Office of the New York State Comptroller

Division of Local Government & School Accountability

# Industrial Development Agency

## Board Governance

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# State of New York
# Office of the State Comptroller

**Division of Local Government**
**and School Accountability**

September 2017

Dear Agency Officials:

A top priority of the Office of the State Comptroller is to help local officials manage government 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 Board governance. Audits also can identify strategies to reduce costs and to strengthen controls intended to safeguard governmental assets.

Following is a report of our audit entitled Industrial Development Agency Board Governance. This audit was conducted pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Article 3 of the New York State General Municipal Law.

This audit's results and recommendations are resources for agency officials to use in effectively managing operations and in meeting the expectations of their constituents. If you have questions about this report, please feel free to contact the local regional office for your county, as listed at the end of this report.

Respectfully submitted,

*Office of the State Comptroller*
*Division of Local Government*
*and School Accountability*

**State of New York**
**Office of the State Comptroller**

# EXECUTIVE SUMMARY

An industrial development Agency (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.

The IDA's role 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. An IDA's Board is responsible for the IDA's general management and control.

We audited six IDAs across New York State: Auburn, Bethlehem, Erie, Hempstead, Orange and Steuben.

## Scope and Objective

The objective of our audit was to determine whether IDA Boards provided effective oversight of the IDAs' operations for the period January 1, 2014 through May 31, 2015. For selected projects, we expanded the audit period back to October 16, 1996. Our audit addressed the following related questions:

- Are the IDAs' actions consistent with the Boards' statutory authority?
- Do the Boards have standard applications and consistent review processes?
- Do the Boards monitor approved project results and take action if project goals are not realized?

## Audit Results

In June 2016, new legislation became effective to increase the accountability and improve the efficiency and transparency of IDA operations.[1] 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

[1] Chapter 563 of the Laws of 2015

modify financial assistance or tax exemptions. Many of the areas we reviewed were not requirements during our audit period. Discussion of these areas in this report is made with the acknowledgment that, while they were not mandated, they were considered good business practices and, therefore, included as a part of our review.

We found IDAs could do more to provide effective oversight of their operations. Orange's Board acted outside of its authority when it accepted and agreed to administer a $1 million grant. Although Hempstead accurately reported its project information to the Authorities Budget Office and the Office of the State Comptroller, the remaining five IDAs submitted annual reports that contained numerous errors. We reviewed 155[2] projects to determine whether the IDAs reported accurate project information and found that 49 contained incorrect information, including inaccurate job creation and retention numbers, project status and transfer information. All six IDAs used a standard project application. However, four (Auburn, Hempstead, Orange and Steuben) did not develop and use any uniform project selection criteria. Further, they did not document their rationale for awarding financial assistance to the project owners.

We also found 24 of the 35 IDA projects we reviewed to evaluate the IDA's approval processes and project monitoring practices did not include terms for recapture or termination of financial assistance when project goals were not met or maintained. Auburn, Hempstead, Orange and Steuben did not require project owners to provide records to support the number or salaries associated with the jobs they purportedly created or retained. In contrast, Erie requests all project owners to annually provide a New York State-45 (a quarterly wage report) to support its job numbers, performs random site visits and provides brief status reports to the Board.

While all IDAs adopted a Uniform Tax Exemption Policy (UTEP), which includes provisions for the recapture of financial assistance, they had not established UTEP implementation procedures for claw-backs of financial assistance. In addition, none of the UTEPs clearly stated when financial assistance should be recovered or terminated. Therefore, recapture of financial assistance may be inconsistently applied to projects that do not meet the terms of their project agreement.

We also compared the reported employment in the 2014 annual reports for a sample of 196 applicable projects. We found 127 (65 percent of project owners) reported they created and retained the jobs they agreed to. However, the remaining 69 (35 percent of project owners) reported they did not. Specifically, their 2014 annual reports indicated they would create or retain 13,818 jobs, but they actually created or retained 10,209 jobs, a shortfall of 26 percent. However, IDA officials rely on the project owner's integrity to self-report employment data.

By not adequately monitoring ongoing projects or verifying reported employment data, the IDAs did not know whether project owners were fulfilling their job goal commitments. As a result, there was an increased risk that projects received tax benefits and IDA financing without fulfilling their commitments to the community.

