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September 2017

Brenda McDuffie, Chairwoman
Board of Directors
Erie County Industrial Development Agency
95 Perry Street, Suite 403
Buffalo, New York 14203

Report Number: S9-15-70

Dear Chairwoman McDuffie and Members of the Board of Directors:

A top priority of the Office of the State Comptroller is to help local officials manage their resources efficiently and effectively and, by so doing, provide accountability for public dollars spent to support government operations. The Comptroller oversees the fiscal affairs of local governments and certain other public entities statewide, as well as compliance with relevant statutes and observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations and governance. Audits can also identify strategies to reduce costs and to strengthen controls intended to safeguard assets.

In accordance with these goals, we conducted an audit of six Industrial Development Agencies (IDAs) throughout New York State. The objective of our audit was to determine whether the IDA Board of Directors provides effective oversight of the IDA's projects. We included the Erie County IDA (Agency) in this audit. Within the scope of this audit, we examined the Agency policies and procedures and reviewed records and project files for the audit period January 1, 2014 through May 31, 2015. For selected projects, we expanded the audit period back to October 16, 1996. This audit was conducted pursuant to Article X, Section 5 of the State Constitution and the State Comptroller's authority as set forth in Article 3 of the New York State General Municipal Law.

This draft report of examination letter contains our findings and recommendations specific to the Agency. We discussed the findings and recommendations with Agency officials and considered their comments, which are included in Appendix B, in preparing this report. Agency officials disagreed with many of our findings but indicated they plan to initiate corrective action. Appendix C includes our comments on issues officials raised in their response. At the completion of our audit of the six IDAs, we prepared a global report that summarizes the significant issues we identified at the IDAs audited.

Summary of Findings

We found that, while the Board of Directors (Board) could have done more to provide effective oversight of the Agency's operations during our audit period, the Board has since made significant changes in oversight and taken positive action as a result of the improvements.

While the Board used a standard project application, it did not develop project selection criteria for all project types and did not require applicant information to be verified or confirmed before it approved a project for financial assistance. Although the use of project selection criteria was not required at the time of our audit, in May 2016 the Board adopted project selection criteria for all project types it offers financial assistance for.

We reviewed the project selection process for 10 projects and found that Agency officials could not provide criteria that was used to evaluate these projects. Board members indicated that they use their collective personal knowledge to evaluate the applicant's cost estimates and job creation goals. These projects have collectively received tax abatements of $4.15 million and two project owners received tax exemptions totaling $287,000. However, Agency officials could not tell us the value of the tax exemptions awarded to the remaining eight project owners.

The Board adopted a project monitoring policy in January 2014 that requires all projects approved in or after April 2013, when project agreements began to include material terms,[1] to be monitored. The material terms include language that allows for recapture or termination of financial assistance when the project goals are not met. Older projects do not include these terms and are not monitored. Historically, the Board had not recaptured financial assistance or terminated a project for poor performance. However, starting July 2016, the Board began to recapture financial assistance for projects that failed to meet the material terms outlined in their agreements. Between July 2016 and February 2017, the Agency recaptured tax abatements totaling $855,089 from six projects and returned the funds to the taxing jurisdictions.

Although the Agency limits the sales tax exemptions that a project owner may take, officials did not monitor project owners' use of sales tax exemption forms and had not developed controls to prevent project owners from exceeding authorized amounts. Three of the 10 projects we reviewed were over the amount authorized. The amounts ranged from $9,000 to $98,000. However, as of November 2015, the Agency established an internal tracking system to monitor sales tax exemptions. As a result, between January 2016 and March 2017, the Agency has collected $473,488 from project owners that exceeded their approved sales tax exemptions and returned the funds to the New York State Tax Department.

In addition, the information submitted by project owners was not always verified. Although Agency officials were not required by statute to verify submitted project information at the time of our audit, Agency officials should ensure that the submitted information reflects the actual results of project activity. The Board requested but did not require project owners to provide an annual New York State 45 (NYS-45) wage report to support the number of jobs or salaries the projects were expected to create or retain. However, in 2016, the Agency began to require quarterly

[1] The Agency defined a material term as a specific set of terms included in project agreements that, if not met, may trigger recapture of financial assistance. These included job goals typically set at 85 percent of the application estimates, investment goals, sales tax exemption amounts and local labor policy compliance.

NYS-45 forms. We reviewed 32 approved projects and found 18 project owners reported they created and retained the jobs indicated in their project agreements. The remaining 14 project owners reported that they did not meet their job goals. Of the 4,344 jobs expected to be created or retained, 3,977 (92 percent) were reported as created or retained.

We also found that the Board has not developed adequate policies and procedures to report reliable project job goals from project owners. As a result, statutory information the Agency must provide in an annual report to the New York State Authorities Budget Office and the Office of the State Comptroller is not always accurate.

Background and Methodology

An IDA is an independent public benefit corporation whose purpose is to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing of industrial, manufacturing, warehousing, commercial, research and recreation and certain other facilities. The overall goal of an IDA is to advance the job opportunities, health, general prosperity and economic welfare of the people of the State.

