

**Deconstructing the “Big Dig”: An Analysis of the Role of the Attorney General in the
Central Artery/Tunnel Project Probe
by Brigid Crowley¹**

“All politics is local.”²

It is the largest public works project in United States history. It is also perhaps the most infamous, with near daily reports of cost overruns, missed deadlines, shoddy workmanship and serial mismanagement. Nearly twenty years after its congressional approval, the now \$14.625 billion Central Artery/Tunnel Project, or “Big Dig” as it has come to be known, faces a series of state and federal investigations and is rife with rumors of corruption by project officials and contractors.³ Given its lineage, the almost-completed project barely resembles the model touted at its conception in the 1970s.

The Big Dig was initially intended to reduce traffic flow through the city of Boston by depressing a portion of the I-93 highway and constructing a new harbor tunnel. These vast improvements were to provide a new gateway to the city, not only by improving the area’s infrastructure, but by adding parks and new civic spaces.⁴ Problems notwithstanding, it remains a “tremendous testament to American skill and technology.”⁵ But the project *has* been plagued with problems almost from its inception. Even as the project nears completion, structural defects have come to light. In September 2004, a fissure in an underground wall caused thousands of

¹ Northeastern University School of Law, Class of 2006. This paper is submitted in conjunction with Professor James Tierney’s Spring 2005 Multistate Litigation seminar (May 10, 2005). It includes a substantial summary of the Big Dig’s long and complex history to facilitate an understanding of the Attorney General’s role in the project.

² Former Speaker of the House of Representatives Thomas P. (“Tip”) O’Neill, *Man of the House; The Life and Political Memoirs of Speaker Tip O’Neill*. New York: Random House (1987)(citing advice his father gave him). The Big Dig is the quintessential embodiment of the old adage.

³ Throughout this review, Central Artery Project and Big Dig are used interchangeably.

⁴ Ironically, Bostonians’ time lost to traffic congestion has grown in recent years, making it the 13th worst city for traffic in the nation. The average motorist now loses an estimated 53 hours per year to rush hour congestion. See TEXAS TRANSPORTATION INSTITUTE’S 2005 URBAN MOBILITY REPORT, *available at* <http://mobility.tamu.edu/ums/report>.

⁵ Mike Barnacle, *Sky Isn’t Really Falling at Big Dig*, BOSTON HERALD, March 17, 2005, 6; See also BOSTON PHOENIX EDITORIAL, *What Did Cellucci Know About the Big Dig Overrun Scandal?*, April 5-12, 2001 (calling the Big Dig the “single largest example of bipartisan pork ever produced by Congress”).

gallons of sand and water to flood the roadway, inconveniencing commuters and further bloating the project's budget.⁶ In March 2005, debris from the tunnel ceiling fell onto helpless motorists. Subsequent investigation revealed hundreds of leaks in the new tunnel, with the minor ones caused by gaps in the roof of the tunnel and the more serious ones resulting from structural defects in the tunnel walls. The latest incidents, coupled with intense political and media pressure, have prompted renewed concerns and calls for investigations into workmanship quality and the project's safety. Further, they have eroded project officials' already-diminished credibility. But with construction scheduled to end in September 2005, who is responsible for the problems? And with a project of such massive scope, how can it be determined who should be held accountable, much less bear the cost of fixing these latest defects? Finally, what authority best represents the public interest in this process?

This review contends that the responsibility is far greater than any single individual or agency. It examines the correlation between the evolution of the Big Dig's troubles and the increasing involvement of the Massachusetts Attorney General. While it may be difficult to quantify the extent to which Big Dig's managers and project officials share in the blame, what remains clear is that Massachusetts and federal taxpayers were not afforded the transparency such a massive project requires. Consequently, the public was ill-informed as to how money, *their* money, was managed and spent. As the project nears its final stages, and as cost recovery issues have come to light, the Attorney General's latest role is just unfolding. Given the office's independence, ability to bring both civil and criminal actions, and role as a primary defender of the public interest, it is this author's position that the Attorney General's enhanced responsibility may be one of the most promising opportunities for Massachusetts residents to recoup some of what they have lost and, in the end, to get the tunnel they thought they paid for.

⁶ Kate Zezima, *Big Dig Called Safe for Cars, But Not So For Pocketbooks*. NEW YORK TIMES, April 23, 2005, 26.

The Big Dig Becomes Law: Process and Initial Cost Projections

When it was first seriously considered in the 1980s under then-Governor Michael Dukakis, the Big Dig's primary challenge, besides getting environmental agency approval, was obtaining funding for the ambitious project. In 1985, the Massachusetts Highway Department (hereinafter "Mass Highway"), the agency with responsibility for overseeing and planning the Big Dig, chose the team of Bechtel and Parsons Brinckerhoff (hereinafter "Bechtel") to manage the project,⁷ touting the companies' reputations as industry heavyweights who had handled some of the world's largest projects, including the Hoover dam and New York City's subway system.⁸ By its own account, Bechtel claimed to be "one of the world's premier engineering, construction, and project management companies."⁹ Perhaps more importantly, Bechtel had clout on Capital Hill, particularly in Republican corners where the company was known as a major fundraising contributor to GOP candidates.¹⁰

Though even by early estimates an expensive project, the Governor and the Massachusetts congressional delegation (chiefly former speaker of the House Tip O'Neill and Senator Edward Kennedy) began the arduous task of lobbying for federal funding of the Big Dig. The legislative leaders secured the project's future after they were able to override President Reagan's veto. But it was not without substantial political effort.

⁷ Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005). (Given the scale of the project, portions of design and construction of the Big Dig were broken up into smaller subprojects handled by an assortment of contractors such as Jay Cashman, Modern Continental, Obayashi Corporation, Perini Corporation, Peter Kiewit Sons', J.F. White. Of these contractors, Modern Continental, Lelio "Les" Marino's politically connected firm, was awarded the greatest total value of contracts).

⁸ Raphael Lewis and Sean P. Murphy, *Lobbying Translates into Clout*, BOSTON GLOBE, February 11, 2003, A1.