Since the new legislation became effective, the Boards have taken steps to improve their oversight of

[2] We selected 158 projects to determine whether the IDAs publicly reported accurate project information and found Orange had three project applications that contained inconsistent job creation and retention numbers, so we could not determine the employment goals for these projects.

IDA operations. For example, Auburn, Hempstead, Orange and Steuben now require project owners to provide documentation to support the number of jobs they report as created and retained. Also, starting July 2016, Erie began to recapture financial assistance for projects that failed to meet the material terms outlined in their agreements. Between July 2016 and February 2017, Erie recaptured tax abatements totaling $855,089 from six projects and returned the moneys to the taxing jurisdictions. Additionally, between January 2016 and March 2017, Erie collected $473,488 from project owners that exceeded their approved sales tax exemptions and returned the moneys to the New York State Tax Department. Bethlehem recaptured financial assistance from one project for $85,580, and Hempstead and Orange have terminated projects for poor performance and failure to meet project goals.

**Comments of IDA Officials**

The results of our audit and recommendations have been discussed with IDA officials and their comments, which appear in Appendix B, have been considered in preparing this report.

# Introduction

**Background**

Industrial Development Agencies (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. Because IDAs' property and activities 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 IDA's role 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.

An IDA's Board is responsible for the IDA's general management and control. A Board member's role and responsibilities include executing direct oversight of the IDA'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]

In June 2016, new legislation became effective to increase the accountability and improve the efficiency and transparency of IDA operations.[4] 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.

We audited six IDAs across the State to determine whether the IDAs' Boards were providing effective oversight of the IDAs' operations for the period January 1, 2014 through May 31, 2015, prior to the implementation of the 2016 legislation. Figure 1 provides relative statistics for these IDAs.

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[3] New York State Public Authorities Law, Section 2824

[4] Chapter 563 of the Laws of 2015.

**Figure 1: 2014 Active Projects**

| Agency | Project Count | Projects' Value (millions) | Expenditures (millions) |
|---|---|---|---|
| Auburn | 16 | $222.9 | $1.3 |
| Bethlehem | 16 | $478.5 | $.159 |
| Erie | 276 | $5,325.6 | $2.6 |
| Hempstead | 81 | $1,945.5 | $1.1 |
| Orange | 41 | $1,035.6 | $2.5 |
| Steuben | 45 | $1,503.7 | $.952 |

## Objective

The objective of our audit was to determine whether IDA Boards were providing effective oversight of the IDAs' operations. Our audit addressed the following related questions:

- Are the IDAs' actions consistent with the Boards' statutory authority?
- Do the Boards have standard applications and consistent review processes?
- Do the Boards monitor approved project results and take action if project goals are not realized?

## Scope and Methodology

We examined IDA records and interviewed IDA and Board officials to identify practices to determine whether the Boards were providing effective oversight of IDA operations for the period January 1, 2014 through May 31, 2015, prior to the implementation of the 2016 legislation. For selected projects, we expanded the audit period back to October 16, 1996. 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.

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.

**Comments of IDA Officials**

The results of our audit and recommendations have been discussed with IDA officials and their comments, which appear in Appendix B, have been considered in preparing this report.

## Statutory Authority and Reporting

New York State Public Authorities Law grants local authorities only those powers explicitly granted or necessarily implied by statute. IDAs are also required to maintain specific information on all projects for which they approve financial assistance. IDAs use this information to submit an annual report of their operations and financial activity, including information on projects which receive financial assistance, to the Authorities Budget Office and the Office of the State Comptroller.

As noted above, the 2016 legislation requires new projects use 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. Many of the areas we reviewed were not requirements during our audit period. Discussion of these areas in this report is made with the acknowledgment that, while they were not mandated, they were considered good business practices and, therefore, included as a part of our review.

We found, with the exception of Orange IDA (Orange), the IDAs' actions were consistent with their statutory authority. Orange's Board acted outside of its authority by agreeing to accept a grant and administering the grant funds in consideration for approving a payment in lieu of taxes (PILOT) agreement. It also acted outside of its authority by making a short-term loan to a project owner. We reviewed 175[5] projects to determine whether the IDAs reported accurate project information on their 2014 annual reports. We found Hempstead accurately reported its project information. However, the remaining five 2014 IDA annual reports contained numerous errors. Their 155 projects contained 49 instances of incorrect information, including inaccurate job creation and retention numbers, project status and transfer information.

