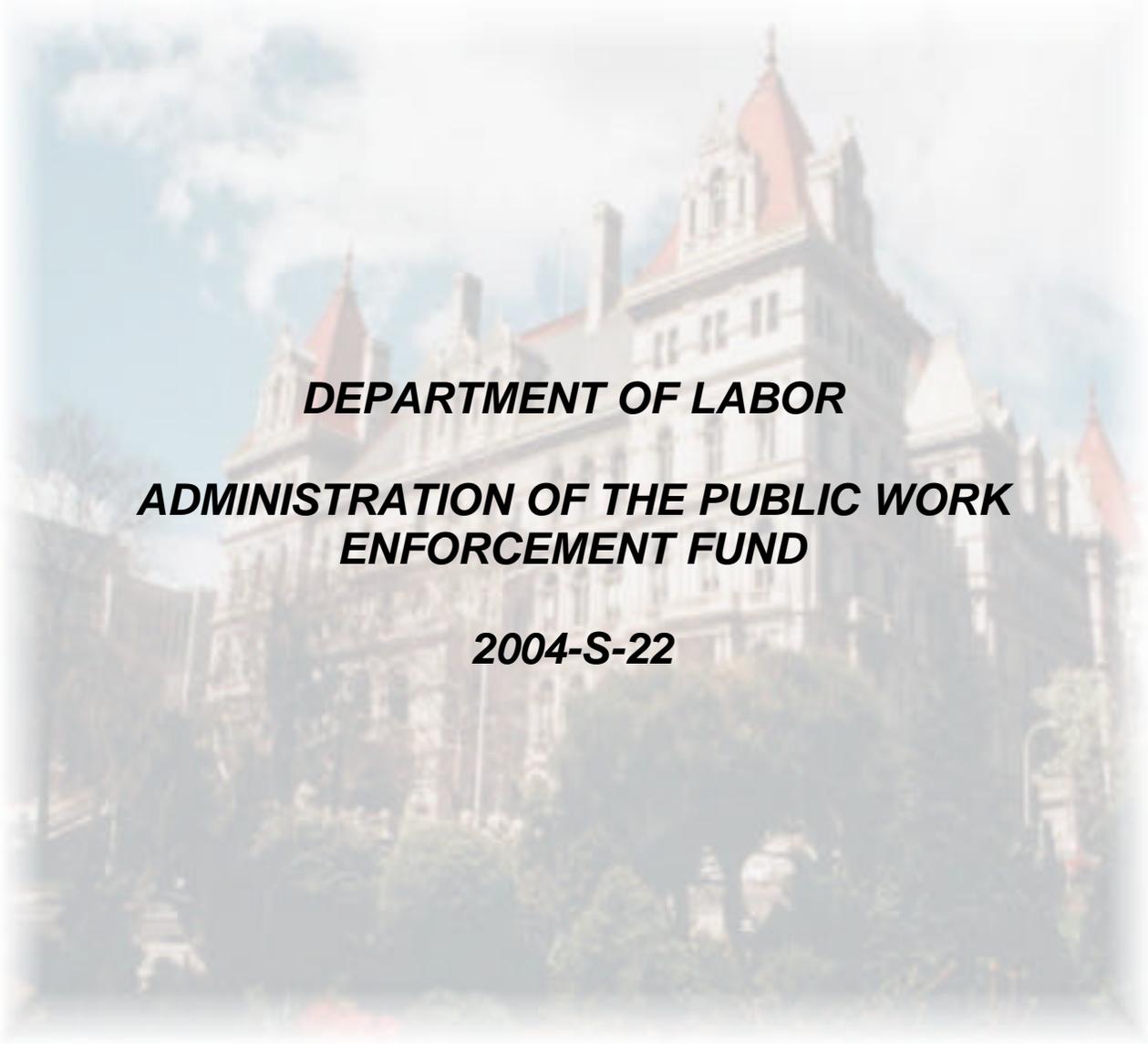


# *A REPORT BY THE NEW YORK STATE OFFICE OF THE STATE COMPTROLLER*

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**Alan G. Hevesi  
COMPTROLLER**



**DEPARTMENT OF LABOR  
ADMINISTRATION OF THE PUBLIC WORK  
ENFORCEMENT FUND**

**2004-S-22**

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**DIVISION OF STATE SERVICES**

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**Alan G. Hevesi**  
**COMPTROLLER**

**Report 2004-S-22**

Ms. Linda Angello  
Commissioner  
Department of Labor  
Building 12, State Office Building Campus  
Albany, NY 12240

Dear Ms. Angello:

The following is our report on the Department of Labor's administration of the Public Work Enforcement Fund.

This audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law. Major contributors to this report are listed in Appendix A.

*Office of the State Comptroller*  
*Division of State Services*

November 1, 2005



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# **EXECUTIVE SUMMARY**

## **DEPARTMENT OF LABOR**

### **ADMINISTRATION OF THE PUBLIC WORK ENFORCEMENT FUND**

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#### **SCOPE OF AUDIT**

The Department of Labor (Department) is responsible for enforcing the Public Work Law, which requires contractors on public work projects to pay the prevailing rate of wages and supplements to all covered employees. Public work projects are construction and construction-related contracts undertaken by public entities for public benefit. The Department conducts investigations to ensure contractors comply with the Public Work Law. Each year, more than 9,000 public work projects are started, and the Department initiates an average of 765 new complaint investigations. Chapter 511 of the Laws of 1995 as amended by Chapter 376 of the Laws of 2003 (Law) established the Public Work Enforcement Fund (Fund). This Law requires each State agency or public benefit corporation (e.g., public authority) that enters into a public work contract to pay .07 of one percent of the total cost of the contract to this Fund. The Department was to use these additional resources for training, labor and related costs for investigators, hearing officers and administrative staff, to ensure that staffing levels for such personnel are maintained at an appropriate level to reduce the backlog of active complaint investigations. This backlog totaled 1,275 cases in 1995.

The Department bills public entities for assessments they owe to the Fund, and entities remit payments to the Department. A total of \$8.8 million (assessment revenues plus interest income) has been deposited into the Fund since its inception. Of this amount, \$6.2 million was expended by the Department and \$2 million was transferred to the State's General Fund. The Fund had a cash balance of \$646,835 as of March 31, 2004.

For the period April 1, 2002 through September 30, 2004, we addressed the following questions about the Department's administration of the Fund:

- Does the Department identify, collect, and properly account for all monies due the Fund?
- Does the Department use Fund monies to enforce the Law according to legislative intent?