⁹ Bechtel Corporation, COMPANY OVERVIEW, available at <http://www.bechtel.com/overview.htm>. Critics would contend that the assertion, though brazen, is at odds with the Big Dig's actual record.

¹⁰ *Id.* In fact, two of President Ronald Reagan's Cabinet members, Secretary of State George P. Shultz and Secretary of Defense Casper Weinberger, were Bechtel board members. Both Republican money interests and Democratic labor constituencies benefited from the approval of the Big Dig.

Passage of the Surface Transportation and Uniform Relocation Assistance Act of 1987 was the lifeblood of the project since it contained the federal commitment necessary for its long-range viability. President Reagan vetoed the bill as being too expensive, and in spite of the lobbying efforts by Massachusetts congressman and West Virginia Senator Robert Byrd, the Senate initially voted to sustain the veto. However, Senator Kennedy and Senator Robert Byrd banded together and again pushed for a revote in the Senate. Once the revote was approved, they pressured the deciding vote, Senator Terry Sanford of North Carolina, by threatening to pull tobacco subsidies to North Carolina farmers. When Sanford changed his vote in April of 1987, the Big Dig became law.¹¹

In 1984, during the pre-development phase, the initial estimated cost to complete the Big Dig was approximately \$2.3 billion. By 1989, project management estimated that construction would cost \$4.4 billion with estimated completion by 1998. Of course, current figures now place the true cost of the project at approximately \$14.625 billion, seven times more and seven years later than originally projected.¹² To be clear, the Big Dig's financing structure is intricate and quite complex. For the purposes of this review, the two primary sources of funding for the Big Dig are divided between federal aid reimbursement and non-federal funding contributions.¹³ By

¹¹ Jeffrey S. Huang, *Are Investors Listening When Politicians Speak? Assessing the Securities Fraud Liability of Political Officials Who Manage Large Civic Works Projects*. 39 AM. CRIM. L. REV. 147, Ft. 92 (Winter 2002).

¹² Kate Zezima, *Big Dig Called Safe for Cars, But Not So for Pocketbooks*, NEW YORK TIMES, April 24, 2004, 26.

¹³ For a more comprehensive description of the funding formula, see TURNPIKE AUTHORITY'S CENTRAL ARTERY/TUNNEL PROJECT FINANCE PLAN, October 1, 2004, available at http://www.massturnpike.com/pdf/finances/fin_10-01-04.pdf. ("The law currently guiding federal transportation spending on the Big Dig is known as the Transportation Equity Act for the 21st Century (TEA-21). It was set to expire in 2003, but has been extended several times. The latest reauthorization is scheduled to expire May 31, 2005. Although yearly funding depends on the federal Highway Trust Fund revenues and annual appropriations levels, the Commonwealth is paying a much larger share of the cost for the latter portion of the Big Dig. To finance the shortfalls which have occurred, a number of non-federal funding sources including General Obligation Bonds, third party funds from Massport and the Turnpike Authority, Bond Anticipation Notes, grant anticipation notes issued by the Commonwealth to be repaid with federal reimbursement funds, and Transportation Infrastructure Fund have

current estimates, it is believed that federal reimbursement will total approximately 60 percent of the full cost of the project once full federal reimbursement is realized, though Massachusetts shoulders much of the current cost burden of the Big Dig.¹⁴

Project Construction

At the outset of construction in 1991, the project had two critical construction components designed to improve Boston's highway system. First, the Big Dig construction was to replace the existing six-lane elevated highway which ran through the city and was often clogged with massive traffic congestion with an underground expressway directly beneath the existing road, culminating in a multi-lane, two-bridge crossing of the Charles River.¹⁵ After the underground highway opened to traffic, the elevated highway was to be demolished and in its place scenic parks and community space would be erected. Secondly, Big Dig designers set out to extend the eastern-most portion of the I-90 (locally known as the "Massachusetts Pike") from its former end south of downtown Boston through a tunnel beneath South Boston and Boston Harbor to Boston's Logan Airport, later named the Ted Williams Tunnel.¹⁶ The scale of these construction improvements were, even on the surface, technically and environmentally ambitious. However, it seems that fiscal responsibility proved to be the project's greatest challenge.

been used to fund the project."). Because the Turnpike Authority issues bonds, the state is required to make regular financial statements to government officials and bond investors.

¹⁴ *Id.*

¹⁵ This Includes the Leonard P. Zakim Bunker Hill Bridge, named after the late head of the Anti-Defamation League, an organization dedicated to combating anti-Semitism, racism and bigotry.

¹⁶ Massachusetts Turnpike Authority, BIG DIG BACKGROUND, *available at* <http://www.massturnpike.com/bigdig/background/index.html>.

Project Oversight: Turnpike Authority Management of the Big Dig

In 1997, as project costs were mounting, the Legislature passed the Metropolitan Highway System Act, creating the Metropolitan Highway System and transferring authority from Massachusetts Highway to the Turnpike Authority (hereinafter “Turnpike Authority”) for ownership and supervision of the completion of the entire Central Artery/Tunnel Project.¹⁷ The Turnpike was also mandated to assume ownership and operation of the new roadway facilities upon completion.¹⁸ The Massachusetts Turnpike Authority is a “public instrumentality” authorized to construct, maintain, repair, control, and operate the Massachusetts Turnpike, as well as the Central Artery/Tunnel Project.¹⁹ It was created by the Massachusetts Legislature in 1952 and does not receive state or federal tax revenue. Rather, the roadway operates on toll revenue, supplemented with revenue from leasing, development of land and air rights, as well as advertising. As an independent fiscal entity, the Turnpike Authority could raise money for the Big Dig through selling bonds and pay off the bonds with an increase in tolls and for this reason was considered a superior agency to manage the project.²⁰ However, in spite of the 1997 shift of authority, Mass Highway continues to be the “agency of record” which receives the federal funding for the Big Dig.²¹

The Governor appoints the members of the Turnpike Authority, including a Chairperson. They are subsequently responsible for carrying out “an essential government function.”²² The

¹⁷ Codified at M.G.L.A. c. 81A.