### Statutory Authority

Local authorities may engage in only those activities and exercise those powers which are expressly authorized in law or which are incidental to performing their statutory purposes. A local authority,

5 We selected 158 projects to determine whether the IDAs publicly reported accurate project information and found Orange had three project applications that contained inconsistent job creation and retention numbers, so we could not determine the employment goals for these projects.

unless otherwise empowered under the law, may not grant or loan its moneys to public or private corporations, private businesses or interests, civic associations, charitable groups, educational institutions, not-for-profit corporations, or any other social religious, fraternal or cultural organization. An IDA may not, under any circumstances, award grants or make loans of its own moneys[6] and cannot administer a grant on behalf of another company.

With the exception of Orange, the IDAs' actions were consistent with their statutory authority, mission and goals. Orange's bylaws, however, define its mission as "…the Agency shall: (1) seek, outreach and process applications for financial assistance…; (2) consider and make grants to qualified applicants for eligible economic development projects;…" Since 2009, Orange has administered grant funds on behalf of the Millennium Pipeline Company (Company), which is not within Orange's statutory authority.

According to Orange's Board minutes, the Board approved the Company's request for a PILOT abatement for a project to upgrade its existing pipelines.[7] At the time the PILOT was authorized, the Company made a significant commitment to Orange[8] and agreed to contribute $1,080,000 over a 10-year period for economic development in the County, beginning 60 days after commercial operation of the project.[9]

A grant commitment letter dated December 4, 2008 sets forth the terms for administering the grant funds. Under the agreement, Orange will administer the Company's grant and determine the criteria for eligibility, qualifications, credit standards, and terms and conditions of the use of the funds. The first grant payment of $108,000 was received from the Company on February 23, 2009, and the Company has provided Orange with annual grant payments since 2009. In 2010, the Board approved the use of the grant funds as a short-term loan to another business, Continental Organics. As of 2012, the grant funds have been paid to the Orange County Funding Corporation, a non-profit corporation that Orange controls.

By agreeing to accept a grant and administering the grant funds in consideration for approving a PILOT agreement, and also making a short-term loan to a project owner, Orange's Board has acted outside its statutory authority. The Board updated the Agency bylaws on July 6, 2016. The revised bylaws no longer allow the Agency to administer grants.

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6 Authorities Budget Office Policy Guidance No. 15-01
7 May 17, 2006 Board minutes
8 March 18, 2009 Board minutes
9 December 17, 2008 Board minutes

**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. IDAs use this information to submit an annual report of their 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 IDA submits its annual report, the Board should review the information for accuracy. The IDA's chief financial officer must then certify that it is complete and accurate. The Board should establish policies and procedures for obtaining and reporting reliable project information.

To develop the annual report, the IDAs send an annual letter to each project owner requesting updated project information, including current employment numbers. To determine whether the IDAs correctly reported project information, we compared each IDA's 2014 annual report to its project documentation for either a sample of projects (if the IDA had more than 50 projects) or the project population.

Hempstead accurately reported 20 projects information. However, the remaining five 2014 annual reports contained numerous errors. The Auburn, Bethlehem, Erie, Orange and Steuben IDAs' annual reports included a total of 394 projects. We examined 158 of the projects and found Orange had three project applications that contained inconsistent job creation and retention numbers, so we could not determine the employment goals for these projects. Of the remaining 155 projects, 49 contained erroneous information. Examples are included below; some examples contained more than one type of error.

- Forty projects had incorrect job creation and retention numbers (Auburn, Bethlehem, Erie, Orange and Steuben). For example,

    - Orange consistently reported the Millennium Pipeline project would create 350 new jobs. However, the project application indicated 27 jobs would be created but did not state these jobs would be in Orange County. Orange officials told us the project was never expected to create jobs.

    - Auburn consistently reported the AAF McQuay International project would retain 483 jobs and create five jobs. However, the project application indicated 651 jobs would be retained and 58 jobs would be created.

- Seven projects were either reported as active when the projects ended years ago, reported twice, or were active but not reported (Bethlehem, Orange and Steuben). For example,

  o Orange reported the Millwood Place, LLC project in its 2014 annual report but the project ended in 2008.

  o Steuben erroneously omitted two projects (Fortitude Industries and Corning Refactories) from the Authorities Budget Office 2014 annual report. However, the two projects were correctly listed on the annual report on the Agency's website.