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## **AUDIT OBSERVATIONS AND CONCLUSIONS**

Our audit concluded that the Department has not identified or collected significant amounts of revenues due the Fund. The Department does not use all available information to identify assessable contracts, and has not developed regulations to clearly state that all assessable entities must pay the Fund fee on every assessable project. In addition, the Department does not collect all payments due to the Fund and controls over Fund monies and data need improvement. We found that if the Department collected all the Fund revenue it should, then the Department would be able to hire additional staff which may improve the timeliness of complaint resolution, and reduce its significantly increased backlog of cases, in accordance with legislative intent.

With the enactment of the Law, the Department was granted implicit rights to enforce the Law's provisions, including collecting Fund assessments due from all entities for their assessable public work contracts. However, we found the Department has not developed a list of all the entities that may be required to remit payments, or identified all assessable contracts. The Department has an in-house resource that should identify all entities' contracts, and that it could share with staff that bill the assessments. Because the Department has not billed public authorities for Fund assessments, or developed regulations to implement the Law, very few public authorities pay assessments to the Fund. Between April 1, 2002 and March 31, 2004, only 10 of the more than 733 State public authorities made payments to the Fund. We estimated that four of the State's public authorities sampled had Fund assessments totaling nearly \$1 million for 2002 awards alone, of which \$575,000 was outstanding. We also identified three authorities with over \$5.7 billion in contracts, but we could not determine which ones were assessable.

The Department needs to improve controls over several operations. For example, we found the Department does not verify the legitimacy of exemptions claimed by the agencies it does bill, or consistently follow up on delinquent accounts receivable. We also found accounts receivable understated by \$68,440. Further, the Department does not maintain adequate controls over Fund receipts, or effectively safeguard the integrity of Fund data. In fact, the Department lost nine years of historical Fund data, which it salvaged only through time-consuming reconstruction efforts. To ensure it collects and properly accounts for all Fund assessments due, we recommend the Department use in-house data and other resources, as necessary, to identify all assessable contracts; develop regulations to help enforce compliance with the Law; invoice public authorities for assessments due; strengthen controls over Fund revenues; and improve controls over the access to, and protection of, Fund data. (See pp. 13 - 25)

The Legislature's intent in creating the Fund was to provide for new public work investigator positions that would help the Department reduce its backlog of

cases. However, we found that, while Fund resources do pay for 26 investigator positions, 14 of these positions existed before 1995, when they were funded by other Department resources. Had Fund monies been used to hire additional new investigators, the Department may have made progress in reducing its case backlog, which has actually grown worse since the Fund was created. In 1995, the backlog of active investigations totaled 1,275 cases; by 2003, the backlog had increased by almost 67 percent to 2,125 cases. To enforce the Law in accordance with legislative intent, we recommend the Department use available Fund revenues to hire new public work investigators. (See pp. 27-29)

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## ***COMMENTS OF DEPARTMENT OFFICIALS***

**D**epartment officials reiterated their position that the Department's only involvement with the Fund is to receive the monies collected by the Comptroller's Office. The Department believes the Comptroller's Office is responsible for administering the Fund, and the individual entities entering into contracts are mandated to transfer the assessment to the Fund. We believe the Law merely makes the State Comptroller the custodian of Fund monies, and that the Department is charged with enforcing the Law. While Department officials did not respond specifically to our recommendations, they did indicate that they are taking certain actions to address some of the concerns we raised.



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# INTRODUCTION

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## Background

The New York State Department of Labor (Department) is responsible for administering the State's Labor Law, including enforcing the Public Work Law. The Public Work Law requires contractors on public work projects to pay the prevailing rate of wages and supplements to all covered employees. To be classified as a public work project, a project must involve a public entity that contracts for the employment of laborers, workers or mechanics on a construction, reconstruction or maintenance project whose primary objective is public benefit. Each year, more than 9,000 public work projects are started and 765 new investigations, on average, are initiated.

Chapter 511 of the Laws of 1995 as amended by Chapter 376 of the Laws of 2003 (Law) established the Public Work Enforcement Fund (Fund). According to this legislation, each State agency or public benefit corporation (e.g., public authority) entering into a contract for a public work project, as defined by Section 220 of the Law, must transfer .07 of one percent of the total cost of the contract to this Fund. In addition, the Law specifies that the monies should be used by the Department for training, labor and related costs for investigators, hearing officers and administrative staff, to ensure that staffing levels for such personnel are maintained at an appropriate level to reduce the backlog of active investigations. Department investigators enforce the Law at public work projects to protect workers' interests. The Department is responsible for collecting payments due for Fund assessments. Although the assessment per project is very small, it was expected that the monies the Department would collect on public work projects statewide would serve as an additional and reliable source of funds to support Department efforts to serve workers, contractors and the public.

The Department bills public entities for assessments due. Entities then send their payments to the Department. A total of \$8.8 million (assessment revenues plus interest income) has

been deposited into the Fund from its inception through March 31, 2004. Of this amount, \$6.2 million was spent for investigations, including personal service costs, and \$2 million was transferred to the State's General Fund to pay for the State's overall operating costs. The Fund had a cash balance of \$646,835 as of March 31, 2004.

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## ***Audit Scope, Objectives and Methodology***

**W**e audited the Department's practices and procedures for administering the Fund for the period April 1, 2002 through September 30, 2004. The objectives of our performance audit were to determine whether the Department identifies, collects, and properly accounts for all monies due the Fund, and whether the Department uses Fund monies to enforce the Law in accordance with legislative intent.

To accomplish our audit objectives, we reviewed applicable laws, rules, regulations, policies and procedures. We interviewed Department officials and reviewed various reports produced by the Department and the Office of the State Comptroller (OSC). We also observed Department practices and procedures for identifying, collecting and accounting for Fund assessments for public work projects, and reviewed Fund deposits and expenditures to verify their validity and appropriateness. In addition, we verified that payments were deposited into the Fund.

We also surveyed 57 State agencies and 48 public authorities. These entities include those authorities that report procurement activity to OSC in accordance with Title 2, Part 201 of the New York Code of Rules and Regulations (2NYCRR Part 201), and other State agencies and authorities who have made payments to the Fund. We asked each entity to identify payments they had made to the Department for deposit into the Fund for the period April 1, 2002 through July 29, 2004. If an entity had not made a payment to the Fund we asked them to identify the reason(s) for nonpayment. We randomly sampled 50 Fund payments reported as paid by the entities to verify that the Department had properly processed the payment. For each payment tested we ensured the payment was properly logged, deposited, and processed.

We conducted our audit in accordance with generally accepted government auditing standards. Such standards require that we plan and perform our audit to adequately assess those Department operations within our audit scope. Further, these standards require that we understand the Department's internal control structure and its compliance with those laws, rules and regulations that are relevant to the operations included in our audit scope. An audit includes examining, on a test basis, evidence supporting transactions recorded in the accounting and operating records and applying such other auditing procedures as we consider necessary in the circumstances. An audit also includes assessing the estimates, judgments, and decisions made by management. We believe our audit provides a reasonable basis for our findings, conclusions and recommendations.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State, several of which are performed by the Division of State Services. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these management functions do not affect our ability to conduct independent audits of program performance.