¹⁸ Massachusetts Turnpike Authority, TURNPIKE HISTORY, *available at* <http://www.massturnpike.com/aboutus/history.html>.

¹⁹ M.G.L.A. c.81A, § 1.

²⁰ Office of the Inspector General, *A History of Central Artery/Tunnel Project Finances 1994-2001: Report to the Treasurer of the Commonwealth*, March 2001, *available at* <http://www.mass.gov/ig/publ/cat01rpt.pdf>.

²¹ *Id.* The Inspector General’s report explains that despite the transfer of authority, much of the team handling the Big Dig management at Mass Highway simply shifted to the Turnpike Authority, leaving many to retrospectively question the effectiveness of the “new” management.

²² M.G.L.A. c. 81A, §§ 1, 2.

Chairperson is responsible for the general management and operation of the Turnpike facilities and the exercise of the Turnpike's management powers.²³ The Chair also makes all personnel decisions, including those related to employment, compensation, transfers, promotions, and terminations.²⁴ Besides its ability to sell bonds, the Authority is vested with the power to enter into contracts and agreements to construct, improve, or repair any part of the metropolitan highway system under its control as well as to police, sue, impose and collect civil and criminal penalties on its behalf.²⁵ In the case of civil penalties, the Authority may seek to recover no more than \$500 per offense, unless the law otherwise provides.²⁶ Since it was established as a quasi-independent entity, unlike agencies such as the Mass Highway Department, the Turnpike Authority is afforded greater autonomy from executive control.²⁷

Project Oversight: Attorney General's Traditional Role

The Attorney General of the Commonwealth has broad authority and discretion in setting the litigation policy for the state. He is an independent, popularly elected constitutional officer and is the chief law enforcement officer of the state, overseeing a wide range of issues. He effectively serves a dual role as the attorney for state government and advocate for the people he represents. The Attorney General possesses the power to bring both civil and criminal claims. The primary statutory declaration of the Attorney General's civil responsibilities is derived from M.G. L. c. 12, § 3. It provides, in part, that:

The Attorney General shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in

²³ *By-Laws of the Massachusetts Turnpike Authority*, Art. V, § 1 (amended September 17, 2002).

²⁴ *Id.*

²⁵ M.G.L. c. 81A, §4.

²⁶ *Id.*

²⁷ Consequently, given its status, it is an agency traditionally outside the scope of the Attorney General's traditional authority.

which the commonwealth is a party or interested, or in which the official acts and doings of said departments officers and commissions are called in question in all the courts of the commonwealth and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United states when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. . . . All legal services required by such departments, officers, commissions . . . in matters relating to their official duties shall except as otherwise provided, be rendered by the attorney general or under his direction.

So long as he does not act in an arbitrary, capricious or illegal manner in representing or refusing to represent a state agency, the Attorney General has wide control over conduct of litigation involving Commonwealth, including the power to determine whether appeals should be taken.²⁸ This power includes the right to chart a course of action which may be opposed by the very administrative officers whom the Attorney General represents.²⁹

With respect to public corruption, the Attorney General's office investigates and prosecutes crimes which violate the public trust, including crimes committed against public agencies as well crimes committed by government officials, agents, and contractors.³⁰ The Attorney General can also bring affirmative civil actions on behalf of the Commonwealth, and represents the Commonwealth and its departments, officers, and commissions in civil litigation and whenever the Commonwealth's official acts are called into question.

One of the critical functions of the Attorney General is to oversee law enforcement initiatives to combat waste, fraud, and abuse in the Big Dig, including fraud, environmental offenses, and fair labor violations. However, besides investigating and conducting affirmative civil litigation, the Attorney General also defends the Commonwealth in actions brought by third parties regarding the project.

²⁸ See *Secretary of Administration & Finance v. Attorney General*, 326 N.E.2d 334 (Mass. 1975).

²⁹ See *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977).

³⁰ Massachusetts Office of the Attorney General, PUBLIC CORRUPTION AUTHORITY, available at <http://www.ago.state.ma.us/sp.cfm?pageid=1207>.

All civil actions to recover money for the Commonwealth may be brought against an individual, contractor, or corporation under the civil False Claims Act, which gives the Attorney General statutory authority to proceed with an action. This authority extends to circumstances when the Commonwealth has entered into a contract with a private corporation to carry out a public purpose.³¹ Criminal charges may also be brought under the criminal False Claims statute, and typically involve procurement fraud, larceny, false claims, criminal environmental violations, tax evasion, prevailing wage violations, and workers' compensation fraud.³²

The Legislature passed a new state False Claims Act in 2000, modeled after the federal False Claims Act. Aided with this power, the Attorney General was given enhanced ability to uncover fraud and recover state funds on Big Dig contracts. Specifically, the Act authorizes the Attorney General to file a civil action to recover treble damages, the costs of investigation and attorney's fees from those who are found to have submitted false claims or false statements in support of claims for state funds for a penalty of between \$5,000 and \$10,000 per violation.³³ The statute also enables the Attorney General to compel the production of documents and testimony while a case is in the investigative stage.³⁴ The Act carries a statute of limitations mandating that any action by the Attorney General must commence within six years of the date on which the violation occurred, or within three years after the date when the material facts are known or should have been known by the Attorney General's office, but in any event, no later than ten years after the date on which the violation occurred.³⁵

Attorney General's 2001 Bond Disclosure Criminal Investigation

³¹ M.G.L.A. c. 12, § 5; *see also* *Attorney General v. Trustees of Boston E.R. Co.* 67 N.E.2d 676 (Mass. 1946).

³² M.G.L.A. c. 266, § 67B; *see also* Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005).

³³ M.G.L.A. c. 12, § 5B.

³⁴ *Id.*

³⁵ *Id.* at § 5K. Of course, given the length of the Big Dig, many potential violations which could now come to light may be time-barred.

