice to proceed is issued to a contractor. Simultaneously the City Council negotiated a new contract with the City Attorney for a 50% increase in legal services and office hours. This reformed process provides greater assurance of formal legal compliance.

Petition Audit Finding #5 regarding the 2011 Street Improvement Program

The city attorney advised the City Council and mayor to retroactively approve contracts after taxpayers served the City with a legal notice.

Following receipt of a *Qui Tam* demand notice I advised the City Manager and the City Council to secure separate, one-page contractual documents with the contractors in an abundance of caution. Subsequent corrective measures to bid award processes are authorized by *the Oklahoma Public Competitive Bidding Act of 1974* at 61 O.S. §113(D), which provides as follows;

> "1. *After the award of a contract, but prior to its execution, an awarding public agency, upon discovery of an administrative error in the award process that would void an otherwise valid award, may suspend the time of execution of the contract. The agency may rescind the award and readvertise for bids, or may direct correction of the error and award the contract to the lowest responsible bidder, whichever shall be in the best interests of the state.*

2. If the awarding public agency has a governing body, the agency shall, at the next regularly scheduled public business meeting of the governing body of the agency, upon the record, present to the governing body that an error has been made in the award process and shall state the nature of the error. The governing body, upon presentation of the facts of the error, may rescind the award and readvertise for bids, or may direct correction of the error and award the contract to the lowest responsible bidder, whichever shall be in the best interests of the state."

Although much or all of the phase 1 street program work was complete by the time the supplemental instruments were signed, the execution of these instruments cleared up any misconceptions concerning the fact that the contractors could be held legally accountable for the work they had performed according the terms and conditions of the bid specifications.

Nonetheless, the current City Manager and City Council now require that separate formal written contracts and affidavits are included with bid packets, and they require that the Purchasing Agent seek and obtain legal review from the City Attorney prior to letting bids. Further, notices to proceed are not authorized until each participating department head reviews the full contract packet.

Petition Audit Finding #6 regarding the 2011 Street Improvement Program

The Engineering Department attempted to address legally questionable issues with the 2011 street projects program.

Please see responses to Petition Audit Findings #1 - #5, inclusive, *supra*.

Petition Audit Finding #7 regarding the 2011 Street Improvement Program

It is alleged the City paid for an engineering study of the city's streets but did not use the study results.

I make no comment on this issue as the State Auditor concluded that the late arrival of the engineering study was not a significant issue and that the gist of the allegation was unsubstantiated.

Petition Audit Finding #8 regarding the 2011 Street Improvement Program

The former interim city manager had a prior business relationship to the winning contractor.

It appears that this Petition Audit finding does not identify any improper relationship between Acting City Manager Tim Wilson and Tri-State Asphalt.

Petition Audit Findings regarding the Operations of the Coleman Theatre.

The City Council, City Manager Jeff Bishop and City Attorney David Anderson have engaged in extensive consideration of the various options available to address the City's options to comply with its legal obligation to provide oversight for the internal financial controls of the Miami Downtown Redevelopment Authority (MDRA), a public trust formed under 60 O.S. §176 *et seq*. Presently the City has no formal authority over the operations of the MDRA.

On Friday, June 14th, 2013, the City Council formally approved proposed amendments to the MDRA trust indenture which will, if accepted by the MDRA trustees, reform trust operations by naming the City Manager to serve *ex officio* as Trust Manager. Further, the proposed amendments would name the City Clerk as the custodian of all MDRA records and authorize the City to provide accounting services to the trust. On that same date, Friday, June 14th, the MDRA board of trustees voted to commit to the reformation of the trust indenture and appointed an attorney to negotiate the terms thereof.

Petition Audit Findings regarding the Administration of the City retirement plan.

Earlier in 2013 the City Council voted to transfer the City's self-funded retirement plan to the *Oklahoma Municipal Retirement Fund* (OMRF) a well-established retirement program for cities, towns and municipal agencies in Oklahoma. As a result, management of the City retirement funds is entrusted to a full-time staff of highly qualified administrators. Further, the risks associated with retirement fund investments are spread across a much larger pool. Finally, this measure will enhance regulatory compliance.

Petition Audit Findings regarding the Administration of FEMA Disaster Assistance Grant Funds.

As the State Auditor determined that the allegation regarding "heavy equipment" damage was not substantiated, no further comment is made.

Petition Audit Findings regarding the
Administration of Loans from the Oklahoma Water Resources Board

As the State Auditor determined that no irregularities or questionable transactions related to the OWRB loans were noted, no further comment is made.

Petition Audit Findings regarding the Abundance of Title 60 Public Trusts.

The City Manager has long proposed consolidating those public trusts of which the City is the named beneficiary into the smallest possible number. However, because state law requires a unanimous vote of each Board of Trustees prior to dissolution, as well as careful management of the impact on public debt related to each public trust, the process of consolidation will take considerable time and effort.

The State Auditor agreed with the applicable prior legal advice of the City Attorney that the City Council transfer utility operations to the Miami Special Utility Authority. The State Auditor also recommended that the City may consider amendment of the City Charter to clarify these issues. I wholeheartedly agree in principle, and I anticipate that a proposed Charter amendment will proceed to a vote of the people later in 2013.

Petition Audit Findings regarding Open Meeting Act Compliance

With regard to an executive session related to possible contractual claims against two contractors involved with the Coleman ballroom and "pocket park" construction project, I simply direct the reader to the legal analysis presented in *Petition Audit Finding #3 regarding the 2011 Street Improvement Program*, above. Again, the City Attorney was providing confidential legal analysis and advice on a pending investigation which involved the possibility of civil litigation. I respectfully disagree with the State Auditor's analysis on this point.

However, the opinion of the State Auditor has led to heightened internal scrutiny of proposed future executive sessions. Further, the analysis provided by the State Auditor has led to a reaffirmation of the bedrock legal principal that no City Councilperson should discuss the same city business with more than one other Councilperson outside of a public meeting. To that end, both I and the City Manager have reviewed e-mail discipline with various City Council members.

Respectfully Submitted,

/s/
David E. Anderson
City Attorney

OFFICE OF THE STATE AUDITOR & INSPECTOR
2300 N. LINCOLN BOULEVARD, ROOM 100
OKLAHOMA CITY, OK 73105-4896

WWW.SAI.OK.GOV