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### ***Response of Department Officials to Audit***

A draft copy of this report was provided to Department officials for their review and comment. Their comments have been considered in preparing this report, and are included as Appendix B. In addition, State Comptroller's Notes, in response to Department comments, are included as Appendix C.

Department officials reiterated their position that the Department's only involvement with the Fund is to receive the monies collected by the Comptroller's Office. The Department believes the Comptroller's Office is responsible for administering

the Fund, and the individual entities entering into contracts are mandated to transfer the assessment to the Fund. We believe the Law merely makes the State Comptroller the custodian of Fund monies, and that the Department is charged with enforcing the Law. While Department officials did not respond specifically to our recommendations, they did indicate that they are taking certain actions to address some of the concerns we raised.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Labor shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising of the steps that were taken to implement the recommendations it contained, and/or the reasons certain recommendations were not implemented.

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# IDENTIFYING, COLLECTING AND ACCOUNTING FOR FUND REVENUES

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With the enactment of the Law, the Department was granted implicit rights to enforce the Law's provisions. In establishing the Fund in 1995, the Legislature stated that all entities that award public work contracts are subject to Fund assessments. As the State agency responsible for collecting the assessments, it is incumbent on the Department to take whatever steps are needed to effectively identify the entities that award assessable contracts and the contracts on which assessments are due.

Our audit concluded that the Department has not identified or collected significant amounts of revenues due the Fund. The Department does not use all available information to identify assessable contracts, and has not developed regulations to clearly state that all assessable entities must pay a Fund fee on every assessable contract. In addition, the Department does not collect all payments due to the Fund and controls over Fund monies and data need improvement.

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## *Identifying Fund Revenues*

We determined that the Bureau of Public Work (Bureau) itself maintains information about all public work contracts, including authorities' contracts and "T" contracts (contracts for amounts below an agency's discretionary spending level), on a computerized system, but that the Bureau has not shared this information with the Department's Finance Office that bills for Fund fees.

State law requires that every entity entering into a public work contract obtain from the Department a prevailing wage rate schedule. The Department produced the PW-39 to facilitate this requirement. The PW-39 identifies the entity's name, the contract number and the nature of the project. Once the contract is awarded, the entity must notify the Department of the contract award date; the contract value; the contractor's name and address; and contract termination (either completion or cancellation) by completing a PW-16. Since this in-house data should contain comprehensive and useful information about all

the public work contracts awarded by all State entities (including public authority contracts and “T” contracts), the Department should use it to identify revenues owed the Fund. We asked Department officials why they did not currently use this resource; they said the Bureau maintained this data on software that was not available in the Finance Office. However, given the cost, in terms of significant uncollected revenues, of not identifying all the Fund fees owed the Department, we believe it is essential that the Department resolve the software issues to enable the Finance Office to produce complete and accurate billings for all assessable contracts.

We found the Department has not developed a complete list of all the entities that may be required to remit payments, or identified all assessable contracts. Currently, the Department uses OSC data to identify both assessable contracts and the entities that award them. The data lists all the construction and construction-related contracts (“D” contracts) awarded during the previous month by State agencies that are required to have their contracts reviewed and approved by OSC. The Department uses this information to bill the agencies for the Fund assessments due. However, as reported, this data does not identify all of the entities and contracts to be covered by Fund assessments. For example, the data excludes contracts awarded by most public authorities, and does not include any subsequent increases or decreases to the total cost of the contracts.

Also, the Law requires assessments to be collected on the total cost of the contract, which includes the value of amendments and contract changes, which has not been done. The Department agrees that this is required. Given that some contracts can take years to complete, the Department should consider collecting the assessment based on the value of the initial contract, and then adjusting the assessment upon completion of the contract.

We believe the Department should use their in-house data to identify all entities that are required to remit payments and to identify all assessable contracts. To the extent possible, the Department should use OSC data to confirm the accuracy of their in-house data.

Department officials indicated they are considering several options to obtain information that has been difficult to obtain in the past, such as including a notification of the Fund fees with

all Prevailing Wage schedules that are sent out; and requesting supporting documentation from those authorities that remit payment without being invoiced.

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## ***Collecting Fund Revenues***

The collection of all Fund revenues due will help ensure the Department has the resources needed to conduct efficient and effective public work investigations. However, we found the Department has not collected all revenues due the Fund because it has not developed regulations which would aid in the collection of Fund revenues, and has generally not billed public authorities for assessments. As a result, most public authorities do not make payments to the Fund. The Department also needs to improve its monitoring of accounts receivable and needs to improve its collection practices.

To determine how much Fund revenue the Department may not be collecting, we reviewed OSC's 2002 Annual Procurement Data Report, which lists the annual procurement activity for all public authorities required to report annually to OSC under 2NYCRR Part 201. From this report, we identified the seven public authorities with the greatest total value of awarded contracts for the year. We then reviewed these entities' 2002 annual procurement reports to identify the value of their construction and construction-related contracts for 2002. The following table shows the seven entities we reviewed, the number and value of their public work contracts, their estimated assessments and their payments, if any.

Authority	Value of Contracts Awarded in 2002 <sup>1</sup> (000)	Estimated Value of Construction Contracts <sup>5</sup> (000)	Estimated Fund Assessments	Actual Fund Payments
LIPA <sup>2</sup>	\$5,381,998	N/D	N/D	\$0
DASNY <sup>3,4</sup>	741,491	\$638,977	\$319,489	0
NYSLGAC <sup>3</sup>	525,575	0	0	0
PASNY <sup>3</sup>	373,007	326,318	163,159	0
NYSERDA	255,820	N/D	N/D	0
SUCF	94,689	N/D	N/D	67,699
MTA <sup>3,6</sup>	2,640,871	1,033,385	516,693	423,925
<b>Total</b>	<b>\$10,013,451</b>	<b>\$1,998,680</b>	<b>\$999,341</b>	<b>\$491,624</b>

<sup>1</sup> As reported by authorities in response to a data request in The State Comptroller's Regulation on Accounting and Reporting for Public Authorities (2NYCRR Part 201).

<sup>2</sup> Includes a multi-billion dollar contract with a vendor to provide operational management services. While this management services contract includes a provision for major capital improvements, the dollar value associated with construction services could not be determined.

<sup>3</sup> This entity was one of the four public authorities included in our calculation of estimated assessments due.

<sup>4</sup> DASNY believes it owes the Fund \$296,319. Our estimate includes change orders on certain contracts and purchase orders for permanent durable goods used in construction (e.g., furnaces) which DASNY excluded from its estimate.