IDAs are authorized to provide financial assistance for certain types of projects. Financial assistance includes the issuance of bonds by the IDA to finance construction of a project and straight-lease transactions. Since the property and activities of IDAs are tax exempt, the IDA may pass the benefits of certain tax exemptions (e.g., real property, sales and mortgage recording taxes) to the private entities that undertake the projects. The loss of revenue associated with these tax exemptions can be offset with an agreement for payments in lieu of taxes (PILOTs), under which the private entity agrees to pay all or a portion of the taxes that would otherwise have been imposed had the project not been an IDA project. The role of the IDA is not just to act as the conduit for financial assistance, but also to monitor the success, progress and cost-benefit of projects, including whether projects are honoring their commitments and agreements.

In June 2016, new legislation became effective to increase the accountability and improve the efficiency and transparency of IDA operations.[2] For new projects, the law requires standard application forms for requests for financial assistance, uniform criteria for the evaluation and selection for each category of projects for which financial assistance is provided, uniform project agreements, annual assessments on project progress including job creation and retention, as well as policies to recapture, discontinue or modify financial assistance or tax exemptions.

The Agency, created in 1972, is governed by a Board composed of 19 members, 14 of which are appointed per statute and the remaining five are appointed jointly by the County Executive and the Chair of the Erie County Legislature. The Board is responsible for the general management and control of the Agency. A Board member's role and responsibilities include executing direct oversight of the Agency's officers; understanding, reviewing and monitoring financial controls and operating decisions; adopting organizational policies; and performing their duties "in good faith and with the degree of diligence, care and skill which an ordinary prudent person in a like position would use under similar circumstances."[3] A Chief Executive Officer and Executive Vice President (officers) manage the Agency's day-to-day operations.

[2] Chapter 563 of the Laws of 2015.
[3] New York State Public Authorities Law, Section 2824

For calendar year 2014, the Agency's annual report included 276 active projects including 56 active bonds, 184 active PILOT agreements[4] and 36 tax exemptions. The Agency had approximately $2.6 million in expenditures in 2014, funded primarily with fees charged for processing project applications and for administering benefits granted to approved projects.

To complete our objective, we interviewed Board members and Agency officials, and we examined Agency records and project files for the period January 1, 2014 through May 31, 2015. For selected projects, we expanded the audit period back to October 16, 1996.

We conducted our audit in accordance with generally accepted government auditing standards (GAGAS). More information on such standards and the methodology used in performing this audit are included in Appendix D of this report. Unless otherwise indicated in this report, samples for testing were selected based on professional judgment, as it was not the intent to project the results onto the entire population. Where applicable, information is presented concerning the value and/or size of the relevant population and the sample selected for examination.

Project Approval

The Board is responsible for reviewing the merits of each project and then making project approval or denial decisions. Because tax benefits granted by the Board to approved projects result in a cost to the community, it is important for the Board to evaluate the merit of each project and the benefits the community should realize from the Agency's investment. Promoting the use of a standard application when project owners request financial assistance from the Agency can help ensure consistency in project evaluation. Although not required at the time of our audit, the Board should adopt uniform criteria for the evaluation and selection of each category of projects (e.g., manufacturing, wholesale, distribution, retail, tourism and housing) for which financial assistance would be provided. Such practices should also include documenting the rationale for approving financial assistance and verifying information provided in the application.

As a matter of good business practice, a standard application should include, among other things:

- A description of the proposed project, including the amount and type of financial assistance requested and an estimate of the capital costs of the project;
- The number of and estimates of salary and fringe benefits for full-time equivalent jobs that would be retained or created if the financial assistance is provided and the projected timeframes for creation of new jobs;
- A statement acknowledging the submission of any knowingly false or misleading information may lead to immediate termination of any financial assistance and reimbursement of an amount equal to all or part of any tax exemptions claimed as a result of the project;
- A statement that the information is true under penalty of perjury;

[4] These are presented as straight-lease projects on the 2014 PARIS report.

- A statement that Agency assistance is necessary to undertake the project; and

- A statement that the project owner is in substantial compliance with all laws, rules and regulations.

Good business practices also promote that an IDA's uniform evaluation criteria should, at a minimum, require that prior to approval of any financial assistance, the IDA should verify and evaluate all material information provided with the application. It should also undertake a written cost-benefit analysis that identifies the extent to which a project will create or retain permanent, private sector investment generated or likely to be generated by the proposed project, the likelihood of accomplishing the proposed project in a timely manner, and the extent to which the proposed project will provide additional revenue for municipalities and school districts.

We found that the Board uses a standard project application. Although not required during our audit, the Board did not develop uniform project selection criteria for all project types,[5] and it did not document its rationale for awarding financial assistance. However, on May 25, 2016 the Board adopted uniform project selection criteria for each project type it offers financial assistance. We also found that, although the application includes a description of the project, cost and performance estimates and other pertinent information, the Board did not require information, such as job retention estimates, to be verified or confirmed before the Board votes on awarding financial assistance to the applicant. Board members used their collective personal knowledge to evaluate the applicant's cost estimates and job creation goals. As of May 25, 2016 all project applicants are required to sign a representations and certification document acknowledging that the information they are providing is true and accurate. The application also contains similar language.

In addition, the standard application did not include statements that information is accurate under penalty of perjury and that the applicant is compliant with all laws and regulations. The standard application used by the Agency also does not require the submission of information on fringe benefits estimates for jobs created or retained. While this information was not required to be part of a project agreement at the time of our audit, it is required under the new legislation for new projects. As a result, on May 25, 2016 the Board adopted a revised standard application which contains the new legislation's requirements.