- Three projects were sold, assigned or amended, and the transfers were not properly reported (Bethlehem and Orange). For example,

  o Bethlehem assigned the Selkirk Ventures, LLC project to ARCP ID Feura Bush NY, LLC in 2014, but did not include the new owner into the annual report.

As previously noted, before an IDA submits its annual report, it must review the information and certify that it is complete and accurate. However, the IDAs' reviews did not identify the erroneous project information. The errors were caused, in part, because the Boards did not establish adequate policies and procedures to report reliable information from project owners. The Boards do not review or approve the annual reports before they are provided to the Authorities Budget Office and the Office of the State Comptroller. The implementation of adequate policies and procedures and a review of the information by the Board prior to the chief financial officer certifying the annual report may have identified these errors and helped ensure accurate project information was publicly reported.

**Recommendations**

The Boards should:

1. Ensure the IDAs' actions are consistent with their statutory authorities.

2. Develop policies and procedures for obtaining and reporting reliable project information for the IDAs' annual report.

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

# Standard Application and Review Process

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 IDA's investment. Promoting the use of a standard application when project owners request financial assistance from the Agency can help ensure consistent project evaluation. 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.

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;
- A statement that IDA assistance is necessary to undertake the project; and
- A statement that the project owner is in substantial compliance with all laws, rules and regulations.

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.

To determine how the Boards reviewed and approved projects, we interviewed Board members and IDA officials. We also reviewed the IDAs' project documentation and Board minutes. Further, we judgmentally selected a sample of 35 projects totaling $1,095,997,012 to review the project selection process.

All six IDAs used standard project applications that generally included a description of the project, cost and performance estimates and other pertinent information. However, four IDA Boards (Auburn, Hempstead, Orange and Steuben) did not develop and did not use any uniform project selection criteria. Further, they did not document their rationale for awarding financial assistance to the project owners.

Erie's evaluative criteria was limited to certain categories such as senior housing projects and adaptive reuse.[10] Bethlehem had the most comprehensive evaluation criteria, adopted in 2014. It included evaluating the nature of the property before the project begins (for example, vacant land or building), the extent to which the project will create or retain permanent jobs, the impact of the proposed project on existing and proposed businesses and economic development in the Town, the likelihood of accomplishing the proposed project in a timely fashion, and whether financial assistance was necessary for the applicant to undertake the project. However, Bethlehem's criteria was general and used for all project types. The new legislation requires a set of criteria specific to each project type (i.e., housing, manufacturing, retail, etc.).

In addition, five Boards (Auburn, Erie, Hempstead, Orange and Steuben) do not require the applicant's information, including job retention estimates, to be verified or confirmed before Board members vote to award financial assistance to the applicant. Only Bethlehem requests and receives confirmation figures. The Board also adopted a monitoring policy[11] which requires retained job estimates to be verified with quarterly income tax reports.

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[10] Erie refers to adaptive reuse as projects where the land or building in discussion has been primarily vacant for at least three years.

[11] Bethlehem adopted the monitoring policy officially in May 2015 and began informally requesting this information prior to adoption of the policy in 2014. It received the NYS-45 forms for the only project approved during our audit period.

During our audit period, the standard applications did not contain several of the components we previously identified. Specifically,

- Five IDAs (Auburn, Erie, Hempstead, Orange and Steuben) do not require project owners to certify that application information is accurate under penalty of perjury.

- Four IDAs (Auburn, Erie, Hempstead and Orange) do not include fringe benefit estimates for jobs created or retained.

- Four IDAs (Auburn, Erie, Orange and Steuben) do not provide a statement that the applicant is compliant with all laws and regulations.

- Three IDAs (Auburn, Orange and Steuben) do not state that IDA assistance is necessary to complete the project.

- Three IDAs (Auburn, Orange and Steuben) did not include a statement that false information can lead to termination of financial assistance.[12]

- One IDA (Orange) does not include timeframes for jobs to be created.

For all 35 projects we reviewed, Board members used their collective personal knowledge to evaluate the applicant's cost estimates and job creation goals. Officials could not provide criteria that they used to evaluate these projects, and the Boards did not document how they arrived at their decisions to approve these projects. Although Bethlehem and Erie have adopted some evaluation criteria, these 35 projects were dated prior to the adoption of the criteria and did not have this evaluation documented.