<sup>5</sup> Based on the limited information available, we believe our estimate to be conservative.

<sup>6</sup> Includes MTA's subsidiaries (NYCTA and MBSTOA, LIRR, and MNR).

**N/D** - Not Determinable

**LIPA** - Long Island Power Authority

**NYCTA** - NYC Transit Authority

**MBSTOA** - Manhattan and Bronx Surface Transit Operating Authority

**LIRR** - Long Island Rail Road

**DASNY** - Dormitory Authority of the State of New York

**NYSLGAC** - NYS Local Government Assistance Corp.

**PASNY** - Power Authority of the State of New York

**NYSERDA** - NYS Energy Research and Development Authority

**MNR** - Metro-North Commuter Rail Road Comp.

**SUCF** - State University Construction Fund

**MTA** - Metropolitan Transportation Authority

Three entities (DASNY, PASNY and MTA) should have remitted \$999,341, but only the MTA remitted \$423,925. As a result, these entities owe the Fund \$575,416 (\$999,341 minus \$423,925). While SUCF paid \$67,699 into the Fund, we were unable to determine the value of its construction contracts, therefore, we could not determine the actual amount that was due the Fund. Further, for LIPA and NYSERDA, which awarded over \$5.6 billion in contracts in 2002, we could not estimate their Fund assessments.

The Department's lack of billing public authorities is clearly a significant reason why such entities have not fully complied with the Law's requirement that they pay the assessments. However, another reason authorities do not pay the Fund is the absence of Department regulations to implement the Law. Guidelines would inform entities of their responsibilities by:

- defining assessable contracts;
- explaining how assessments are calculated;
- stating when and how Fund payments should be made;
- indicating the data entities should provide to the Department, and timeframes for data submission; and
- identifying Department contacts in case entities require further information or have questions.

Department officials stated that they do not have the authority to issue regulations concerning entities' payments to the Fund, since the Commissioner's general regulatory authority does not cover the Law. Officials further stated that, in their view, the Law makes the State Comptroller responsible for administering the Fund.

However, it is a well-accepted principle that the power of an administrative agency to make rules and regulations does not depend solely upon an express grant from the Legislature. Rather, its regulatory power may exist from implication, such as where there is a delegation of power to an agency which would not be meaningful in the absence of a power to make rules. Thus, the Department which is charged with enforcing the Law, has implicit authority to enact regulations to enforce the provisions of Chapter 511 (established by Law), which is designated to generate revenue for the Department to use in carrying out its enforcement responsibilities under that Law. Regarding the Department's contention that the State Comptroller is responsible for administering the Fund, it is our view that the enactment of the Law merely makes the State Comptroller the custodian of Fund monies, as he is with hundreds of other funds created by the Legislature. Indeed, Article V, §1 of the State Constitution precludes the Legislature from assigning him any administrative duties which are not incidental to his auditing functions.

Since the Department has not issued regulations and has not billed all public authorities, it must rely on public authorities to be aware of and to comply with their obligation to pay. In practice, however, most public authorities simply do not pay Fund assessments. Between April 1, 2002 and March 31, 2004, only 10 of the more than 733 State's public authorities made payments to the Fund. To learn why most public authorities are not complying with the Law, we asked 48 of the public authorities operating in the State to either identify Fund payments they made during the period April 1, 2002 through July 29, 2004, or to explain why they had not made Fund payments. Ten of the 40 public authorities that responded to our survey reported that they had paid Fund fees, and 30 reported they had not paid. Reasons for nonpayment were provided by 28 as follows:

- 12 entities said they were not aware of the Law or did not know what contracts were assessable;
- 10 entities reported that they did not award any construction contracts;
- 5 entities (erroneously) reported they were not subject to the Law; and
- 1 entity was aware of the Law, but did not make payments because, according to entity officials, the Law is vague and unclear.

Since more than half of the non-paying respondents were either uninformed or incorrectly informed about their obligations regarding Fund payment, there is a definite need for the Department to clarify the Law's requirements.

We determined that DASNY was aware of its obligations under the Law. For example, DASNY opposed the legislation that established the Fund in 1995. As shown in the prior table, for 2002 alone, DASNY owes the Fund an estimated \$319,489. Annually, DASNY enters into an agreement with the Department to fund a public work investigator position dedicated to enforcing the prevailing wage laws on projects managed by DASNY. Although DASNY elected to fund this dedicated position, the agreement was not intended to offset DASNY's responsibility to pay Fund assessments. The Department should take appropriate steps to compel non-compliant entities to adhere to the Law.

We found the Department does not verify that the few authorities that do pay Fund assessments are paying what they owe. For example, the MTA paid the fund \$564,044 in August 2003 to cover assessments for a two-year period, but it did not identify the contracts to which this payment related. Likewise, Battery Park City Authority remitted \$26,275 to the Fund (a payment prompted by our survey), but Authority officials did not report how they had calculated this payment. Therefore, Department officials do not know whether public authorities that do make remittances are actually paying what they owe in assessments, since they do not verify the completeness and accuracy of these remittances.

### **Exemptions**

One of the problems with the Department's reliance on OSC's listing of "D" contracts is that the list includes grants and other "pass-throughs" of funds from State agencies to municipalities, and treats these funding transactions as contracts. These pass-through funding scenarios are not assessable because they simply result in moneys being transferred to municipalities. Similarly, public work contracts directly let by municipalities are not subject to Fund fees. However, public work contracts where the State agency or a public benefit corporation is actually contracting for work on behalf of a municipality are assessable. This result is dictated by the explicit language of the Law, which encompasses all public work contracts of State agencies and public benefit corporations, and does not exempt such contracts let on behalf of municipalities.

Department records show that State entities exempted contracts worth more than \$415 million in 2002. These exemptions reduced Fund payments by almost \$208,000.

When the Department bills an agency for Fund assessments, it includes the OSC listing of the previous month's contract awards on which the assessment was based. Agency personnel review the data to verify that the listed contracts are assessable before they remit a Fund payment. When agency personnel identify a contract they deem to be exempt, they exclude the contract and reduce the invoice accordingly.

We found that the Department does not verify that exemptions claimed for municipal grants or other pass-through funding are bona fide by periodically testing claimed exemptions. While Department officials state they have a verification process, we found that this process is restricted to reviewing the limited

notes (e.g., “locally administered” or “eng. Firm - construction/inspection”) that exempting entities pencil in on the reports they remit with their payments. The Department does not randomly test the legitimacy of such exemptions by reviewing the specific contract. As a result, agencies may be reducing their assessments by claiming exemptions that are not valid.