We judgmentally selected 10 projects with project costs totaling about $316 million to review the project selection process (Figure 1).

[5] The Board developed and implemented evaluation criteria for senior housing projects and adaptive reuse projects. Adaptive reuse are projects on land or buildings that have been primarily vacant for at least three years.

Figure 1: Summary of 10 Projects Reviewed		
Project Approval Date	**Description**	**Project Cost**
General Motors Company (10/16/1996)	Modifications of the company's facility to allow for new engine fabrication and improve plant condition and efficiencies.	$293,000,000
500 Bailey, LLC (3/11/1998)	Acquisition and modernization of a building.	$7,193,308
American Pharmaceuticals Partners, Inc. (12/15/2004)	Expansion of the company's facility.	$4,000,320
New Era Cap Company, Inc. (6/14/2010)	Renovation and modernization to a company building to house the company's headquarters.	$3,165,000
McGard, LLC (3/21/2011)	Expansion and upgrading the company's waste treatment facility.	$2,454,000
API Heat Transfer, Inc. (11/18/2013)	Conversion of a company building into its corporate headquarters.	$1,732,134
B&L Wholesale Supply, Inc. (1/8/2007)	Renovation and modernization of the company's facility to centralize the company's credit, sales management and marketing functions.	$1,592,000
J.M. Lester, LLC (4/16/2003)	Acquisition of land and construction of a jewelry manufacturing facility.	$1,060,896
Praxair, Inc. (2/11/2004)	Construction of a research and development facility.	$976,840
Osmose, Inc. (3/15/2000)	Acquisition of a research and development building.	$877,000

Agency officials could not provide criteria that was used to evaluate the 10 projects, and the Board did not document how it arrived at its decision to approve these projects. Board minutes reflected only that the projects were approved to receive assistance. All 30 projects presented to the Board during our audit period were approved.

Project Monitoring

A significant Board responsibility is to monitor and evaluate the performance of projects receiving financial assistance to determine whether they are meeting the goals included in their applications, such as the number of jobs to be created. The Board should evaluate each project's performance to ensure the project fulfills the commitments made to the residents in exchange for the financial assistance awarded. Although not required at the time of our audit, a uniform project agreement between the IDA and the project owners receiving financial assistance should be in place and used to monitor and evaluate projects' performance. In addition, Agency officials should also use each project's required annual status report to assist in monitoring project performance. Without effective monitoring, the community may not receive the expected benefits from the financial assistance provided.

The Board uses a uniform project agreement, including a uniform tax exemption policy (UTEP), and monitors projects that were approved on or after April 2013. At that time, the Agency began to annually track each project based on what officials call "material terms," that are set forth in the project agreements. The Agency annually assesses compliance with the material terms. When a project owner fails to meet the material terms, the Board is notified for potential recapture or termination of financial assistance. However, projects approved prior to April 2013 do not include material terms and, therefore, are not subject to these requirements. One of the 10 projects we examined contained material terms because the remaining nine projects were approved prior to April 2013.

Project Agreements – To properly monitor projects, IDAs should adopt and use uniform project agreements. Although not required at the time of our audit, a uniform project agreement should, at a minimum, include:

- The Agency purpose to be achieved by the project;
- A description of the project and the financial assistance to be provided;
- A requirement for an annual certification by the project owner, occupant or operator of full-time equivalent jobs created and retained as a result of the financial assistance;
- The dates when PILOT payments are to be made and estimates of the amounts or formulas by which these amounts are calculated;
- A provision for the suspension or discontinuance of financial assistance, or for the modification of any PILOT agreement to require increased payments, for certain defined performance shortfalls;
- A provision for the return of all or a part of the financial assistance provided for in accordance with Agency policy; and
- A provision that the business certify, under penalty of perjury, that it is in substantial compliance with all laws, rules and regulations.

The Agency's project agreement contains most of the best practice components. However, for our sample, we found the project agreements were missing components that could help the Agency more effectively monitor the projects. For example, the agreements do not state the Agency purpose to be achieved, require updated information if salaries or benefits for these jobs change, or state under penalty of perjury that the project owner is compliant with all laws and regulations. The Board adopted a new uniform project agreement on May 25, 2016 that contains all of the best practice components detailed above.

In addition to the material terms that the Agency started to track in April 2013, it also began to include recapture provisions that must be met to retain financial assistance. We reviewed a random sample of five projects approved from April 2013 through May 2015 to determine whether the project agreements contained recapture and material terms. We found these projects contained material terms that may trigger a recapture of financial assistance and that they were meeting these terms.

Job Performance – At the time of our audit, the Agency requested project owners to annually provide a New York State-45,[6] a quarterly wage report, so that the Agency could verify the project owner's self-reported annual employment figures. Beginning in 2016, the Agency requires the

[6] Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return

project owner to provide a NYS-45 form or an employment report. The Agency uses the information to verify project employment. In addition, the Agency performs random site visits of ongoing projects, and the Board receives brief status reports that include an indication of whether job goals are being met.[7]

We reviewed 32 randomly selected projects[8] to determine whether approved projects created and retained the number of jobs specified in their project agreements. We found 18 project owners agreed to create and/or retain 3,373 jobs and they reported they created and retained 4,423 jobs. However, the remaining 14 project owners reported they did not (Figure 2). For example, these projects should have created and retained a total of 4,344 jobs. The 2014 annual reports for the projects indicate that 3,977 jobs were created or retained, a shortfall of 367 (8 percent).