There had been long-standing skepticism by many that the top management of the Big Dig was not candid about the true cost of the project. But few suspected the scope of the overrun because then-Chairman of the Turnpike Authority chief James “Jim” Kerasiotes had always dismissed such speculation, insisting that the project was “on time and on budget.”³⁶ Yet by 1997, the cost of the Big Dig had skyrocketed to \$10.4 billion. Though Kerasiotes promised no additional cost increases, quietly, the project cost rose to \$10.8 billion the next year. In February 2000, state filings with the Federal Highway Administration estimated the cost at \$12.2 billion.³⁷

In March 2000, after media outlets leaked the information, Kerasiotes and others disclosed the Big Dig was neither on time *nor* on budget. In fact, it was revealed that overruns exceeded \$1.4 billion.³⁸ By October 2000, that figure jumped to \$2.5 billion.³⁹ Big Dig officials contended that the cost overruns were due primarily to “unforeseen” growth in construction contracts. While inflation could be attributed to a portion of the escalating costs, project officials had projected costs based on extremely an aggressive cost containment model which, even to accounting novices, was untenable based on the project’s past performance.

Governor Cellucci, facing mounting political pressure after the forced revelations about the cost overruns, abruptly fired embattled Big Dig chief Jim Kerasiotes in April 2000, and replaced him with Andrew Natsios, Cellucci’s former Secretary of Administration and Finance. The accounting firm of Deloitte & Touche was also hired to conduct an independent review of

³⁶ Carey Goldberg, *Big Dig Chief is Forced Out in Boston*, NEW YORK TIMES, April 12, 2000, A18. Due to the announcement of a potentially \$1.4 billion overrun, the Federal Highway Administration (FHA) established a multi-disciplinary Federal Task Force and charged it with examining the \$1.4 billion potential cost overrun as one of its duties. Subsequently, in a March 31, 2000 report, the Task Force estimated that a more realistic cost estimate for the project would be between \$13.4 and \$13.6 billion.

³⁷ This figure was later revised (to the \$13.6 the FHA suggested) and steadily rose, until it reached its current estimate of \$14.625 billion.

³⁸ Office of the Inspector General, *A History of Central Artery/Tunnel Project Finances 1994-2001: Report to the Treasurer of the Commonwealth*, March 2001, available at <http://www.mass.gov/ig/publ/cat01rpt.pdf>.

³⁹ Central Artery/Third Harbor Tunnel Project Oversight Coordination Commission Report, §3A (September 2001).

the Big Dig.⁴⁰ Though Natsios vowed to keep costs down and make the project “completely transparent,” the Big Dig management structure was inherently flawed given that it lacked any transparency such that serious problems were able to remain insulated from the public domain for years after they apparently became known to project officials.⁴¹

On March 20, 2001, Massachusetts Inspector General Robert Cerasoli (hereinafter “Inspector General” or “Cerasoli”)⁴² issued a report entitled *A History of Central Artery/Tunnel Project Finances 1994 – 2001*, accusing former Governor Bill Weld, Gov. Paul Cellucci,⁴³ as well as Bechtel and Turnpike officials of conspiring over a number of years to hide from the public, as well as bond investors, massive cost overruns that ultimately pushed the ambitious public works project's price-tag far beyond the oft-promised \$7.8 billion and subsequent \$10.8 billion. The report was the culmination of a year-long investigation of the \$1.4 billion cost overruns that had been announced in February 2000.

Assistant Inspector General Greg Sullivan later testified to the Massachusetts legislature Joint Transportation Committee that the effort to conceal the project's high costs dated as far back as 1994, when Bechtel consultants advised then-Governor Weld that the then-\$8 billion project was, in fact, going to cost nearly \$14 billion.⁴⁴ The Inspector General's report also alleged that thousands of pages of documents and numerous computer hard drives had been

⁴⁰ The August 2001 Deloitte report recorded the cost of the Big Dig at \$14.1 billion. See Office of the Inspector General, *A History of Central Artery/Tunnel Project Finances 1994-2001: Report to the Treasurer of the Commonwealth*, March 2001, available at <http://www.mass.gov/ig/publ/cat01rpt.pdf>.

⁴¹ Carey Goldberg, *Big Dig Chief is Forced out in Boston*, NEW YORK TIMES, April 12, 2000, A18.

⁴² Massachusetts law provides that the Office of the Inspector General shall “act to prevent and detect fraud, waste and abuse in the expenditure of public funds, whether state, federal, or local, or relating to programs and operations involving the procurement of any supplies, services, or construction, by agencies, bureaus, divisions, sections, departments, offices, commissions, institutions and activities of the commonwealth, including those districts, authorities, instrumentalities or political subdivisions created by the general court and including the cities and towns.” See M. G.L.A. c. 12A, § 7.

⁴³ The report specifically contends the former and current Governor “likely knew” of cost overruns. As explained later in this paper, while likely true, this evidence fails to overcome the evidentiary standard necessary for any Attorney General criminal action.

⁴⁴ Jules Crittenden, *Memo Shows Big Dig Bosses Mulled Hiding Overruns*, BOSTON HERALD, April 12, 2001, 5 (citing Sullivan's testimony to the Committee on April 11, 2001).

destroyed.⁴⁵ In concluding that the past as well as current Governor and his appointees did not disclose “the real Big Dig budget story” to federal investigators, Congress, the State Treasurer, and the State Legislature,” the Inspector General made a number of disturbing allegations concerning the Big Dig’s finances, including:

- During a 1999 bond pre-sale period, the Turnpike Authority’s outside counsel acknowledged to project officials, but not publicly, that the Big Dig faced an almost \$1.4 billion overrun;⁴⁶
- In 1994, Bechtel provided Governor Weld and state officials with a Big Dig cost estimate of almost \$14 billion, “a figure uncannily close to the June 2000 current \$14.1 billion estimate.” This estimate starkly contradicted the \$8 billion estimate (more exactly \$7.998 billion) offered publicly by Big Dig officials at that time. After Bechtel presented its \$14 billion estimate in 1994, state managers directed state and Bechtel staff to undertake a cooperative effort to “maintain the fiction of an ‘on-time’ and ‘on-budget’ \$8 billion project.”⁴⁷

Documents the Inspector General’s office obtained demonstrated that they did so essentially by creating embellished numbers through a series of exclusions, deductions, and adjusted accounting assumptions that covered-up the \$6 billion difference,⁴⁸

⁴⁵ Office of the Inspector General, *A History of Central Artery/Tunnel Project Finances 1994-2001: Report to the Treasurer of the Commonwealth*, March 2001, available at <http://www.mass.gov/ig/publ/cat01rpt.pdf>.