### **Accounts Receivable**

The Department should bill all State entities for Fund fees owed on public work construction contracts, and entities are required to pay the assessments required by the Law. The Department should keep complete and accurate records of assessments billed, and should take the actions necessary to promptly collect any accounts receivable. However, we found that the Department’s electronic accounting records, including accounts receivable records, were significantly understated. Further, despite the fact that about 80 percent of these receivables were more than a year old; the Department has not developed written collection procedures. As a result, there is a risk the Department will not collect these outstanding assessments.

In late 2003, the Department lost nearly nine years of electronic accounting data for the Fund when its computer application, data files, and backup files were corrupted, resulting in the loss of the Department’s electronic accounts receivable records. Using the Department’s manual records to identify and summarize Fund receivables, we found that the Department’s accounts receivable records were understated by \$68,440. Officials stated that due to recent staff turnover, the Department had not had the opportunity to summarize its invoicing and receivable records and therefore, did not have a complete listing of outstanding accounts receivable. Department officials acknowledge they are using our analysis as their listing of delinquent Fund receivables.

We aged the Department’s delinquent accounts receivables and found that more than \$55,000 (almost 79 percent) of these receivables as of March 2004 had been outstanding for more than a year. In fact, about \$34,800 (almost 50 percent) of the receivables had been outstanding for two years or more. Department officials stated that they have a long-standing collection practice which requires staff to follow-up on delinquent accounts by sending second and third notices and calling non-paying entities to encourage prompt payment.

Officials further stated that they did not strictly adhere to this policy because when the Fund data files became corrupt the receivable information was not readily available. Further, we interviewed staff responsible for collecting delinquent receivables and we found that they do not send second and third notices as required by the Department. They told us that, in July 2004, they began to call entities with delinquent accounts and they provided a phone log to support their actions.

While we acknowledge the Department's recent efforts to collect its delinquent account receivables, we encourage the Department to be consistent in its collection efforts and to develop written collection procedures so staff responsible for collecting delinquent accounts perform the actions management intends. Since accounts generally become less collectible the longer they remain outstanding, there is a significant risk that the Department will not be able to collect long overdue assessments.

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## ***Accounting for Fund Revenues***

**A**s Fund administrator, the Department is responsible for receiving, recording and depositing Fund receipts from State entities, and for maintaining the integrity of computerized Fund data, such as billing records, State entity remittances and State entity receivables. However, the Department does not promptly record receipts or adequately safeguard them until they are deposited into the Fund. As a result, Fund assets are at risk of loss, misuse or misappropriation. In fact, the Department lost nine years of Fund data, and salvaged this historical information only through time consuming reconstruction efforts. We also found the Department has not established effective logical access controls.

### **Controls Over Revenues**

Management must establish strict controls over its revenue receipts to protect and provide accountability for these State resources. For example, management should immediately establish accountability for its receipts, provide adequate protection over its receipts and reconcile receipt journals to verify proper handling. In addition, activities such as authorization, custody, recordkeeping and reconciliation duties should be segregated to ensure one person does not have the ability to carry out and conceal errors and/or irregularities.

However, the Department's controls over revenue receipts are weak. For example, we found Fund receipts are not recorded when they are received. Meanwhile, the checks and the check log are stored in an unlocked safe during business hours that is accessible to all accounting staff and to anyone who passes by. Further, the Department does not reconcile its receipts log to its accounting records to verify that all revenues are appropriately processed. Lastly, the Department does not separate critical revenue receipt and revenue recording functions: one person is responsible for generating Fund invoices, making accounting entries, reviewing and approving invoice adjustments and maintaining and adjusting the Fund's accounting records. Because Department controls over Fund receipts need strengthening, Fund assets are at risk of loss or misappropriation. However, it is essential that Department officials strengthen revenue controls to lessen the potential for the misappropriation of State assets. For example, since the Department receives some payments without having invoiced the paying entity (e.g., the MTA's August 2003 payment of more than \$564,000), such payments are not anticipated because the Department has not billed the Agency for the amount due and therefore has no record of the assessment due.

We tested a sample of Fund payments to determine whether the above weaknesses had resulted in revenue loss or misuse. Our sample comprised 50 Fund payments, randomly selected from among the 111 Fund payments entities reported to us that they made during our scope period. Our test showed these payments had been properly processed and deposited to the Fund in a timely manner.

We shared the above weaknesses with Department officials who indicated because checks are received throughout the day, it is impractical to log each check when received. They agreed to review and revise their revenue controls to include logging checks more timely. Without immediate accountability, Fund receipts would be vulnerable until recorded. They also indicated they now require deposits to be reconciled to the check log. Further, Department officials indicated opening the safe is a cumbersome and time consuming process; therefore, it has not been feasible to keep it locked when authorized staff require access to it throughout the day. The Department has looked into other alternatives to safeguard the contents of the safe and has added a keypad to the safe door to allow the door to be kept closed and opened by authorized staff as needed.

## **Controls Over Fund Data**

The Department must have adequate logical access controls and backup procedures to protect the integrity of Fund data and resources. Logical controls (e.g., user IDs and passwords) should be designed to restrict legitimate users to the specific systems, programs and files they need, and to prevent unauthorized persons from entering the system at all. Backup procedures, such as routinely copying data files and software, and securely storing these files at a remote location, are usually the most cost-effective actions an entity can take to mitigate service interruptions.

Our review determined that the Department's Fund data files are vulnerable to unauthorized access and modification. We found that although users are required to enter a user ID and a password to access the Fund application, such controls do not exist to access Fund data files. As a result, an individual can inappropriately obtain and/or conceal Fund revenues by acquiring a Fund remittance, deleting the related invoice and then modifying the accounting records. Department officials stated that this fraudulent activity would be detected by the review of monthly invoicing records, which are numbered sequentially by the software, since the missing invoice(s) would be obvious. However, we reviewed the invoicing sequence and found a missing invoice number. Department officials believe this invoice number was never issued.

Department officials state that they have adequate access controls for Fund data. Fund data files are maintained in a folder restricted to specified users, who can access the files only through an accounting application installed on their computers. However, during limited testing, we found that an individual who did not have access to the accounting application installed on their computer could in fact access the application's data files. The Department should establish controls to restrict Fund data file access to authorized users.

As noted earlier in this report, the Department lost nearly nine years of electronic accounting data for the Fund when its computer application and data files were corrupted in the Fall of 2003. Officials have not been able to determine when, how or why this corruption happened. The loss of all the Fund data files meant the Department no longer had any electronic historical records of Fund billing and receivables.

Department officials stated the information was not lost, because, using paper reports, they were able to reconstruct nine years of accounting records in an Excel spreadsheet. However, this time-consuming reconstruction effort required expending significant State resources. Further, we found the reconstructed accounting records were not complete and a few Fund payments were not properly recorded in the newly constructed records.