Figure 2: Projects Falling Short of Job Creation and Retention Goals

Project Project Approval Date	Job Creation and Retention Figures		Variance
	Project Agreement	2014 Annual Report	
New Era Cap Company, Inc. (6/14/2010)	315	221	**(94)**
Moog, Inc. (8/15/2011)	2511	2,451	**(60)**
Invitrogen Corporation (9/11/2002)	635	576	**(59)**
Northstar Services, LLC (6/12/2006)	260	205	**(55)**
Peter F. Hunt (10/15/2003)	47	24	**(23)**
New Era Cap Company, Inc. (3/13/2006)	300	278	**(22)**
55 Thielman Associates, LLC (12/13/2010)	17	0	**(17)**
Advanced Marketing (10/13/1999)	32	19	**(13)**
FMC Corporation (2/14/1996)	127	118	**(9)**
I Squared R Element Co., Inc. (8/16/1995)	79	70	**(9)**
Casa Shelby Development, LLC (4/20/2009)	3	0	**(3)**
Elmwood Square Preservation (8/13/2003)	3	2	**(1)**
Green Meadows-Buffalo, LLC (8/8/2005)	13	12	**(1)**
New Covenant Church (12/17/2012)	2	1	**(1)**
Totals	**4,344**	**3,977**	**(367)**

[7] Employment is not verified during site visits via any source documentation (for example, payroll report or New York State-45 forms), but through conversations with project owners and observations.

[8] The Agency's 2014 annual report included 276 approved projects. Of these, we randomly selected 40 projects. Of these, we reviewed 32 approved projects that should have created or retained jobs, as they were not in the construction phase.

Sales Tax Exemptions – Agency project purchases are often eligible for exemptions from sales and use tax. The Agency determines the maximum amount of sales and use tax exemptions and files a ST-60, tax exemption form, with the New York State Department of Taxation and Finance (Department). The form informs the Department of the maximum amount of tax exemptions the project owner can use. Project owners are required to annually report the actual sales and use tax savings to the Department.

While the Agency should have had a process in place to monitor sales and use tax exemptions to ensure project owners do not exceed the approved limits, the Agency did not monitor project owners to ensure they were not excluding more purchases then the Agency authorized from taxation. In addition, officials could not tell us the value of sales and mortgage tax exemptions they awarded to eight of the 10 projects we previously discussed (Figure 4, Appendix A).

We also judgmentally selected another sample of 10 projects and found the Agency's records indicated that three projects exceeded their limits by $98,021, $52,714 and $8,894. As a result, the Agency followed up with each project owner and each project owner revised their tax exemption forms. Two project owners' revised forms now indicate they did not exceed their tax exemption limit. However, one project owner's forms still indicate they exceeded their limit by $3,079. As of November 2015, the Agency established an internal tracking system to monitor sales tax exemptions and has begun taking action to recover sales tax exemption overages from project owners. As a result, between January 2016 and March 2017 the Agency has collected $473,488 from project owners that exceed their approved sales tax exemptions and returned the funds to the New York State Tax Department.

Although the Board adopted a UTEP which includes provisions for the recapture or claw-back of financial assistance, and has adopted recapture implementation procedures, during the audit period, the Board had not recaptured financial assistance or terminated a project for poor performance. However, starting July 2016, the Board began to recapture financial assistance for projects that failed to meet the material terms outlined in their agreements. Between July 2016 and February 2017 the Agency recaptured tax abatements totaling $855,089 from six projects and returned the funds to the taxing jurisdictions. The Agency is in the process of recapturing an additional $5,656. In addition, the UTEP does not clearly state when financial assistance should be recovered or terminated. Officials said that, as of April 2013, they informally set a recapture threshold of 85 percent of the jobs detailed in the project agreements. However, creating or retaining less than the informal threshold may or may not result in a recapture. Officials said they have not established a formal threshold because they want flexibility in enforcing recaptures.

By not adequately monitoring ongoing projects, the Board would not know whether project owners are fulfilling their job goal commitments. As a result, an increased risk existed that projects received tax benefits and Agency financing without fulfilling their commitments to the community.

Annual Reporting

IDAs are required to maintain specific information on all projects for which they approve financial assistance. While the project owner is responsible for providing project information to the IDA, the IDA is responsible for collecting and reporting the data. An IDA uses this information to submit an annual report of its operations and financial activity, including information on projects which receive financial assistance, to the Authorities Budget Office and the Office of the State Comptroller. Before the Agency submits its annual report, the Board should review the information for accuracy. The Agency's chief financial officer (CFO) must then certify that it is complete and accurate. Good business practices require the Board to establish policies and procedures for obtaining and reporting reliable project information.

To develop the annual report, the Agency sends a letter to each project owner requesting updated project information, including current employment numbers. To determine whether the Agency correctly reported project information, we compared 40 of the 276 projects detailed in the 2014 annual report to project documentation maintained by Agency officials. We found five projects had incorrect job creation and retention numbers. For example, the Agency has consistently reported that the Life Technologies project had 475 jobs before Agency assistance. However, there were actually 507 jobs.

