



New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Assessment and Collection of Selected Fees and Penalties

Department of Labor



Report 2010-S-70

May 2013

Executive Summary

Purpose

To determine whether the Department of Labor (Department) is assessing and collecting all required fees and penalties. Our audit covered the period April 1, 2008 through July 31, 2011.

Background

The Department assesses and collects a wide range of fees for various licenses/certificates issued and services rendered. The Department also assesses and collects a variety of fines such as those levied on employers for their failure to pay fees in a timely manner or comply with workplace safety rules. We reviewed the three Department fees with the highest reported revenue: boiler inspections, public work enforcement and asbestos abatement.

Key Findings

- The Department does not assess and collect all required fees and fines. In total, the Department did not collect about \$3.8 million, including associated penalties, for the three fee categories we reviewed.
- The Department does not have accurate records to show who is required to pay boiler inspection and asbestos-related project fees. As a result, the health and safety of New York State residents may be at risk and potential revenue is not realized.

Key Recommendation

- Increase oversight of the assessment and collection of fees and penalties identified in this report.

Other Related Audits/Reports of Interest

[Department of Labor: Oversight of Revenue Contracts \(2009-S-16\)](#)

[Department of Health: Oversight of Revenue Contracts \(2009-S-17\)](#)

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

Division of State Government Accountability

May 31, 2013

Mr. Peter M. Rivera
Commissioner
Department of Labor
Building 12, State Office Campus
Albany, NY 12240

Dear Mr. Rivera:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit, entitled *Assessment and Collection of Selected Fees and Penalties*. This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller
Division of State Government Accountability*

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This report is also available on our website at: www.osc.state.ny.us

Background

The Department of Labor (Department) assesses and collects a wide range of fees for various licenses/certificates issued and services rendered. Services provided include inspecting boilers and asbestos abatement projects. Fines are levied on employers who fail to pay fees timely or who do not comply with workplace safety rules.

For the three years ended March 31, 2011, the Department reported collecting \$79.2 million in fees and penalties. We reviewed the three Department fees with the highest reported revenue - boiler inspections, public work enforcement and asbestos abatement - which account for \$70.7 million (89 percent of reported fees and penalties).

Audit Findings and Recommendation

Assessing and Collecting Fees and Penalties

We found the Department does not assess and collect all required fees and fines. In total, the Department collected about \$3.8 million less than it should have, including associated penalties, for the three fee categories we reviewed. We also found that the Department does not have accurate records to show who is required to pay boiler inspection and asbestos-related project fees. As a result, New York State residents may be subjected to needless health and safety risk and potential revenue may not be realized.

Boiler Inspection Fees and Penalties

The Department's Boiler Safety Unit (Unit) is responsible for ensuring that boilers are inspected (except for those in apartment buildings with less than six families and boilers that produce less than 100,000 BTUs per hour). Boilers must be inspected either annually or biennially, in accordance with boiler regulations, depending on the size and type of boiler. Boiler owners must pay an inspection fee (\$75 or \$200) to the Department within 30 days after the inspection invoice date. If the fee is not paid within 30 days, the Labor Law requires that the owner be assessed a penalty. However, the penalty can be waived if the Department determines the delay in payment was for a good reason and the reason is documented.

The Unit's activities promote safety, efficiency, decreased breakdown time and, most importantly, prevent accidents and injuries.

For the three years ended March 31, 2011, the Department reported collecting nearly \$10 million in boiler inspection fees, and \$64,000 in penalties. However, there is no complete record of the boilers that exist throughout the State. As a result, the Department does not know how many boiler inspections are required and is losing potential boiler inspection revenues.

- Department officials said that when they switched to their current inventory system, data from the old system was not transferred correctly to the new one. While the Department has assigned two people to begin updating and maintaining the new system, officials estimate it will take two years to thoroughly review the existing inventory to determine the inspection status of each boiler. However, Department officials told us progress is being made.
- Department officials also noted that code enforcement officials, such as those with local building, fire and health departments, have an informal practice to notify the Department when they see boilers during their inspections. However, even though Department officials believe it would be beneficial, such reporting is not required. The Department of State, which provides the state building codes, which all code enforcement officials follow, also agreed this would be beneficial noting the importance of ensuring that boilers are safe.

We also determined that the Department is not collecting all possible penalties from owners

who do not pay the inspection fees timely. During the audit period, the Department waived \$3.2 million in late payment penalties.

If inspection fees are not received within 90 days of fee notification, the Department summons the owners to attend a fee hearing. This process often results in fees being waived; however, the Department did not always comply with a requirement to document why the penalties were waived. We judgmentally selected 25 records from fee hearings and found that the late penalty was waived in each instance, but the reason for the waiver was documented in only two of those instances.