### **Recommendations**

1. Determine a means of sharing the Bureau's data with the Department's Finance Office so the Department can produce complete and accurate billings of all assessable entities, including public authorities.
2. Work with OSC to obtain available data to assist the Department in developing a complete list of entities and assessable contracts.
3. Use in-house data and OSC data, as necessary, to identify all State entities' assessable contracts, as well as approved contract amendments/change orders, so the Department can bill entities for all fee revenues due the Fund.
4. Develop regulations that provide for the implementation and enforcement of the Law and distribute the guidelines to covered entities. These regulations should:
  - define assessable contracts;
  - explain how assessments are calculated;
  - state when and how Fund payments should be made;
  - indicate the data entities should provide to the Department and timeframes for data submission; and
  - identify Department contacts just in case entities require further information or have questions.

## **Recommendations (Cont'd)**

5. Invoice public authorities for all public work contracts, including authorities' pass through contracts that are awarded by State agencies.
6. Verify the validity of exemptions claimed by State entities by regularly reviewing randomly selected contracts on which exemptions are claimed.
7. Take steps to maintain accurate accounts receivable records and promptly collect receivables due by:
  - updating the Department's accounting records to include the outstanding accounts receivables previously lost and not reflected in the Department's accounting records;
  - developing written Department collection procedures; and
  - developing controls to assure compliance with Department policy.
8. Establish adequate internal controls over the Fund's cash receipts. Such controls should include, but not be limited to:
  - immediately recording each receipt into the revenue receipt log;
  - limiting access to receipts to authorized persons, and securing unprocessed receipts in a locked safe;
  - reconciling the revenue receipts log to the accounting records; and
  - separating revenue receipt and revenue recording responsibilities.
9. Develop and implement controls to ensure only authorized persons have access to Fund data files.



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## USING FUND REVENUES ACCORDING TO LEGISLATIVE INTENT

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We found that if the Department collected all the Fund revenue it should, then the Department would be able to hire additional staff which may improve the timeliness of complaint resolution, and reduce its continuing backlog of cases, to provide effective enforcement of the Labor Law.

The Department is responsible for enforcing the Public Work Law, which requires contractors on public projects to pay the prevailing wage rates and supplements to all covered employees on public work projects. Each year, more than 9,000 public work projects are started in New York State. On average, 765 new complaints related to public work projects are investigated each year. There can often be an extended period of time between the date an initial complaint is received and the date the investigation is concluded by the Department's investigators. As a result, the Department has a backlog of active cases (cases for which investigations have not yet concluded). The Legislature created the Fund to in part provide the Department with the resources needed to fund new public work investigator positions and thus, reduce the backlog. We found that, while Fund resources do pay for investigator positions, the Department used some Fund monies to pay for existing positions. Had all Fund monies been used to hire new investigators, the Department may have made progress in reducing its case backlog.

We reviewed the Department's expenditures of Fund resources to determine whether the Department had used these resources to address the backlog in public work projects investigation cases, according to Legislative intent. We determined whether:

- Fund resources were used to pay for investigator personal service costs;
- investigators paid through the Fund perform only public work investigations; and

- Fund resources were used to obtain additional investigators to reduce the backlog of public work investigations.

We found that, during our audit period, the Department used the majority of Fund resources to pay for investigator personal service costs. Specifically, \$1.5 million (almost 87 percent) and \$1.1 million (88 percent) of the Department's expenditures charged to the Fund for fiscal years 2002-03 and 2003-04, respectively, were for personal service costs. We also interviewed a sample of nine investigators, randomly selected from among the 27 investigator positions supported by Fund revenues as of August 18, 2004, and concluded that the investigators do spend all their time working on public work investigation cases.

We then examined the extent to which the Department had used Fund resources to hire additional investigators to help reduce the backlog in investigations. We found the Department had 37 public work investigator positions shortly after the Fund was created in 1995, and 51 investigator positions as of September 2004, an increase of 14 positions. The Fund was used to pay for 26 of the 51 positions including 12 positions that were added after the Fund was established, and 14 that existed prior to the creation of the Fund. If Fund resources were used exclusively for new investigator positions, potentially increasing Fund supported public work investigators to 65 positions, these positions could have further reduced the backlog of active cases. The Department indicated that the Legislature had reduced the number of regular public work positions by ten, thereby decreasing the total number of investigators in the program.

To determine the extent to which the Department has reduced its backlog since 1995, we analyzed Department case statistics. The Department had a backlog of 1,275 active public work investigations at the time the Fund was established in 1995. We determined that the backlog averaged about 1,740 cases between 1995 and 2003. As of December 31, 2003, Department reports showed the backlog had grown to 2,125 active investigations.

Therefore, despite the Legislature's provision of additional resources for the express intent of reducing the backlog of

cases under investigation, the backlog actually increased by 850 cases between 1995 (1,275) and 2003 (2,125). We believe the Department's inability to reduce its backlog of cases is directly related to Fund monies used to finance existing positions, rather than support new positions. We believe these decisions, together with the Department's ineffective practices for identifying and collecting significant amounts of assessment revenues owed the Fund, are the principle reasons the Department has not reduced its backlog of cases, as the Legislature intended. To provide for adequate administration of the Law, including the timely investigation and resolution of public work complaints, the Department should implement the recommendations in this report.

Department officials acknowledge that the backlog of cases has not decreased but believe that measuring the success of the program based upon the number of cases opened, closed, and the ensuing backlog is not necessarily a clear indicator of the program's success in enforcing the prevailing wage law. Officials further conveyed that the program collected 114 percent more unpaid wages and supplements in 2002 than in 1996. Over the same period, the Department asserts they collected 134 percent more civil penalties. While we agree that program outcomes reported by the Department are positive trends in its enforcement efforts, a primary goal for the additional funding was to reduce the Department's backlog of active investigations and this was not achieved.

### **Recommendation**

10. Work with the Division of the Budget to enable the Department to use Fund revenues to, in part, provide it with the resources needed to fund new public work investigator positions.



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## MAJOR CONTRIBUTORS TO THIS REPORT

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William Challice

Richard Sturm

Donald Geary

Randy Partridge

Theresa Nellis

Jessie Wright

Nancy Varley



# APPENDIX B

George E. Pataki, Governor



Linda Angello, Commissioner

June 27, 2005

Mr. William P. Challice  
Office of the State Comptroller  
Division of State Services  
123 William Street, 21st Floor  
New York, New York 10038

Mr. Challice:

The New York State Department of Labor (Department) has received and reviewed your draft audit report (2004-S-22) on the Department's administration of the Public Work Enforcement Fund (Fund). The Department does not agree with the basic assumptions and conclusions made in this draft audit report.