Although the CFO certified the annual report, the Agency's review did not identify the erroneous project information. We believe the errors were caused, in part, because the Board has not established adequate policies and procedures to report reliable information from project owners. The implementation of adequate policies and procedures may have identified these errors and helped to ensure accurate project information was publicly reported.

Recommendations

The Board should:

1. Continue to use the revised uniform project selection criteria and document the rationale for awarding financial assistance to project owners.

2. Require financial assistance application information to be verified and confirmed before the Board approves new projects.

3. Continue to use the new procedures to ensure that actual sales tax exemptions do not exceed the sales tax exemptions the Board approved.

4. Continue to use the new policies and procedures for reporting reliable project information for the Agency's annual report.

5. Ensure the annual report filed with the Authorities Budget Office and the Office of the State Comptroller is accurate.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to our office within 90 days, pursuant to Section 35 of General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Board to make this plan available for public review in the Board Secretary's office.

Our office is available to assist you upon request. If you have any further questions, please contact Ann Singer, Chief Examiner of the Statewide and Regional Projects Unit, at (607) 721-8306.

We thank Agency officials and staff for the courtesies and cooperation extended to our auditors during this audit.

Sincerely,

Gabriel F. Deyo
Deputy Comptroller

APPENDIX A

PROJECT TAX EXEMPTIONS

Figure 4: Tax Exemptions Provided to Projects

Project Project Approval Date	Property Tax Abatement[a]		Tax Exemptions		Total
	Received	Pending[b]	Sales and Use	Mortgage Recording	
General Motors Company (10/16/1996)	$2,109,861	$709,159	unknown	unknown	$2,819,020
500 Bailey, LLC (3/11/1998)	$724,786	$158,210	unknown	unknown	$882,996
American Pharmaceuticals Partners, Inc. (12/15/2004)	$592,006	$285,267	unknown	unknown	$877,273
API Heat Transfer, Inc. (11/18/2013)	$62,682	$538,853	$96,000	$0	$697,535
New Era Cap Company, Inc. (6/14/2010)	$318,882	$5,526	$160,000	$31,000	$515,408
J.M. Lester, LLC (4/16/2003)	$123,718	$33,068	unknown	unknown	$156,786
B&L Wholesale Supply, Inc. (1/8/2007)	$81,171	$31,246	unknown	unknown	$112,417
McGard, LLC (3/21/2011)	$28,750	$72,964	unknown	unknown	$101,714
Osmose, Inc. (3/15/2000)	$74,476	$16,988	unknown	unknown	$91,464
Praxair, Inc. (2/11/2004)	$36,546	$16,890	unknown	unknown	$53,436
Total	$4,152,878	$1,868,171	$256,000	$31,000	$6,308,049

[a] Amounts were calculated using records from the County Tax Assessor's office and information in the project agreements.

[b] Assumes a 2 percent annual tax rate increase.

APPENDIX B

RESPONSE FROM AGENCY OFFICIALS

The Agency officials' response to this audit can be found on the following pages.

June 1, 2017

THE ECONOMIC DEVELOPMENT CORPORATION FOR ERIE COUNTY

Ms. Ann C. Singer
Chief Examiner
Statewide Audit
State Office Building
Suite 1702
44 Hawley Street
Binghamton, NY 13901

Re: Audit Response – Draft of April, 2017
Erie County Industrial Development Agency
Audit Report Period: January 1, 2014 – May 31, 2015
Additional Audit Report Period: Selected projects back to October 16, 1996
Audit Report Number: S9-15-70

Dear Ms. Singer:

A top priority of the Board of Directors (the "Board") of the Erie County Industrial Development Agency ("ECIDA") is to provide effective and transparent oversight of the Agency's operations and to provide good stewardship of its tax incentive administration. As the OSC auditors noted throughout their report, the ECIDA Board has positively demonstrated its oversight in part by:

See Note 1 Page 19

- Adopting project selection criteria for all project types;
- Recapturing financial assistance and terminated projects for failing to meet their material terms;
- Establishing an internal tracking system for monitoring sales tax exemptions and collected monies from clients who exceeded their approved amounts;
- Requiring clients to sign a certification acknowledging that the information they are providing is true and accurate; and
- Adopting a revised standard application which incorporated the requirements of the new legislation.

Although the ECIDA appreciates the OSC's recognition of its oversight activities, we object to several assertions made by the OSC throughout the audit.

OSC Review Utilized Inapplicable Standards for Audit Reporting Period

First, we strongly disagree that the Board "could have done more to provide effective oversight of the Agency's operations during the audit period." The OSC field audit was conducted in October 2015, with the scope of the audit encompassing ECIDA policies, procedures, and project files for the Audit Report Period January 1, 2014, through May 31, 2015. Despite the fact both the Audit Report Period and the field audit commencement time periods predated the June 15, 2016 legislative changes (hereinafter the "June 2016 Legislation"), the standards and best practices that the OSC auditors utilized to evaluate the 20 projects that they examined inexplicably stemmed from the June 2016 Legislation, which was not in effect during the audit reporting periods referenced above. Most of the projects that they reviewed were approved prior to the adoption of the ECIDA Recapture Policy (some projects that they reviewed were

See Note 2 Page 19

induced as far back as 1996) – and all projects that were reviewed were approved by the Board prior to the effective date of the new legislation, June 15, 2016. We find it disingenuous that the audit utilized post June 2016 Legislation statutory standards to examine pre-June 15, 2016 projects and take exception to any implication that the Board could have provided more effective oversight when such a conclusion is based on application of statutory requirements that were not in existence during the audit reporting periods.