Further, during our audit period, a total of 68 projects were presented to the IDA Boards for approval. The Erie, Orange and Steuben Boards approved the 50 projects that were presented to them. Auburn did not approve or deny any applications in our audit period. Bethlehem and Hempstead rejected two of the 18 projects presented for approval. Bethlehem rejected a project it found was not in line with its mission. Although Hempstead's Board approved a project, its owner decided not to proceed with the project after the Board denied the owner's request for additional property tax abatements.

[12] The application requires a certification from the applicant that the information presented is accurate but does not state that financial assistance can be terminated if false information is provided.

Without documented criteria for evaluating projects and comprehensive project applications, residents do not have assurance that IDA benefits are awarded through a fair and consistent process. Positively, after our audit fieldwork was completed, all IDAs have adopted standard applications that are fully compliant with the recently approved legislation.

**Recommendations**

The Boards should:

4. Develop and implement uniform project selection criteria and document the rationale for awarding financial assistance to project owners.

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

# 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. 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, IDA 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.

<u>Project Agreements</u> – To properly monitor projects, IDAs should adopt and use uniform project agreements. A uniform project agreement should, at a minimum, include:

- The IDA 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 IDA policy; and
- A provision that the businesses certify, under penalty of perjury, that they are in substantial compliance with all laws, rules and regulations.

To determine how the Board monitors projects, we interviewed certain Board members and IDA officials, reviewed Board minutes for the period January 2007 through May 2015 and reviewed project documentation for the 35 projects we previously discussed. We found that the project agreements were missing components that could help the IDAs to more effectively monitor their projects. For example:

- None of the IDA agreements require the project owner to certify under penalty of perjury that the project owner is compliant with all laws and regulations.

- Five IDAs (Auburn, Erie, Hempstead, Orange and Steuben) have agreements that do not state the IDA's purpose to be achieved by the project.

- Five IDAs (Auburn, Bethlehem, Erie, Hempstead and Orange) have agreements that do not require updated information if salaries or benefits for these jobs change.

- Orange's agreements do not contain a requirement for annual certification of jobs created and retained.

Additionally, 24 of the 35 IDA projects we reviewed have historically not included terms for recapture or termination of financial assistance when project goals are not met or maintained. The exclusion of recapture provisions in project agreements significantly hinders the IDAs' ability to recapture or terminate financial assistance or makes it unlikely for the IDA to take action when a project fails to meet its project goals. While most IDAs have moved towards including recapture provisions for employment targets in their project agreements, Orange and Steuben have not. Specifically:

- One IDA (Hempstead) has included specific employment targets for recapture in its project agreements for all projects we reviewed from 2005 onward.

- Two IDAs (Bethlehem and Erie) have included specific employment targets for recapture in their project agreements consistently since 2012 and 2013, respectively.

- One IDA (Auburn) had recapture language written into its project agreements inconsistently throughout the past few years. For example, the Goulds Pumps, Inc. project was approved in June 2001 and included recapture language related to job goals. However, the Seminary Commons project, approved in June 2011, did not.

After our audit fieldwork was completed, five of the six IDAs (Auburn, Erie, Hempstead, Orange and Steuben) adopted project agreements that were fully compliant with the new legislation requirements.

Job Performance — Positively, we found that Erie requests all project owners to annually provide a New York State 45 form (NYS-45 form), a quarterly wage report, so it can verify the project owner's self-reported annual employment figures. Erie also 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.[13] However, Auburn, Hempstead, Orange and Steuben did not require project owners to provide records to support the number or salaries associated with the jobs they purportedly created or retained. The Boards and IDAs relied on the project owners' integrity to accurately report the number of jobs they created and retained. As a result, the IDAs may not know whether agreed upon jobs were actually created or retained or whether the individuals employed are paid the salary the project owner said it would pay in the project application.

As of May 2015, Bethlehem began to require project owners to provide a NYS-45 form that it uses to verify reported employment figures. Additionally, although we saw no approved project agreements containing a verification requirement, the uniform project agreements used by Orange and Steuben in 2015 now include an annual requirement to provide the NYS-45 forms to verify reported employment figures. After our fieldwork was completed, Auburn and Hempstead also began to require project owners to submit the NYS-45 forms to verify their reported employment figures.