In response to our audit findings, Department officials sent a memo to staff stating that they must document the reason for a penalty dismissal. However, the Department also needs to ensure that it collects all revenue it is due, and should assess late penalties on those who do not submit their inspection fees timely, without good cause.

Public Work Enforcement Fund

The Labor Law requires contractors on public work projects to pay prevailing wage rates to all covered employees. Public work contracts involve a public entity that contracts for the employment of workers on a construction, reconstruction or maintenance project that primarily benefits the public. More than 10,000 public work projects are engaged each year in New York State. Chapter 511 of the Laws of 1995 established the Public Work Enforcement Fund (Fund). Each State agency or public benefit corporation that enters into a public work contract is required to remit 1/10 of one percent of the total contract cost to the Fund.

The Fund is used 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. Currently, there are about 513 State and local authorities. Only eight authorities reported they had public work projects during the period April 1, 2008 through February 7, 2011. These eight authorities remitted \$8.5 million to the Department.

We contacted 16 large public authorities, including 15 State, and one local, authority(s), that had not remitted money to the Fund and asked if they had public work projects during our audit period. One authority did not respond to our request and four other authorities were referred to the Public Works Bureau for a decision regarding whether they were required to contribute. The remaining 11 public authorities reported to us a total of \$535.6 million in projects covered by the fund, during the period April 1, 2008 through April 29, 2011, but had not contributed the required \$535,576 to the Fund.

We found the Department does not have a process for determining which public authorities are required to remit this fee and for which contracts. As a result, the Department is not receiving all required fees. We note that the State Authorities Budget Office started collecting information on contracts as of March 31, 2010, that now enables the Department to more easily identify those public authorities required to pay the fee to the Fund. We recommend the Department use this

information as a tool and develop a method to identify public authorities required to remit the fee to the Fund.

Asbestos Project Notification Fee

The Department's Asbestos Control Bureau (Bureau) oversees the abatement of toxic hazards associated with asbestos fiber during the rehabilitation, reconstruction or demolition of buildings. The Bureau enforces the Labor Law and Industrial Code 56, which require Department notification for large asbestos projects. Contractors involved with asbestos projects that contain more than 260 linear feet, or 160 square feet of asbestos, must pay a project notification fee to the Department.

Exposure to asbestos fibers, a known carcinogenic agent, creates a serious risk to the public safety and health. The Bureau reduces the risks to the public associated with exposure to asbestos, by establishing an inspection and enforcement program. All contractors involved with asbestos projects meeting the minimum size must notify the Department and pay anywhere from \$200 to \$4,000 for a project notification fee depending on the amount of asbestos in the project.

We found that most contractors adhere to the self-notification process and pay the required project notification fee. However, the Department has no method for determining whether there are other contractors that should be paying the fee, or how much the fee should be. As a result, there is no way to know how much more the Department could be collecting in revenue each year. To determine whether there are contractors which did not pay the required project notification fee, we obtained a list of landfills throughout the State that accepted asbestos and reviewed their associated documentation. In total, landfills accepted asbestos from 50 projects during our audit period where the amount of asbestos contaminated refuse disposed was at least ten tons. We found that 45 out of the 50 contractors paid the project notification fee (one was exempt). We averaged the amount paid by the 45 projects and estimate that the Department could have collected an additional \$6,992 for the remaining four projects (\$1,748 per project).

We also note that the project notification fee was not equitable, as small asbestos projects can pay as much as those that are much larger. For example, a project with 1,725 linear feet and 35,263 square feet would pay the same \$4,000 maximum fee as a project with 1,650 linear feet and 1,000 square feet. The Department should review this structure to determine whether a more equitable fee structure could be created based on the size of a project to provide greater equity and possibly increase revenue. Fees are statutorily set and any revisions would have to be sought through a change in the statute establishing the fees.

Recommendation

1. Increase oversight of the assessment and collection of fees and penalties identified in this report. The Department should at a minimum perform the following steps:
 - Assess late payment penalties on all late boiler inspection fees payments.

- Collect all boiler inspection revenues due.
- Stop waiving boiler inspection late penalties without adequate justification and document the reason(s) for waiving penalties.
- Update and maintain a current inventory of all boilers that should be inspected.
- Work with the Department of State and code enforcement officials to identify boilers that should be inspected.
- Develop a method to identify public authorities that have assessable public work contracts and ensure that these authorities remit proper payments to the Fund. Consider using the information available on construction contracts at the Authorities Budget Office to identify these public authorities.
- Develop a method to identify those required to pay an asbestos project notification fee and follow-up with these contractors to ensure payment. Consider periodically obtaining manifests from landfills to verify that contractors are paying the project notification fee.
- Review the asbestos fee structure to determine whether a more equitable fee structure could be created based on the size of a project to possibly increase revenue.