In the Background and Methodology Section and in Appendix C, the auditors indicated that they performed the audit in accordance with Generally Accepted Government Auditing Standards ("GAGAS"). We disagree and submit that the auditors did not apply the GAGAS standards correctly. The auditors consistently applied the June 2016 Legislation as the standard for evaluating all projects that they reviewed -- despite that fact that the legislation was not in effect for any of those projects. These actions violated numerous GAGAS provisions. Specifically, pursuant to GAO-12-331G Government Auditing Standards Section 6.56, auditors must "obtain sufficient, appropriate evidence to provide a reasonable basis for their findings and conclusions." Appropriateness is further defined as the "measure of the quality of evidence that encompasses its relevance, validity, and reliability in providing support for findings and conclusions related to the audit objectives." *Id.* at Section 6.57. Further, auditors are tasked with identifying "any provisions of laws, regulations, contracts or grant agreements that are significant within the context of the audit objectives and assess the risk that noncompliance with provisions of laws, regulations, contracts or grant agreements could occur." *Id.* at Section 6.28.

See Note 3 Page 20

Here, the auditors identified incorrect provisions of laws, regulations, and project documents, and therefore used inappropriate, irrelevant evidence (by analyzing project data during periods prior to the Audit Reporting Period), and applied irrelevant standards for the period in question, namely, statutory requirements which did not take effect until June 15, 2016, resulting in inconsistent application of the GAGAS standards set forth above. Accordingly, we believe the auditors do not have a reasonable basis for their findings and conclusions.

<u>Projects Were Reviewed and Monitored Under Prior UTEPs.</u>

The auditors incorrectly stated that Agency officials could not provide the criteria that were used to evaluate the 10 projects that they reviewed and referenced in Figure #1. The evaluative process used by the Board was the Uniform Tax Exemption Policy ("UTEP") that was in effect at the time of each project's inducement. The current Board did not approve any of these projects and cannot and should not be held accountable for evaluating the then-applicable criteria in effect at the time of each project inducement, upon which these 10 projects were approved.

See Note 4 Page 20

The audit incorrectly stated that projects approved prior to April 2013 were not monitored. All project owners that receive a benefit from the ECIDA, regardless of when they were induced, receive an annual employment survey. Employment data is reported annually to the Authority Budget Office through its online PARIS reporting system.

See Note 5 Page 20

<u>Sales Tax Exemption Monitoring Prior to June 2016 Was the Responsibility of the NYS Tax Department</u>

We object to the OSC auditor's assertion that the ECIDA did not develop controls to prevent project owners from exceeding their authorized sales tax savings amounts. Historically, monitoring of sales tax savings was the responsibility of the New York State Tax Department. The ECIDA merely requested the ST-340 form that projects owners submitted to the NYS Tax Department as a ministerial function. The legislation in June 2016 required IDAs to monitor sales tax amounts. The ECIDA implemented its sales tax monitoring process in late 2015, approximately six months prior to the effective date of the June 2016 Legislation.

See Note 6 Page 20

ECIDA Developed Adequate Policies and Procedures During the Audit Report Period

We object to the auditor's findings that the Board did not develop adequate policies and procedures to report reliable project job goals from project owners. On January 29, 2014, the ECIDA adopted a Recapture Policy which holds project owners responsible for the promises they make to the Board. These promises, known as Material Terms, include employment, investment, local labor, pay equity, and unpaid taxes. The compliance of these materials terms by project owners are monitored by ECIDA staff through various reporting mechanisms. Failure of a project owner to meet its material terms results in the commencement of the recapture policy. Notably, the ECIDA Board approved this policy more than two years prior to the legislation that required IDAs to adopt a recapture policy. Further, the Economic Development Council utilized the ECIDA's policies to assist in developing the statewide 2016 legislation. The Board acknowledges that projects approved prior to January 2014 are not subjected to the provisions of the Recapture Policy. Since the documents executed between the ECIDA and its clients are legally binding on both parties, the ECIDA does not have the legal authority to unilaterally change the terms of those contracts after the fact to impose new laws, policies, or best practices.

See Note 7 Page 21

Project Selection Criteria Was Appropriate for Projects Induced Prior to June 2016

We are perplexed by the auditor's criticisms that the ECIDA did not develop uniform project selection criteria for project types, did not adopt uniform project agreements, and did not include, on its application, a statement that the information furnished by the applicant was accurate under penalty of perjury. The auditors acknowledge multiple times throughout their report that none of these items were required at the time of the audit. The auditors further acknowledge that the ECIDA later implemented these items. Since these issues were fully satisfied by the ECIDA prior to the June 2016 Legislation, they should have been removed from the audit.