⁴⁶ *Id.* The Inspector General’s report alleged that a late night fax sent by the outside counsel for the Turnpike Authority a week before the bond sale stated: “These are ‘hard’ numbers, not worse case #'s [numbers].” This fax was sent the night before Governor Cellucci and other state officials met with Wall Street analysts to discuss the Commonwealth’s bond rating. The Inspector General further noted that the Turnpike Authority’s outside counsel initially withheld this disclosure document from him under a purported claim of attorney-client privilege.

⁴⁷ Specifically, the Inspector General’s report cited a 1995 memo written by a Bechtel budget manager that summarized instructions that Bechtel received from then-Chief Kerasiotes: “It should be noted that Secretary Kerasiotes at the Federal Highway Administration briefing stated that he expected this value to be below \$8.0 billion prior to releasing to the public.” Not coincidentally, the cost figure given to the public was \$7.997 billion.

⁴⁸ *Id.*

- Big Dig and local highway officials breached their fiduciary duties by not disclosing all relevant financial facts to the public, the Legislature, or, as they were required to by law, the bond markets;⁴⁹
- The Governor, the Chairman of the Turnpike Authority, and the Commonwealth's Secretary of Transportation and Construction failed to fulfill their responsibility to implement the reporting requirements of M.G.L. c. 3, § 17 of the Acts of 1997. (When authority was transferred to the Turnpike Authority, the Legislature required semi-annual Big Dig Finance reports that disclosed the true nature of project costs and finances);⁵⁰
- Only after the State Treasurer conducted its due diligence review in February 2000, did Big Dig officials disclose the cost overrun.⁵¹

Furthermore, Cerasoli urged a federal review of the matter, claiming that federal highway officials knew the cost of the project but engaged in a public relations campaign to conceal the true figure. Yet, it was not clear from Cerasoli's report if this was done to keep the project from being quashed or for another reason. But despite the Inspector General's effort to "shine a light" on the Big Dig's finances, he had limited options in that, unlike the Attorney General, he lacks the statutory authority to pursue criminal charges.⁵²

In response to the report, Attorney General Reilly issued criminal grand jury subpoenas to over twenty state and federal agencies and project officials, including the Governor's office, the office of project managers Bechtel/Parsons Brinkerhoff, the Turnpike Authority, and other state and legislative agencies. The timing of the Attorney General's investigation was criticized by some as it coincided with then-Governor Paul Cellucci's confirmation hearing before the U.S.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Frank Phillips, *AG Opens Criminal Probe Into Handling of Big Dig*, BOSTON GLOBE, April 3, 2001, A1.

Senate on his nomination as ambassador to Canada.⁵³ However, Cellucci claimed to welcome the Attorney General's involvement, though he had previously criticized Cerasoli's report as "political payback" for the Governor's budget proposal to eliminate the Inspector General's office.⁵⁴

The Attorney General's probe signaled a new phase of scrutiny over the project. At the same time that cost overruns exceeded \$1.4 billion in 1999, Governor Cellucci and others had moved forward with a bond issuance based on false numbers. This was particularly concerning to the Attorney General given that it is his office which represents Mass Highway, the recipient of all federal funds for the project. Given the extensive and serious allegations contained in the Inspector General's report, the Attorney General did what the Inspector General and others lacked the authority to do: Attorney General Reilly launched his criminal investigation.

Specifically, sources said that the subpoenas asked for cost schedules, memoranda, and other documents related to the finances of the project.⁵⁵ When he issued the subpoenas for these documents dating back to 1993, the Attorney General claimed that no one individual was being targeted and stated that as with all criminal investigations, "we'll go where the evidence takes us."⁵⁶ The Attorney General further cited the Inspector General's report as the "sole determining factor" in launching the probe. Attorney General Reilly said at the time, "it is very clear why we needed to secure the documents and hard drives [which were] related to the burgeoning overrun.

⁵³ Elisabeth J. Beardsley, *IG's Report Stirs Big Dig Pot-Subpoenas, New Hearings, Due Diligence*, STATE HOUSE NEWS SERVICE, April 3, 2001, available at <http://www.statehousenews.com> (quoting Governor Cellucci as saying "now we have the Attorney General, who is someone who has credibility and integrity, [handling] this investigation. The fact that I'm having a hearing in Washington should not stop the Attorney General's office from doing their work.").

⁵⁴ *Id.* Ironically, Cellucci's budget proposal sought to move the Inspector General's duties under the power of the Attorney General's office.

⁵⁵ Joe Battenfeld, *Reilly Digs In, Gov's Office, Others Eyed in AG's Artery Probe*, BOSTON HERALD, April 3, 2001,

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⁵⁶ *Id.*

We felt that it was imperative that we took the action we took and [felt we could] not wait any further.”⁵⁷

Attorney General Reilly’s investigation coincided with probes by the FBI and the U.S. Department of Transportation⁵⁸ into the project finances as well as the Securities and Exchange Commission into some of the same issues that prompted the Attorney General’s investigation: namely, whether state officials deliberately submitted false information in a 1999 bond prospectus that asserted the project was “on time and on budget” and that project goals were “aggressive but achievable.”⁵⁹ A federal civil probe was also launched into the Big Dig’s “controversial” owner-controlled insurance program.⁶⁰

As the Attorney General’s investigation got underway, it became clear to his office that Cerasoli’s report contained some critical flaws which would make bringing criminal charges incredibly difficult. From a methodology standpoint, the Inspector General’s report relied on interviews with a small fraction of the integral Big Dig officials and further was constrained by the fact that many documents were withheld by Bechtel and Big Dig officials under attorney-

⁵⁷ Elisabeth J. Beardsley, *IG’s Report Stirs Big Dig Pot*, STATE HOUSE NEWS SERVICE, April 3, 2001.