The driving force for the conclusions made in your draft report is Chapter 376 of the Laws of 2003 (Chapter), an amendment to Chapter 511 of the Laws of 1995, which established, as an unconsolidated law, the Public Work Enforcement Fund. For purposes of this letter, all references to "the law" or "the statute" will refer to the two sections of this unconsolidated law as presently amended. The New York State Department of Labor has reviewed Chapter 376 of the Laws of 2003 (Chapter) to determine whether and to what, if any, extent the Commissioner of Labor (Commissioner) may promulgate regulations regarding the payment of money into the Fund and the Commissioner's ability to collect money from such fund. The Chapter itself does not grant such authority, nor does the Commissioner's general regulatory authority cover this Chapter.

* Note 1
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The law does not grant regulatory authority to any person. The law clearly places responsibility for administration of the Fund with the Comptroller. The Commissioner's only role is to receive the monies collected by the Comptroller. Section 1 of the statute states that the Comptroller shall establish the Fund and that "Each state agency or public benefit corporation entering into a contract...shall make a transfer of 0.07 of one percent of the total cost of the contract to the fund." The law does not specify that the Department of Labor is to collect the fee assessments but mandates that the state agencies and public benefit corporations entering into the contract are to "transfer" the assessment into the public work enforcement fund. Section 2 appropriates \$2 million to the fund, which shall be payable "on the audit and warrant of the state comptroller on vouchers certified or approved by the commissioner of labor." Section 2 further states that no expenditures shall be made from such appropriation except by the approval of the Director of the Budget, filed with the Comptroller and the Chairmen of the Senate Finance Committee and Assembly Ways and Means Committee.

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\* See State Comptroller's Notes, p. 39

According to law, then, the Commissioner's only involvement with this fund is to accept moneys that are payable to the Department based on submission, to the Comptroller, of vouchers approved by the Commissioner. The administration of the Fund is clearly the Comptroller's responsibility.

The Commissioner's general regulatory authority also does not cover this law. Labor Law §21(11) grants the Commissioner the authority to "issue such regulations governing any provision of this chapter as he (sic) finds necessary and proper". This law, however, is an unconsolidated law, and not a "provision of this chapter," i.e. of the Labor Law. Accordingly, this section does not grant the Commissioner regulatory authority over the Fund. Labor Law §23 grants the Commissioner the authority to make "administrative regulations" i.e., regulations "necessary for the internal administration of the department." As the Fund is administered by the Comptroller, not the Commissioner, it is not part of the internal administration of the Department and, hence, not a subject for regulation under this section of the Law either.

In addition to the above disagreement with the draft audit report, the Department also has the following corrections and/or comments with regard to the Department's activities discussed in the report:

#### **Identifying, Collecting and Accounting for Fund Revenues**

The report states on page 9 that, "The Department does not use available information to identify assessable contracts, and has not developed regulations to clearly state that all assessable entities must pay a Fund fee on every assessable project." The Department does use available OSC information (CON-511 report) to identify assessable contracts and entities that it bills. Also, on page 15 of the audit report, OSC acknowledges the use of the report but points out a problem in that the report includes grants and other "pass-throughs" of funds from state agencies to municipalities. At the time the law was passed, the Department's Finance Office worked with OSC to determine the best information available on which to base assessments and billings, the CON-511 was the result of those discussions. Although the report may contain grants and "pass-throughs," most state entities being billed will note on the report that such contracts should be exempt and they will reduce the invoice accordingly.

* <i>Note</i> 2
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While we dispute that the Department has the authority to issue regulations, it should be noted that the Department, through the Division of the Budget, did release procedures informing assessable state entities of the PWEF law and provided procedures to be followed for the entities to pay the fee on each assessable project (Budget Bulletin 1154 issued January 1996). This Budget Bulletin was rescinded by DOB in May 2000. However, the Department has continued to follow these procedures since their issuance, and will be working with the Division of the Budget to develop an acceptable mechanism for issuing guidance on transfers and deposits to the Fund.

\* See State Comptroller's Notes, p. 39

The report states, on page 9, that State law requires every entity entering into a public work contract to file a Request for Wage and Supplement Information (PW-39) form with the Department. The report then goes on to further assert that “the Department has a comprehensive in-house resource that identifies all entities’ contracts...” and that “...it maintains information about all public work contracts...” The auditors are again referring to the PW39 as well as the PW16 contract information that contractors submit to the Department’s Public Work Bureau. The Department takes issue with both of these statements. First, the form PW-39 is a Bureau produced form to facilitate the legal mandate on public entities to request a schedule of wages for potential public work projects. Its use is not required by state law as stated. Secondly, as the Department has already stated, the information on the PW39 and PW16 information is often incomplete and untimely. The form PW-39 only reflects the intent of the contracting agency to put a project out to bid, not that an assessable contract has been signed. On any one project there can be multiple contracts, each one needing to be individually assessed. The PW-39 has none of that information. Therefore, the audit report should not make reference to this resource as being “comprehensive” or that the Department maintains information about “all” public work contracts. The additional requirement on public entities to report, once awarded, contract information is in the law. However, the Bureau estimates that the PW16, which has a couple thousand entries a year, is only 30% of the total contracts and this information is already listed in many cases on the CON-511. Therefore, to try and bill based on either the PW16 or the PW39 in the Bureau would be highly inefficient and duplicative at a minimum, and would literally involve thousands of billings per year.

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**Note**  
2

\*  
**Note**  
3

The report states that the audit found that the Department does not verify the legitimacy of exemptions claimed by the agencies that the Department does bill, or make efforts to track or collect Fund accounts receivable. These assertions are not correct. The Department has made several attempts to track and collect Accounts Receivable. There was a time when, due to staff transition and the loss of electronic data files, this activity was temporarily suspended until such time as the electronic data file was restored and new staff was transitioned. However, this was a temporary instance that has long since been corrected by instituting the accounts receivable process. In addition, the Bureau does validate each exemption from the information provided by the letting agency. The Department has no knowledge of any occurrences of an exemption or exemption information provided being false or misleading. If there is any doubt, we verify the contract requirements with the letting entity. If the Comptroller has information that a state agency or public benefit corporation has misrepresented these exemptions, please provide it to us and we will review it.

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**Note**  
4

The auditors cite that the Department does not verify the completeness and accuracy of public authority remittances. The Department does not have access to the state agencies or public authorities’ contracts to perform verification that the payments were complete and accurate.

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**Note**  
5

\* See State Comptroller's Notes, pp. 39 - 40

The discussion on page 15 concerning “pass through funds” is incorrect. “Pass through funds” are moneys passed through an entity covered by the enforcement fund (such as the Department of Transportation) to a variety of public entities for construction projects to be let by the receiver of funds. The entities through which the funds pass do not pay a percentage of these dollars because they are simply a conduit for the monies to another governmental entity, they are not letting contracts. If the governmental entity receiving the funds is covered by the enforcement fund, they should be assessed for whatever contract amounts they let. To calculate in any given year the potential lost dollars by funds not covered by the statute is pointless.