See Notes 2 & 8 Pages 19 & 21

As stated above, the Board disagrees that Agency officials could not provide the criteria that was used to evaluate the 10 projects referenced in Figure #1 and that the Board did not document how it arrived at its decision to approve the projects. If the OSC auditors would have researched and utilized the laws that were in effect at the time of each of those project's inducements (instead of the June 2016 legislation), and reviewed deliberations contained in the minutes of Policy Committee and Board meetings, as applicable, they would have found that the ECIDA was in full compliance with the laws and best practices that were in effect at the time. The chart below further illustrates this point.

See Notes 2 & 8 Pages 19 & 21

Project	ECIDA Response
General Motors (10/16/96)	• When the 1996 Board approved this project, it did so by legally applying the Uniform Tax Exemption Policy (UTEP) that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for the evaluative criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.
500 Bailey, LLC (3/11/98)	• When the 1998 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.

See Notes 2 & 8 Pages 19 & 21

See Notes 2 & 8 Pages 19 & 21

American Pharmaceuticals Partners, Inc. (12/15/04)	• When the 2004 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.	See Notes 2 & 8 Pages 19 & 21
New Era Cap Company, Inc. (6/14/10)	• When the 2010 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.	See Notes 2 & 8 Pages 19 & 21
McGard, LLC (3/21/11)	• When the 2011 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.	See Notes 2 & 8 Pages 19 & 21
API Heat Transfer, Inc (11/18/13)	• When the 2013 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system. • In 2016, the Board recaptured $6,523.83 from API because it fell below its jobs at application.	See Notes 2 & 8 Pages 19 & 21
B&L Wholesale Supply, Inc. (1/8/07)	• The ECIDA was out of title on this project as of 1/30/15, ten months prior to the time of the field audit. • The Board objects to the audit of an inactive project. • Notwithstanding our objection, the 2007 Board approved this project by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • When the project was active, the ECIDA monitored B&L's job performance annually and reported the job data to the Authority Budget Office through its online reporting system.	See Notes 2, 8 & 9 Pages 19 & 21
J.M. Lester, LLC (4/16/03)	• When the 2003 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.	See Notes 2 & 8 Pages 19 & 21

Praxair, Inc. (2/11/04)	• When the 2004 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.	See Notes 2 & 8 Pages 19 & 21
Osmose, Inc. (3/15/00)	• When the 2000 Board approved this project, it did so by legally applying the UTEP that was in effect at the time. • The current ECIDA Board did not approve this project and cannot and should not be held accountable for evaluating the criteria upon which this project was approved. • The job performance for this project is monitored annually and is reported to the Authority Budget Office through its online reporting system.	See Notes 2 & 8 Pages 19 & 21

Conclusion

Despite the many issues with which the ECIDA disagrees, the ECIDA does agree with the OSC's Audit Recommendations:

- Continue to use the revised uniform project selection criteria and document the rationale for awarding financial assistance to project owners;
- Require financial assistance application information to be verified and confirmed before the Board approves new projects;
- Continue to use the new procedures to ensure that the actual sales tax exemptions do not exceed the sales tax exemption the Board approved;
- Continue to use the new policies and procedures for reporting reliable information for the Agency's annual report;
- Ensure the annual report filed with the Authority Budget Office and the Office of the State Comptroller is accurate.

The ECIDA is proud of its success in advancing its mission and, as always, remains committed to providing effective and transparent oversight of the Agency's operations. We are thankful for your recognition that the Board has positively demonstrated effective project oversight, but disappointed by the inclusion of confusing and disingenuous conclusions that do nothing more than unnecessarily raise the specter of some form of impropriety. The ECIDA will continue to review its policies as required, and will implement the provisions of new laws and best practices as they are adopted by the New York State legislature.

See Notes 2 & 10 Pages 19 & 21

Sincerely,

Brenda McDuffie
Chairwoman

APPENDIX C

OSC COMMENTS ON THE AGENCY OFFICIALS' RESPONSE

Note 1

While the Agency has taken several steps to improve project oversight, most of these steps were taken after our field work was completed but before our audit report was published. Therefore, we updated our draft report to reflect the positive actions the Board took.

Note 2

The audit conducted was a performance audit, not a legal compliance audit. Although Agency officials disagree with the best practices detailed in the audit report, they are consistent with the guidance our Office has provided for more than a decade. While many of the best practices and recommendations we have included in our various audit reports and publications were not codified in law, we believe, from many perspectives, they are practical, good business practices and necessary to provide effective oversight. Several of the recommendations we included in the current report are consistent with the recommendations we made to the Agency in 2006 (S8-6-22 and 2006-MS-2).[9] The reports recommended the Board:

- Develop specific project evaluation criteria;
- Develop a process to verify information included on project applications;
- Take independent steps to verify reported employment data;
- Take steps to enter into contractual agreements with benefited project owners that provide officials with access to employment information;'
- Require that project monitoring be performed to determine whether the projects are producing benefits as intended;
- Develop a recapture policy;
- Specify sanctions, such as recapture provisions or increased PILOT payments, for those projects that fall below performance standards; and
- Compare the sales tax exemptions the project owners and tenants are claiming against the estimate at application and investigate the reasons for significant variances.

[9] Due to the age of these reports, they are no longer available on our web page. However, you may request a copy of these reports by e-mailing LGSA-Audits@osc.state.ny.us.