⁵⁸ A federal transportation audit in February 2000 had been highly critical of the management of the project. The audit alleged that Big Dig chief, Jim Kerasiotes, knew of the cost overruns more than two months before a February 1999 bond issue for the project but publicly said nothing until well afterwards. *See* Frank Phillips, *AG Opens Criminal Probe Into Handling of Big Dig*, BOSTON GLOBE, April 3, 2001, A1; *see also* Carey Goldberg, *Big Dig Chief is Forced Out in Boston*, NEW YORK TIMES, April 12, 2000, A18.

⁵⁹ *Id.*

⁶⁰ Maggie Mulvihill and Jonathan Wells. *High Powered Detectives to Keep Eye on Big Dig*, BOSTON HERALD, October 7, 2000, 4.

The 2001 SEC investigation ultimately culminated in an administrative decision finding Jim Kerasiotes was negligent (but did not commit fraud) in his oversight of the project’s finances and made material misrepresentations in the sale of securities, i.e., the Turnpike’s bond offerings in March, September, and December 1999. The SEC articulated what most observers ultimately knew to be true: “Reasonable investors would have considered project cost increases in excess of \$1 billion to be an important factor in the investment decision-making process.” Though he violated §17 (a)(2) and (3) of the Securities Act of 1933, he was not subject to any fines, citations, or reprimands. *See In re Turnpike Authority*, Release No. 33-8260, 80 S.E.C. Docket 2081, 2003 WL 21757219 (July 31, 2003).

However, it is noteworthy that (perhaps as a testament to Bechtel’s power on Capital Hill) no U.S. Attorney’s office, U.S. Department of Transportation, or Federal Highway Administration investigations have ever yielded any public results. In truth, the vast majority of the troubling information that’s been uncovered on the project has been the result of investigations by the media, and by independent state officials or inspectors after public opinion demanded it.

client privilege.⁶¹ The criminal subpoenas afforded the Attorney General the opportunity to gauge the full scope of the Big Dig. Based on these documents, he realized he would face an uphill battle in bringing criminal charges given the knowledge requirement of the criminal False Claims Act, not to mention the fact that any of Bechtel's criminal actions could be undercut by the fact that state officials may have known of the overruns.

With respect to the knowledge requirement, M.G.L. 266, § 67B stipulates that an individual who makes a false claim to "any employee, department, agency or public instrumentality of the commonwealth, or of any political subdivision thereof, any claim upon or against any department, agency, or public instrumentality of the commonwealth, or any political subdivision thereof" must *know* at the time the claim is submitted that it is "false, fictitious, or fraudulent" in order to be guilty of violating the law. While the crime is punishable by a ten thousand dollar fine and/or two and one-half to five year imprisonment term, such charges must be proved beyond a reasonable doubt.

Unlike the Inspector General, the Attorney General must weigh the state's litigation strategy and is cognizant of the reality that criminal false claims charges are notoriously difficult to prove.⁶² In order to prove Bechtel criminally liable for submitting false claims, the Attorney General would need to prove that Bechtel *knew* at the time they submitted the claims to Big Dig officials that the numbers were false. Such a charge is difficult to establish given that at the time Bechtel submitted many of their cost estimates, they were based on work *yet* to be performed. It would, therefore, be difficult to demonstrate that they *knew* such charges were false since the

⁶¹ Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005)(noting the Inspector General lacked knowledge of the "full story.")

⁶² Interview with Laura Marlin, Assistant Attorney General, Criminal Bureau, Office of the Attorney General (April 20, 2005).

work had not yet occurred. Bechtel would likely contend that since the claims were valid at the time, they cannot be held liable for cost overruns which only later came to light.

Further, assuming the Cerasoli accusations against state officials-including Weld and Cellucci as true, Bechtel could undercut the Attorney General's case by claiming that state officials *knew* of the cost overruns as early as 1994.⁶³ Thus, they would contend that it wasn't that the claims the company submitted were false, but rather that Big Dig officials publicly misrepresented the cost of the project. While that would not absolve the company of liability if they did submit false claims to project officials, from a jury nullification perspective, it could undercut Bechtel's culpability and substantially weaken the state's case (i.e., a jury could take the view that if the Commonwealth knew of the expected cost overruns, then what crime was really committed by Bechtel?). Finally, there is a practical aspect the Attorney General had to consider: bringing charges against Bechtel or project officials during one of the most critical construction phases of the project would virtually assure work on the Big Dig would be halted, further inconveniencing commuters and residents who were anxious for the much-delayed project to reach completion.

As stated earlier, the Attorney General must use his judgment to set the litigation strategy for the state. He must weigh all the evidence and evaluate the strength of cases he wishes to bring, particularly given the limited resources bestowed on the office.⁶⁴ While there is speculation the Attorney General would like to have been able to bring criminal charges against

⁶³ Further, as stated earlier, the Inspector General's charge that Governor Cellucci and others "likely knew" of cost overruns as far back as 1994 is insufficient evidence to bring a criminal action. Not surprisingly, these officials publicly claimed they had no knowledge of the overruns. Moreover, these officials did not benefit personally from the lack of disclosure nor could the state prove that the investors suffered financially since the state's bond rating was unaffected.

⁶⁴ Interestingly, the Legislature gave the Attorney General and the state Auditor money to fund a position to handle the criminal investigation of the Big Dig in 2001. Yet, as the investigation got underway, the legislature ceased funding the position. *See* Interview with Laura Marlin, Assistant Attorney General, Criminal Bureau, Office of the Attorney General (April 20, 2005).