Audit Scope and Methodology

To determine whether the Department is assessing and collecting all required fees and penalties, during the period April 1, 2008 through July 31, 2011.

To accomplish our objectives, we reviewed relevant laws and interviewed staff at the Department. To determine how the Department assessed and collected late payment penalties we obtained a download of their payment database and analyzed the timing of payments to determine if any were paid late and should have been assessed a penalty. We also examined their records documenting the dismissal of the penalties once they were assessed.

We also judgmentally selected twenty public authorities with potentially significant construction contracts and reviewed whether they remitted money to the Public Work Fund, as required.

To verify whether asbestos contractors were paying the Project Notification Fee, we judgmentally sampled 50 asbestos waste shipment manifests that were maintained at landfills. The manifests provided the name and address of the asbestos abatement contractor, the project site, and the tonnage of asbestos disposed. However, there is no method to convert the requirements of 260 linear feet, or 160 square feet of asbestos into weight in part because any other material that is exposed to the asbestos during removal must be considered contaminated (e.g., framing material, sheetrock and other material). Consequently, to ensure that the asbestos projects were large enough to require that the Project Notification Fee should be paid, we worked with Department officials and agreed that 10 tons of dumped material would incorporate at least the minimum reportable amounts. Therefore, we selected only those manifests where 10 tons or more of asbestos was disposed of. We then compared the manifests to the Department's database to verify whether the fee was paid.

We conducted our performance audit in accordance with generally accepted government auditing

standards. 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 objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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. 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 functions do not affect our ability to conduct independent audits of program performance.

Authority

The 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.

Reporting Requirements

We provided a draft copy of this report to Department officials for their review and comment. Their comments were considered in preparing this final report and are attached in their entirety at the end of this report.

According to their response, Department officials agree with our recommendations and have been working to implement them as appropriate.

Within 90 days of the 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 what steps were taken to implement the recommendations contained herein, and where the recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

A team of accountability experts respected for providing information that decision makers value.

Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments



New York State Department of Labor
 Andrew M. Cuomo, Governor
 Peter M. Rivera, Commissioner

April 12, 2013

Frank Patone
 Audit Director
 Office of the State Comptroller
 Division of State Government Accountability
 123 William Street – 21st Floor
 New York, NY 10038

Dear Mr. Patone:

This is in response to your letter dated February 13, 2013, regarding Draft Report 2010-S-70 containing OSC's audit entitled Assessment and Collection of Select Fees and Penalties.

In the Background section of the report on page four, OSC determined the total of \$68.9 million for the three largest programs for the three year period April 1, 2008 through March 31, 2011. It would appear the \$68.9 million total includes the Scaffold Plan Examination fee but does not include the Civil Penalty-Asbestos. The actual total for Asbestos/Boilers/PWEF fees and penalties is \$70.7 million.

Below is OSC's Recommendation and the Department of Labor's (Department) response to each of the bullets.

OSC Recommendation:

1. *Increase oversight of the assessment and collection of fees and penalties identified in this report. The Department should at a minimum perform the following steps:*

- *Assess late payment penalties on all late boiler inspection fees payments.*
- *Collect all boiler inspection revenues due.*
- *Stop waiving boiler inspection late penalties without adequate justification and document the reason(s) for waiving penalties.*
- *Update and maintain a current inventory of all boilers that should be inspected.*
- *Work with the Department of State and code enforcement officials to identify boilers that should be inspected.*
- *Develop a method to identify public authorities that have assessable public work contracts and ensure that these authorities remit proper payments to the Fund. Consider using the information available on construction contracts at the Authorities Budget Office to identify these public authorities.*
- *Develop a method to identify those required to pay an asbestos project notification fee and follow-up with these contractors to ensure payment. Consider*

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 Comment
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* See State Comptroller's Comment on page 15.

periodically obtaining manifests from landfills to verify that contractors are paying the project notification fee.

- *Review the asbestos fee structure to determine whether a more equitable fee structure could be created based on the size of a project to possibly increase revenue.*

Department Response (bullets one through three):

In the fall of 2012 the Boiler Inspection Bureau developed and implemented a protocol that provides guidance to the Chief Boiler Inspector on when and how the Department may be able to waive penalty fees. The decision on when to waive penalties is made by the Chief Boiler Inspector in conjunction with the Division Head. That protocol includes documentation that will be placed in the relevant case file.

Department Response (bullets four and five):

The Division of Safety and Health (DOSH) has continued to build upon our long standing relationship, through the Department of State, with the local code enforcement officers (LCEOs). For purposes of boiler inspections, DOSH has sent a letter to all LCEOs in New York State, explaining our role alongside theirs and shared a document from the National Board of Boiler and Pressure Vessel Inspectors that covers our jurisdiction and requirements. Our hope is that LCEOs can identify issues during their work that can be referred to the Boiler Inspection Bureau to be addressed.