To determine whether approved projects created and retained the number of jobs specified in the project agreements, we used the 2014 annual reports and compared the reported employment for a sample of 196 applicable projects.[14] Of these projects, 127 (65 percent of project owners) reported they created and retained the jobs they agreed to create or retain. However, the remaining 69 (35 percent of project owners) reported they did not. These projects indicated they would create or retain 13,818 jobs but actually created or retained 10,209 jobs (26 percent shortfall).

[13] Employment numbers are 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.

[14] We compared all projects for Auburn, Bethlehem, Hempstead, Orange and Steuben because they had under 100 active projects. We sampled and compared 40 projects (using a random number generator) at Erie because it had 276 active projects. Some projects were not applicable for job goal comparisons because the projects were still in the construction period.

IDA officials said these variances are likely attributed to many circumstances, including project owners overstating job creation and retention goals in project applications, running a facility more efficiently, or facing poor economic conditions. However, in exchange for financial assistance, including significant property tax reductions, the businesses agreed to create and retain a specific number of jobs and should be held accountable for failing to do so. At a minimum, the IDAs should know the precise reason for the project owner failing to create or retain the jobs detailed in the contractual agreement.

We found only Bethlehem's and Hempstead's procedures require the IDA to learn why the project owners failed to meet their job goals. The Boards consider the explanation for the job shortfall when they determine whether recapturing financial assistance is warranted. While Auburn, Erie and Steuben compare project goals to current employment levels, they do not require project owners to provide explanations for their project shortfalls. While Steuben provided documentation explaining some project shortfalls, it did not have explanations for all projects that failed to meet their job goals. Orange does not provide its Board with project status reports. The IDAs should have taken appropriate actions, including terminating the project or recapturing financial assistance granted to the project owner. However, the IDAs typically did not take such actions.

<u>Recapture Provisions</u> — Although all IDAs adopted a Uniform Tax Exemption Policy (UTEP) which includes provisions for the recapture or "claw-back" of financial assistance, they have not established UTEP implementation procedures for claw-backs of financial assistance.[15] Officials rarely claw-back financial assistance or terminate a project for poor performance. Four of the 35 projects reviewed experienced a claw-back or termination of assistance for failure to meet project goals. For example:

- Bethlehem recaptured financial assistance for one project when the project owner failed to maintain the job goals outlined in the project application.

- Hempstead terminated financial assistance to three projects. It terminated one project because the project owner did not submit the required annual report of project jobs created and retained. It terminated another project for not meeting job goals and IDA timelines for progression of the project.

[15] Erie has a separate recapture policy that does provide procedures for implementing a claw-back. However, it is not included in the UTEP and does not define a threshold percentage for shortfalls in employment goals when the claw-back should be enforced.

It terminated the last project when a current project owner sought amended PILOT agreement terms to further reduce their PILOT payments.

Three IDAs (Auburn, Bethlehem and Hempstead) have a statement that recapture of financial assistance can be enforced if project goals are not met. For example, Hempstead's UTEP states that a company's failure to create or retain the number of private sector jobs stated in its application could trigger recapture of financial assistance. Similarly, the UTEPs for Bethlehem and Auburn explain that if the PILOT agreement includes goals for employment and they are not being met, the IDA can enforce recapture. However, none of the six IDAs' UTEPs clearly state when financial assistance should be recovered or terminated. There are no set thresholds that determine when claw-backs should be implemented. Officials explained their policies were intended to be vague so they have flexibility in determining when the provision should be used and to treat each project on a case-by-case basis.

By not adequately monitoring ongoing projects or verifying reported employment data, the IDAs do not know whether project owners are fulfilling their job goal commitments. As a result, there is an increased risk that projects received tax benefits and IDA financing without fulfilling their commitments to the community.

In July 2016, Erie began to recapture financial assistance for projects that failed to meet the material terms outlined in their agreements. Between July 2016 and February 2017, Erie recaptured tax abatements totaling $855,089 from six projects and returned the moneys to the taxing jurisdictions. Additionally, in November 2015, Erie established an internal tracking system to monitor sales tax exemptions. As a result, between January 2016 and March 2017, it collected $473,488 from project owners that exceeded their approved sales tax exemptions and returned the moneys to the New York State Tax Department. Orange terminated a project in May 2017 for improper leasing of property without IDA prior approval and late payment of real estate taxes.