Big Dig officials for the cost overrun debacle, the reality was he lacked the evidence needed to secure convictions. Absent a “whistleblower” that could shed new light on the Inspector General’s charges, there was no “smoking gun” present which could assist the Attorney General in meeting the evidentiary threshold. Thus, while it is clear that many Big Dig officials failed in their job performances, their negligence was insufficient evidence to establish criminal liability. However, as the 2004-2005 cost recovery efforts have gotten underway, the Attorney General continues to evaluate evidence he obtains and has not foreclosed the possibility that criminal charges won’t ever be brought against Bechtel or Big Dig officials.

Attorney General’s Takeover of Cost Recovery Efforts and Civil Fraud Investigation

Significant changes have occurred since the Attorney General’s 2001 investigation. The state has a new Governor, the Turnpike Authority has a new Chairman, and the Big Dig is set for completion in September 2005.⁶⁵ Yet, problems with the Big Dig abound and the project’s complicated history continues to unfold even in the final days of the project. As previously mentioned, in September 2004, a fissure in an underground wall of the I-93 tunnel caused thousands of gallons of sand and water to flood the roadway, resulting in a ten-mile traffic jam and the tunnel’s closure.⁶⁶ Only a few months later, in March 2005, debris from the tunnel ceiling fell onto helpless motorists. Subsequent investigations revealed hundreds of more minor leaks in the new tunnel, caused by gaps in the roof of the tunnel as well as a smaller number of structural defects in the tunnel walls. As stories of these defects within the I-93 tunnel surfaced,

⁶⁵ Governor Mitt Romney (R) was elected in 2002. His predecessor, Jane Swift, appointed Matthew Amorello as Chairman of the Turnpike Authority. Governor Romney has proposed legislation to merge the administrative and operational activities of the Massachusetts Turnpike Authority into the Massachusetts Highway Department. He has further petitioned the SJC for an Advisory Opinion addressing whether he has the authority to remove Amorello, a political enemy, from his position, given that the Turnpike Authority is a quasi-independent agency traditionally beyond Executive control. As it currently stands, Amorello’s term is set to expire in 2007.

⁶⁶ Kate Zezima, *Big Dig Called Safe for Cars, But Not So For Pocketbooks*. NEW YORK TIMES, April 23, 2005, 26.

questions arose as to who should bear the responsibility for the repairs and what authority could best ensure the state is compensated for any poor workmanship. Though Turnpike Chairman Matthew Amorello claimed that the agency's senior officials did not know of any leaks until September 2004, media reports offer a contrasting view, insinuating that project officials may have known of the leaks as early as 2001.⁶⁷

In general, "cost recovery" is the process by which Big Dig officials are supposed to file claims against design and construction management professionals for the costs associated with the project were are attributable to errors, omissions, or other unsatisfactory performance.⁶⁸ However, in retrospect, the structure for the Big Dig's cost recovery efforts was inherently flawed. To begin, the project set up the cost recovery program primarily to ensure federal funding, not to recover costs. Created in 1994 to identify design and management mistakes, the Big Dig's Cost Recovery Committee only recovered \$35,707 (and not from Bechtel) before its elimination in 2001.⁶⁹ In a telling statement, Michael P. Lewis who served as the Chairman said "[cost recovery] was never the front-burner issue for me. Perfection was not the standard."⁷⁰

Further, Bechtel's involvement in the project management undermined the Commonwealth's ability to hold the company accountable for its design work. Essentially, the people who were constructing and managing the project (Bechtel) were simultaneously working alongside the ones responsible for recovering the costs related to those efforts (Turnpike officials and the Cost Recovery Committee). The internal organizational relationships impeded the Turnpike Authority's ability to therefore ensure that Bechtel was accountable for its

⁶⁷ Sean P. Murphy, *Pike Was Told About Faulty Wall Section*, BOSTON GLOBE, November 12, 2004, A1.

⁶⁸ Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005).

⁶⁹ Raphael Lewis, *Artery Errors Cost More Than \$1B*, BOSTON GLOBE, February 9, 2003, A1.

⁷⁰ *Id.*

performance.⁷¹ One would think that Bechtel should have spotted the problems given that the company was responsible for not only the entire design process but for enforcing the project's construction guidelines.⁷² Yet, Bechtel lacked any financial incentive to minimize delays and errors. In fact, as errors occurred and delays increased, so too, did Bechtel's profits.⁷³

In early 2003, Big Dig officials turned the complicated task of cost recovery over to retired family court judge Edward Ginsberg to conduct an independent review. But Ginsberg's efforts, though an improvement from the former team, were also somewhat anemic. To date, the state has spent more than \$8 million on Big Dig cost-recovery efforts and re-claimed only \$4 million.⁷⁴ Ten suits, brought initially by Ginsberg's team, against smaller "cogs" in the chain are pending, totaling approximately \$13 million that the state is currently seeking for design defects. The first of those cases is set for trial in January 2006.⁷⁵ Yet, Ginsberg's ability to engage in cost recovery efforts was also stalled by an inability to reach an agreement with Bechtel.⁷⁶

During 2003, Governor Romney also pledged to recover Big Dig funds which were lost due to costly mistakes by putting together his own cost-recovery panel filled with engineers and investigators. He went so far as to name Ira Sepanian, former Bank of Boston CEO, as the panel's likely chairman. However, in spite of the press conference he held, the proposal never came to fruition.⁷⁷

⁷¹ Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005). It has been explained that the project's management model, called an Integrated Project Organization "IPO" was supposed to increase efficiency, yet it was disastrous for accountability and cost recovery efforts.

⁷² Raphael Lewis, *Artery Errors Cost More Than \$1B*, BOSTON GLOBE, February 9, 2003, A1

⁷³ *Id.* Noting that since the state pays Bechtel's employees on the "pay as you go basis" the company benefited from costly errors and delays since it required their employees to stay on the job longer.

⁷⁴ Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005).

⁷⁵ *Id.*

⁷⁶ As explained later, the state's \$150M suit against Bechtel is temporarily on hold while the Attorney General pursues cost recovery efforts.