\*  
*Note*  
2

The Department has reviewed the opinion of OSC’s counsel that the Law requires assessments to be collected on the total cost of the contract, which includes the value of amendments and contract changes and concurs. Therefore, reference to the Department’s belief to the contrary on page 9 of the report should be removed.

\*  
*Note*  
2

**Accounts Receivable**

On page 17, the report states that the auditors interviewed staff responsible for collecting delinquent receivables and found that they do not send second and third notices as required by the Department. However, in an earlier draft document shared with the Department, the auditors stated that they spoke to the person who previously followed up on the delinquent accounts and that person indicated that they did follow the Department’s long-standing practice. These statements are inconsistent. The facts are that the Department did follow up on delinquent accounts in the past as well as in the present, and the Finance Office has now incorporated the delinquent receivable collection practice into its written procedures.

\*  
*Note*  
6

The Department’s Finance Office stated and the auditors acknowledged in previous discussion documents that: “During our audit, Department officials told us they have begun to develop aged receivable reports.” This sentence has been removed from the final draft and it should be reinstated. It should also be noted that the Department’s Finance office has recently built this process into its monthly accounting procedures.

**Accounting for Fund Revenues**

The report asserts that “the Department does not promptly record receipts.” An explanation was provided to the auditors (as indicated on page 18 of the report) that it is impractical to log each check when received because checks are delivered to the Accounting Office intermittently throughout the day. In many instances checks are recorded immediately upon receipt, while other checks are kept secured in the safe and logged-in within a 24-hour period. Therefore, the statement above should indicate such. Additionally, it should be noted that the Finance Office has implemented comprehensive procedures to ensure that checks are being recorded as timely as possible and that receipt journals are being reconciled on a regular basis.

\* See State Comptroller's Notes, pp. 39 - 40

The first sentence on page 19 should read, "The Department has looked into other alternatives to safeguard the contents of the safe and has added a keypad to the safe door to allow the door to be kept closed and opened by authorized staff as needed."

\*  
Note  
2

### **Controls over Fund Data**

On page 19, the auditors note that during their limited testing of the Department's Fund Data Files they found that an individual who did not have access to the accounting application could in fact, access the applications data files. We informed the auditors that we discussed this issue with DOL IT staff who believed the files that the auditors in fact accessed were old Peachtree files that were corrupted. We noted to the auditors that IT staff had previously restricted access to the new Peachtree files and the audit report should reflect this fact. The auditors responded that they were not able to modify their report at that time, but that we should clarify this point in our response. As such, it should be noted in the report that the Department has established controls to restrict Fund Data file access to authorized users only. Also, it should be acknowledged that the Department has implemented procedures to routinely back up its Fund files.

\*  
Note  
7

### **Using Fund Revenues According to Legislative Intent**

In response to the number of positions funded by the Fund, the Department had provided comments to the discussion document that your auditors had issued, but our comments have not been included and we would like the comments added on page 24, second paragraph after the bullets:

- The Department has filled an additional 27 items funded from the PWEF and has tried to maintain that level. However, over the 10 years this was offset by decreases to other funding streams in the State Budgets passed by the Legislature. In 1995 we could fill 74 positions funded through the other funding streams. Currently, we can fund 27 items funded from PWEF and 64 items funded from the other funding streams, so there is only a net increase in Public Work of 17 items. Currently there are 26 of the 27 original PWEF funded items that are filled and we are in the process of filling the one vacant item.

\*  
Note  
2

If you have any questions or would like to discuss anything further, please contact me at (518) 457-9016.

Sincerely,



Karen C. Stackrow  
Director of Internal Audit

\* See State Comptroller's Notes, pp. 39 - 40



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## State Comptroller's Notes

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1. Chapter 511 of the Laws of 1995, which originally established the Public Work Enforcement Fund, provides in relevant part:

“The sum of five hundred thousand dollars (\$500,000), or so much thereof as may be accumulated, is hereby appropriated to the department of labor from any moneys credited to the public work enforcement fund created pursuant to section one of this act for the purposes of carrying out the provisions of this act.” (emphasis added)

As is clear from this language, the appropriation to the Department of Labor was intended for the purpose of carrying out the provisions of this chapter.

While the Department claims that its general regulatory authority under section 21(11) of the Labor Law only grants the Commissioner the power to enact regulations pursuant to the provisions of the Labor Law, it is a well accepted principle that the power of an administrative agency to make rules and regulations does not depend solely upon an express grant from the Legislature (*O'Connor v. Hendrick*, 184 NY 421 [1906]). Rather, its regulatory power may exist by implication (*The Finger Lakes Racing Association, Inc. v. The New York State Racing and Wagering Board*, 45 NY2d 471, 410 NYS2d 268 [1978]), such as where there is a delegation of broad power to a public agency which would not be meaningful in the absence of a power to make rules (*Strauss v. The University of the State of New York*, 2 AD2d 179, 153 NYS2d 397 mod on other grounds 2 NY2d 464, 161 NYS2d 97 [1956]). Such rule making authority would exist by implication if the Legislature had not chosen to express it (*Strauss v. The University of the State of New York*).

Consequently, since the Department of Labor is charged with enforcing the Public Work Law, it would have implicit authority to enact regulations to enforce the provisions of this chapter, which is designed to generate revenue for the Department so that it may carry out its enforcement responsibilities under that Law.

Further, the enactment does not place responsibility for administration of the Fund with the Comptroller, but merely makes him the custodian of these moneys as he is with hundreds of other funds created by the Legislature.

2. We revised our report based on additional information provided by the Department in its response.
3. If the Department collected public work contract information as required, they would have more complete information, enabling them to accurately bill entities for Fund assessments.
4. During the audit, we reviewed five contract exemptions from the assessment and found that these exemptions were appropriate. However, this limited test does not guarantee

that all entities only exempt valid contracts. We believe, it is in the Department's interest to periodically confirm, on a test basis, that contracts exempted by entities are appropriate. Without such oversight and as noted in the Department's response, they would have no knowledge of false or misleading exemptions.

5. As we recommend, the Department should develop regulations to define an entities Fund responsibilities. As part of these regulations, the Department should specify the data it requires entities to remit with Fund payments.
6. Contrary to the Department's statement that they followed up on delinquent accounts in the past as well as in the present, they note in their response (page 35, 2<sup>nd</sup> paragraph) that, at a point in time, they did not follow up on delinquent accounts.
7. Neither we nor the Department's IT staff could definitively determine that the files accessed by the auditors were, in fact, old Fund files.