Department Response (bullet six):

As a result of a 2007 OSC audit, the Department worked with OSC to develop a monthly report listing construction contracts approved through the OSC contract system. The OSC report is currently used as the basis for the Department's Public Work Enforcement Fund (PWEF) billings and contains 13 state agencies and public authorities throughout the state and an average of 500-600 contracts in total. The Department routinely bills 7 public authorities (Dormitory, Thruway, Canal, Bridge, Battery Park City, MTA, and Central NY Regional Transportation) based on this OSC report.

Also, a process has been in place for many years for other Public Authorities to make payment to the Department in accordance with BPRM B-610 (see link below).

<http://www.labor.state.ny.us/workerprotection/publicwork/pdfs/enforcefundbudgetpolicy.pdf>

The Department has been working with the Authorities Budget Office (ABO) on a method to identify additional public authority construction contracts subject to the PWEF assessment. We requested the ABO to provide a report similar to OSC's report, listing all construction contracts reported to them by the public authorities in NYS. The report generated by the ABO was extensive. It included 272 public authorities and 6,598 contracts that were categorized as

construction type and possibly subject to the PWEF assessment. The ABO informed the Department that they do not have a way to readily identify those contracts subject to the PWEF assessment. The contract descriptions provided by the public authorities to the ABO are very general and we cannot always determine if they are contracts for “construction, reconstruction, renovation, repair, maintenance or other improvement” as defined in the PWEF enacting legislation. We will continue working with the ABO to develop a process that provides more specifically relevant information and details the contracts that are subject to the PWEF assessment. The Department needs to determine if it is possible and feasible to isolate only those contracts that are subject to the PWEF assessment.

Since the implementation of the SFS in April 2012, OSC developed a new version of the monthly PWEF contract report that the Department uses to bill agencies/public authorities for their share of the PWEF assessment. The new report contains 70% more D-construction contracts than the previous reports. Under SFS, OSC is now able to capture all D-construction contracts and not just those over a certain dollar threshold as was the case previously with CAS. Therefore, as the number of contracts being reported by OSC increases, so will the amount we will collect for the PWEF assessment.

In reference to your most recent audit where you recommended the Department develop a system to address assessment and payment of PWEF, we note at the outset that OSC has the authority to conduct audits of State agencies and public benefit corporations, is in possession of and has access to information on public agencies and public benefits corporations financial expenditures. OSC has the exclusive authority and powers to analyze and audit the PWEF.

The Department is establishing a new protocol to apprise all public agencies and public benefits corporations of their obligations and to generate targeted information that will enhance OSC audit capabilities.

- 1) The Department will annually mail a notice to all agencies and public benefit corporations and request that they fill out an affirmation of their public work and their contribution in compliance with the PWEF.
- 2) All parties that fail to answer the request for affirmation will be referred to OSC for further action.

Department Response (bullet seven):

On the asbestos notification fee, we will use reconciliation of Department records to ensure and verify that asbestos contractors, building owners, and others in the regulated community follow all regulations under the purview of the Department’s Asbestos Control Bureau (ACB). This program began in late 2011, with examination of air monitoring records received by the ACB in Buffalo. Starting in late 2011 this has expanded statewide to include examination of air monitoring records, demolition permits, site-specific variances, surveys, and waste manifests.

Air monitoring contractors/labs are required to send elevated air monitoring reports to the ACB immediately within the same business day, as per Industrial Code Rule 56-4.10(a). These reports are cross checked with notifications listed in the ACB system.

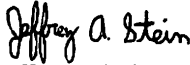
Demolition permits have been obtained from all major cities statewide over which we have jurisdiction. In addition, permits from many towns, villages and smaller cities have been obtained. Another source of information is from local fire companies, who can provide a list of fires in their area for potential controlled demolitions. These inspections began in late 2011 and have been ongoing.

In early 2012 contact with all major landfills that accept friable waste for access to data was established. Some of these landfills have begun to send ACB monthly waste manifests for their site which allows ACB to compare the data and ensure asbestos projects are not missed. ACB has now expanded the contact to landfills outside of New York State that accept waste from New York. We are confident that these steps will improve our mission of ensuring the safety and health of New Yorkers preventing their exposure to asbestos material.

Department Response (bullet eight):

The Department has been in discussions to possibly change the fee structure; however, as indicated in the report, any revision to these fees would have to be authorized through a legislative change as the fees are statutorily set.

Sincerely,


Jeffrey A. Stein
Principal Auditor

ec: Commissioner Rivera
Mario Musolino
Pico Ben-Amotz
Vilda Mayuga
Jim Rogers
Roger Bailie

State Comptroller's Comment

1. The fee total on page 4 of the report has been revised to reflect the Department's calculation.