⁷⁷ Brian McGrory, *Dropping the Ball*, BOSTON GLOBE, November 16, 2004, B1 (Romney's aide, Doug Foy, blamed the Legislature, saying that since "they never picked up the ball, so it never happened."). State Senators Marc P. Pacheco and Bruce Tarr also filed bills for an independent panel but the bills remained stuck in the Transportation Committee.

When the massive leak sprung in the tunnel on September 15, 2004, followed by the falling debris incident just a few months later, increased scrutiny fell on the Big Dig's cost recovery efforts. Many wondered who would be made to pay for the repairs. In the process of the public and political outcry, there were renewed calls for "independent panels" and "commissions" to study the cost recovery issue. However, the commissions proposed by Romney and others would have lacked the efficiency, authority, strength, and independence that distinguishes the Attorney General.⁷⁸

Following legislative debate, the Attorney General entered into a "Memorandum of Understanding" with the Turnpike Authority in February 2005 shifting cost recovery efforts for the Big Dig over to the Attorney General's office through the end of 2006. At the same time his office overtook this responsibility, the Attorney General also launched a civil fraud investigation focused on the quality of the workmanship, the quality of the supervision, as well as the oversight and design of the Big Dig tunnels.

To the knowledge of those in his office as well as this author, the Massachusetts Attorney General had never before taken on the investigatory efforts of an essentially independent agency such as the Turnpike Authority.⁷⁹ In truth, there hadn't been a need to until recently, since such agencies are traditionally responsible for conducting their own investigations and litigation strategy as permitted by statute. Yet, the history of ineptitude and the gravity of the situation

⁷⁸ The Attorney General was criticized by some for undertaking the cost recovery responsibility. Congressman Michael Capuano has said, "My concern here is whatever the AG issues, it's going to be in the middle of a gubernatorial campaign," he said. "When the time comes, even if the AG has done everything perfectly correct, comes up with the perfect answer, it's going to be subject to political second guessing and headline grabbing." See Scott S. Greenberger, *Leaks May Cost Taxpayers*, BOSTON GLOBE, April 23, 2005, A1. He has also been criticized by some for not intervening sooner and for "looking the other way" while Big Dig Contractors gave him \$35,000 (or 1.5 % of his reported \$2.3M war chest) in campaign contributions since 2001. See Brian McGrory, *A Second Chance to Do It Right*, BOSTON GLOBE, January 4, 2005, B1. Reilly has dismissed criticism saying "This is an extremely difficult and complex case. You'd never take a case like this for a political reason." See Ann Donlan, *State Takes Charge On I-93 Tunnel Safety*, BOSTON HERALD, March 17, 2005, 6.

⁷⁹ Interview with David Kerrigan, Government Bureau Chief, Office of the Attorney General (April 23, 2005).

demanded that a disinterested party be empowered to undertake the responsibility that the Turnpike Authority was effectively forced to relinquish.

Given his role as the state's legal watchdog, the Attorney General is the authority best suited to conduct a "thorough, independent [review] to recover as much money as possible on behalf of taxpayers."⁸⁰ Further, transferring the authority to the Attorney General has other benefits that a commission would lack: not only does the Attorney General have the power to mediate and negotiate a settlement and litigate any cost recovery efforts, he is able to gauge whether this information should result in potential criminal charges. He has vowed to uncover "who knew what and when."⁸¹ Such independence, which is inherent to a prosecutorial model, is autonomy the Big Dig desperately needs.

It is expected that Attorney General Reilly will try to seek a negotiated settlement with Bechtel. His office has temporarily put on hold a \$150 million breach-of-contract suit which Ginsberg's cost-recovery team had filed against the company. Further, the existing actions seeking \$13 million will now become part of the negotiations which will include the larger claims against Bechtel. A settlement is probably preferable to costly, drawn-out litigation, particularly since the Attorney General's case could be complicated by the insinuation that public officials knew of deficiencies. Also, the Attorney General could be constrained by the False Claims Act's statute of limitations.⁸²

⁸⁰ Casey Ross, *Reilly Vows He'll Get to the Bottom of Big Dig*, BOSTON HERALD, January 14, 2005, 10 (quoting the Attorney General).

⁸¹ Casey Ross, *Blame Game Begins Over Big Dig Leaks*, BOSTON HERALD, November 11, 2004, 8 (quoting the Attorney General).

⁸² Raphael Lewis, *Artery Errors Cost More Than \$1B*, BOSTON GLOBE, February 9, 2003, A1. The article notes that the statute of limitations prohibits the state from pursuing cases that date back more than three to ten years, depending on whether the case is for breach of contract or negligent performance. As a result, the state is unlikely to be repaid for as many as two-thirds of the errors caused by Bechtel or other contractors because the statute of limitations period has expired. In another telling turn of events, Bechtel refused the state's request in 2002 to waive the statute of limitations on all its work related to the project.

In the meantime, the federal government has intervened. Congressional leaders and federal highway officials have conducted hearings and launched investigations into the Big Dig's safety and cost recovery efforts.⁸³ The U.S. Attorney's Office in Boston has also launched a criminal probe, allegedly focused on the construction defects within the tunnel.

Conclusion

The Big Dig's latest troubles have highlighted the true vulnerabilities of the Bechtel/Turnpike Authority contractual arrangement. As previously stated, the structure of the program lacked the mechanisms necessary to ensure that deficient performances would be detected and cost recovery pursued when such problems were actually detected. The Attorney General's investigation is the best chance taxpayers have to improve transparency and ensure accountability. Furthermore, his involvement is important to dispel the perception that the process is subject to bureaucratic and political manipulation. Though it is too early to predict what the ultimate monetary figure will be, or if any criminal charges will be forthcoming, the Attorney General's efforts should assure state and congressional leaders, as well as the public, that the project's managers and contractors will be held fully accountable for the cost of any negligence, incompetence or malfeasance. For those who have footed the bill for the Big Dig over the last twenty years, it may be little comfort.

⁸³ Federal Highway Administration officials in an Interim report published in April 2005 assessed that the leaking I-93 northbound tunnel is safe now and in the future.