**Recommendations**

The Boards should:

6. Develop and implement project monitoring policies and procedures to determine whether project owners are meeting the goals included in their agreements, such as job creation and retention goals.

7. Develop policies to recapture, discontinue or modify financial assistance or tax exemptions.

8. Develop and implement UTEP implementation policies and procedures, including but not limited to, clearly defining when a claw-back should occur and repercussions when project owners do not provide annual status reports.

# APPENDIX A

# ADDITIONAL IDA PROJECT INFORMATION

## Figure 2: Project Sample – Costs and Tax Exemptions

| Project | Project Cost | PILOT Savings Through 2014 | Pending | Sales and Use Tax Exemptions | Mortgage Recording Tax Exemptions |
|---|---|---|---|---|---|
| **Auburn** | | | | | |
| AAF McQuay International | $9,500,000 | $5,149 | ($338,057) [c] | Unknown [a] | Unknown [a] |
| Auburn Community Hotel LP | $11,057,381 | $362,678 | $8,037,839 | $336,000 | $55,000 |
| Goulds Pumps, Inc. | $3,400,000 | $2,354,088 | ($101,632)[a] | $24,000 | $0 |
| JBJ Real Property, LLC | $6,700,000 | $313,083 | $271,535 | $176,000 | $0 |
| Seminary Commons, LLC | $1,450,000 | $84,809 | $398,057 | $15,000 | $14,000 |
| **Bethlehem** | | | | | |
| 35 Hamilton of Glenmont | $1,200,000 | $34,406 | $24,758 | $48,000 | $11,250 |
| Finke Enterprises, LLC | $7,171,200 | $134,650 | $2,640,692 | $288,173 | $70,000 |
| PSEG Power NY, Inc. | $400,000,000 | N/A[b] | N/A[b] | Unknown[a] | Unknown[a] |
| SRS Bethlehem, LLC | $12,300,000 | $536,470 | $772,189 | $988,763 | $156,506 |
| Selkirk Ventures, LLC | $7,510,000 | $969,286 | $46,074 | Unknown[a] | Unknown[a] |
| **Erie** | | | | | |
| 500 Bailey, LLC | $7,193,308 | $724,786 | $158,210 | Unknown [a] | Unknown [a] |
| American Pharmaceuticals Partners, Inc. | $4,000,320 | $592,006 | $285,267 | Unknown [a] | Unknown [a] |
| API Heat Transfer, Inc. | $1,732,134 | $62,682 | $538,853 | $96,000 | $0 |
| B&L Wholesale Supply, Inc. | $1,592,000 | $81,171 | $31,246 | Unknown [a] | Unknown [a] |
| General Motors Company | $293,000,000 | $2,109,861 | $709,159 | Unknown [a] | Unknown [a] |
| J.M. Lester, LLC | $1,060,896 | $123,718 | $33,068 | Unknown [a] | Unknown [a] |
| McGard, LLC | $2,454,000 | $28,750 | $72,964 | Unknown [a] | Unknown [a] |
| New Era Cap Company, Inc. | $3,165,000 | $318,882 | $5,526 | $160,000 | $31,000 |
| Osmose, Inc. | $877,000 | $74,476 | $16,988 | Unknown [a] | Unknown [a] |
| Praxair, Inc. | $976,840 | $36,546 | $16,890 | Unknown [a] | Unknown [a] |
| **Hempstead** | | | | | |
| 101 Uniondale, LP | $69,000,000 | $5,640,302 | $0 | $0 | $0 |
| AMB Fund III Mosaic | $19,550,000 | $898,042 | $281,994 | $0 | $0 |
| HP Lynbrook, LLC | $42,360,000 | $162,735 | $2,004,993 | $0 | $0 |
| PDC Corporation | $13,059,850 | $202,703 | $0 | $213,038 | $52,628 |
| Rose Fence | $3,116,000 | $57,666 | $0 | $413,608 | $244,965 |
| **Orange** | | | | | |
| Airport Properties II | $15,179,083 | $652,099 | $91,528 | $561,000 | $130,000 |
| CRH Realty II | $2,720,000 | $1,625,563 | $745,922 | $97,885 | $300,000 |
| Leentjes Amusements | $4,122,000 | $338,064 | $91,643 | $200,000 | $45,000 |
| Millennium Pipeline Company | $80,700,000 | N/A[b] | N/A[b] | $3,413,573 | $0 |
| Orange County Choppers | $13,400,000 | $1,388,037 | $356,229 | $487,500 | $0 |
| **Steuben** | | | | | |
| Center for Fiber Optic Testing | $4,000,000 | $70,471 | $9,848 | $347,360 | $0 |
| Decker Parking Garage | $9,800,000 | $509,997 | $217,739 | $400,000 | $0 |
| Corning Headquarters Expansion | $25,000,000 | $1,888,319 | $547,928 | Unknown [a] | $0 |
| Photonics Facility | $7,600,000 | $1,048,240 | $587,815 | $480,000 | $200,000 |
| The Gunlocke Company | $10,000,000 | $2,070,666 | $811,396 | $30,000 | $0 |