In response to our 2006 audits, the Agency took a similar stance on the audit's criteria and recommendations. The Agency's 2006 audit response included the following statements: "In our view, many of the criteria suggested by the Comptroller are fundamentally subjective…", "We question the Comptroller's recommendation that each IDA should develop its own specific criteria.", "The reliance upon employment growth as a primary criteria for tax abatement is particularly counter-productive…" In summary, the Agency President stated "We do not believe that the establishment of very detailed criteria or the recapture of benefits are the best practices to achieve those objective in the long run."

The Agency also stated that, "We would prefer that any changes in the criteria for the evaluation of projects be subject to legislative review and adopted within General Municipal Law." The Agency took little action to implement the 2006 recommendations. As a result, many of the 2006 findings were not corrected and we reported on them again.

While the Agency Chairwoman points out that several of the best practices detailed in the audit report recently became statutory requirements and, therefore, provide no reasonable basis for the report findings, she does not offer an explanation on their impracticality or why they were not implemented prior to their becoming law.

Note 3

Our audit did comply with GAGAS standards. GAGAS standards do not require legal criteria. As noted above, this was a performance audit, not a legal compliance audit. As such, the criteria used was based on more than 10 years of recommendations made by this Office.

Note 4

The UTEP does not require documented evaluation criteria, and it applies only to projects that have been approved. The evaluation criteria we discuss pertains to what criteria the Agency officials and Board used to evaluate the merits of each project to arrive at an approval or denial decision. The Board is responsible for providing effective oversight of all active projects regardless of when a project may have been approved.

Note 5

Obtaining an annual employment survey that is completed by and based on the project owner's integrity does not solely constitute effective oversight. The IDA should use an independent method to support the project owner's self-reported employment data. When a shortfall occurs, officials should obtain explanations for deviations from the project agreements.

Note 6

The Agency Board grants sales tax exemptions. As a result, it is responsible for ensuring project owners do not exceed the exemptions granted. In our 2006 audit, we made the following recommendation: "IDA officials should compare the sales tax exemptions the project owners and tenants are claiming against the estimate at application and investigate the reason for significant variances." However, the recommendation was not implemented. Consequently, three of the 10 projects we examined had exceeded their sales tax exemptions from $9,000 to $98,000. The Agency implemented a sales tax monitoring process after we shared our findings. As a result, between January 2016 and March 2017, the Agency recovered $473,488 from nine project owners that exceeded the Board's authorized sales tax exemptions.

Note 7

The Agency purports a recapture policy that holds project owners responsible for the promises made to the Board is an adequate policy and procedure to report reliable project information. However, the policy does not address ensuring the data the Agency reports agrees with its project documentation. The Board has not adopted any policies to ensure accurate and reliable information is publicly reported.

Our report states the Board improperly reported project data for five of the 40 projects (13 percent) we examined. For example, officials reported Life Technologies had 475 jobs before the Board approved financial assistance. However, the Agency's documentation shows the company told the Board it had 507 jobs, 32 more jobs than the Board reported. As a result, even if additional jobs were not created and the company reported it had 507 jobs at the end of the year, since the Board underreported the preassistance job number, if it updated subsequent reports, they would inaccurately show that 32 jobs were created.

Note 8

In addition to Note 2, although the Board Chairwoman disagrees that Agency officials could not provide the criteria that was used to evaluate the 10 projects referenced in the report, the Agency has not provided any project evaluation criteria. Regardless of when a project was approved and who comprised the Board at the time of approval, the Agency should have retained sufficient records to document the rationale and basis for granting financial assistance to project owners. The UTEP the Board Chairwoman refers to does not support or document the reasons the Board authorized taxpayer financial assistance to project owners.

Note 9

The audit period was January 1, 2014 through May 31, 2015. The B & L Wholesale Supply, Inc. project was active during our audit period.

Note 10

Our report accurately reflects the conditions and findings we found during the audit. The audit's criteria is consistent with the best practices the Comptroller's Office has supported, reported on and publicly shared for many years. As stated in Note 2, our Office audited the Agency more than a decade ago and reported on several of the findings this report contains. Had officials taken appropriate actions in 2006, the results of this audit may have been different.

APPENDIX D

AUDIT METHODOLOGY AND STANDARDS

The objective of our audit was to determine if the Agency's Board was providing effective oversight responsibilities of the Agency's operations for the period January 1, 2014 through May 31, 2015. For selected projects, we extended our audit period back to the date of their inception.

To achieve our audit objective and obtain valid evidence, we performed the following procedures:

- We interviewed the Board and Agency officials to understand and assess the Agency's processes and procedures.

- We reviewed the Agency's policies, including the UTEP, to identify written criteria outlining an applicant's eligibility for sponsorship and the benefits that are offered.

- We judgmentally selected 10 projects to obtain a sample of various sizes and types of projects for further review and testing. This testing included, among other things, comparing amounts projected to be spent and amounts actually spent, comparing the reported actual job numbers by the businesses to projected jobs on the application, and reviewing PILOT agreements and payments to ensure that they were accurate and complied with the agreements.

- We reviewed Board minutes to identify project monitoring or job creation discussions and reports to the Board regarding projects failing to achieve project goals.

- We reviewed the Agency's project application, project agreements and any applicable evaluation criteria and compared them to the new legislation.

We conducted this performance audit in accordance with GAGAS. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.