[a] The project application does not indicate whether tax exemptions were granted, and Agency officials were unable to provide documentation to support whether exemptions were or were not granted. As a result, we could not determine the exemption values.
[b] These property tax exemptions are based on consumption rates. Sufficient information was not available to determine the property tax abatements.
[c] The project was assigned in 2002. The original owner received the significant property tax abatements. The new owner's PILOT agreement will likely result in higher taxes then would be paid had the agreement not have been entered into.

# APPENDIX B

## RESPONSES FROM IDA OFFICIALS

We provided a draft copy of the global report to all six IDAs we audited and requested a response from each IDA. We received global responses from four IDAs, including Hempstead, Steuben, Bethlehem and Erie.  Auburn, and Orange IDAs said they had no additional comments and referred to their individual letter responses.

With the exception of Erie IDA, IDA officials generally agreed with our findings and recommendations. The following comments are excerpted from the responses received. Comments that were specific to findings at a particular IDA are not included here, but are instead addressed in the IDA's individual report. Each IDA's individual report includes its response to our audit of the IDA.

Erie County IDA: "OSC auditors evaluated IDAs to determine whether they implemented standard application forms, uniform project agreements, project progress assessments (job retention and creation), and recapture policies.  OSC auditors acknowledged that even though many of these areas were not legally required during its October 2015 audit, they were considered "good business practices" and were therefore included …We disagree with the OSC's conclusions that those areas were considered "good business practices" prior to the June 2016 legislation."

See Note 1 Page 24

Hempstead IDA: "…Membership of the Board was reconstituted in November, 2016… However, the new Board has implemented many new policies, especially in the area of increased transparency in operations…"

Steuben County IDA: "…In advance of the audit period, the agency Executive Director was engaged in the development of the Comptroller's reform package…Once the legislation was passed, the IDA quickly adopted the measures outlined in the reform package serving as a leader in State to implement these best practices…"

Town of Bethlehem IDA: "The audit process and report will help the Agency comply with legal requirements and good business practices."

# APPENDIX C

## OSC COMMENT ON IDA OFFICIALS' RESPONSE

Note 1

Although Erie County IDA 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. OSC has issued many audit reports, including Erie County IDA audit reports (99-P-1, S8-6-22 and 2006-MS-2)[16] that reflect operational best practices. In addition, a 2006 publication titled *Industrial Development Agencies in New York State: Background, Issues and Recommendations* can be found on OSC's website.[17] 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.

[16] Copies of these reports can be obtained by contacting our Office.

[17] http://www.osc.state.ny.us/localgov/pubs/research/idabackground.pdf

# APPENDIX D

## AUDIT METHODOLOGY AND STANDARDS

The objective of our audit was to determine whether IDA Boards were providing effective oversight of the IDAs' 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 audit evidence, we performed the following procedures:

- We interviewed the Boards and IDA officials to understand and assess the IDAs' processes and procedures.
- We reviewed the IDAs' policies, including the UTEP, to identify written criteria outlining an applicant's eligibility for sponsorship and the benefits that are offered.
- We judgmentally selected 35 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 also reviewed the project agreements to determine whether they had provisions for recapture of financial assistance, and if so, whether they were enforced.
- We reviewed the reporting accuracy of 178 projects. We reviewed all projects at the IDA if they had 50 or less in the 2014 reporting year, or we used a random number generator to select 20 projects for testing. If we found any inaccuracies, we used a random number generator to select an additional 20 projects for testing. We compared project application information such as job creation and retention goals to the publicly reported job goals.
- 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 IDAs' project applications, 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.

## APPENDIX E

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# APPENDIX F

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