Empire State Development

Charles A. Gargano
Chairman
and Chief Executive Officer

July 26, 2005

Honorable Alan G. Hevesi
Comptroller, State of New York
110 State Street
Albany, NY 11236

Re: OSC Audit 2004-S-32

Dear Comptroller Hevesi:

Attached, as required pursuant to Section 170 of the Executive Law, is the report of the New York Job Development Authority, doing business as Empire State Development Corporation (ESDC) advising you of steps that have been and will be taken to implement the recommendations contained in the above-referenced audit report, and where such recommendations were not implemented, the reasons therefore.

Sincerely yours,

Attachment

cc: Honorable George E. Pataki, Governor
Honorable Sheldon Silver, Speaker
Honorable Joseph L. Bruno, President
Pro Tempore & Majority Leader

Eileen Mildenberger
Anita Laremont
Garry Ryan
Frances Walton

EMPIRE STATE DEVELOPMENT REPORT REGARDING NEW YORK JOB DEVELOPMENT AUTHORITY'S IMPLEMENTATION OF RECOMMENDATIONS IN AUDIT REPORT ON INTERNAL CONTROLS OVER PROCUREMENT AND CONTRACTING ACTIVITIES AND CONFLICT OF INTEREST (2004-S-32)

The following constitutes ESDC's report to the Governor, the State Comptroller, the Speaker of the Assembly, the Temporary President of the Senate and fiscal committees regarding steps taken to implement the recommendations contained in the above-referenced audit report.

ESDC is proud of its extensive system of internal controls over procurement and contracting activities and conflict of interest. ESDC agrees that improvement is always possible (and, in fact, constantly seeks ways to better perform its functions), but must point out that the areas identified for improvement represent mainly either minor non-conformity with existing policies and procedures, or a difference of opinion about what is required either by law or as a best practice. Following are our responses to the recommendations contained in the draft audit.

Recommendation 1:
ESDC agrees to submit all service contracts requiring annual Authority Member review to the Members for such review. The board materials will serve as documentation of such reviews being completed. Note, however, that the loan servicing contract which was the focus of this recommendation will not be renewed when it expires.

Recommendation 2:
ESDC agrees with this recommendation. A copy of the missing loan file was located in the possession of outside counsel working on the foreclosure. The draft audit indicates that the update of information on the loan default status report was not current, and implied that this was the fault of the loan servicing agent. Please not, however, that it is the responsibility of ESDC staff to update this information. All comments have been updated and will be maintained on a current basis in the future.

Recommendation 3:
Virtually all of the JDA defaulted loans have been in that status for a number of years. In years prior to the audit, when JDA had a much higher volume of new loan generation, JDA's Members were more regularly advised of defaults. During the past few years, the loan default list has remained rather stagnant, with few new loans going into default. Portfolio management continues to actively work to resolve the outstanding defaulted loans, and consults with management on a regular basis as it pursues a variety of strategies to maximize JDA's return on these loans. However, JDA agrees that the Authority Members should be regularly apprised of the status of these defaulted loans, and agrees to provide an annual report on defaulted loans to the Authority Members.

Recommendation 4:
ESDC has established a policy to cancel or otherwise resolve outstanding checks six months after the date of original issue.

Recommendation 5:
JDA's independent auditor has explained, by letter from John Wolfgang to Garry Ryan dated January 18, 2005 (a copy of which is attached as Exhibit A to this response), that it in fact reviewed JDA's thirteen (13) checking accounts.

Recommendation 6:
The OSC recommends that we require Authority Members to sign copies of a Statement of Interest and Activities form to acknowledge their receipt of the Directors Code of Conduct when they begin their board service, pointing out that we require employees to execute an Employee Statement of Interest and Activities form when they begin their employ. ESDC has distinguished between Authority Member and employees with respect to this requirement due to the small number of Authority Members (11) compared to the large number of employees (approx. 370). The General Counsel and Corporate Secretary meet with each Authority Member when he or she appointed to JDA's board, and personally provide them with these materials as part of a board member's briefing book, along with a verbal summary of the material contained therein. Heretofore, we have felt this sufficient to ensure each director's awareness of his or her ethical requirements. We do not believe that executing an acknowledgement provides any "additional assurance" that directors will comply with JDA's Code of Conduct beyond the verbal commitment received when the materials are provided. However, for the sake of record keeping, we will endeavor to secure such an acknowledgement from new directors in the future.

Recommendation 7:
JDA has very minimal expenses. There are no employees on JDA's payroll, and ESDC does not charge JDA rent. Consequently, the only expenses JDA has relate to its payment of loan servicing fees and other costs related to servicing its portfolio. These expenses are in the aggregate so *de minimus* that an annual budget is not warranted.

Recommendation 8:
JDA agrees that it should comply with the requirement that a quorum be present at all meetings. JDA acknowledged to OSC auditors that a board meeting held on May 23, 2002, was held in error without a quorum present. Upon learning of this error, the Authority Members immediately ratified the action taken at that meeting by approving the $1.8 million in loan guarantees that had been erroneously approved at the earlier meeting.

Recommendation 9:
JDA does not believe state law requires Authority Members to be physically present to vote at JDA meetings. We disagree with the opinions of the Committee on Open Government with respect to this issue, can find no case law to support them, and are not bound to follow such opinions. In the current era of vastly improved communication technology, it is standard practice among corporate boards throughout the world to permit participation at board meetings telephonically – in fact, the state's Business Corporation Law permits such provisions in by-laws. In recognition of the many demands placed upon the availability of the Authority's Members – all uncompensated, and virtually all of whom have full time employment, JDA determined that in order to ensure maximum participation in meetings, it was advisable to permit telephonic participation at our publicly held meetings.

Recommendation 10:
ESDC staff explained to OSC that JDA's Corporate Secretary inquires of staff monthly, via e-mail, whether there are items for JDA's meeting agenda. If she received affirmative responses, she sets up a meeting. Otherwise, a meeting is not scheduled. Staff explained that these e-mail exchanges have not been preserved. JDA will assess the value of the preservation of such exchanges, and if it determines there to be a value, will preserve them.

Recommendation 11:
The draft audit recommends that the Corporate Secretary monitor the delivery of board materials to Authority Members to ensure that they are timely, and keep records of these deliveries. The Corporate Secretary prepares the packages and delivers them to the Administrative Services department for delivery to individual board members. Administrative Services notifies the Corporate Secretary when all packages are delivered, and in keeping with ESDC practice, maintains records of all deliveries for three months. ESDC believes the practice of maintaining records for three months is sufficient. With respect to timeliness, the Corporate Secretary endeavors to deliver materials to board members at least five (5) days prior to a board meeting, and sets a schedule at the outset of each month to ensure the achievement of this goal. However, because of the fluid nature of our business, with new items sometimes needing to be added to board agendas close to the meeting date, and other changes beyond staff's control, it is on occasion not possible to meet this goal. The Authority Members have expressed appreciation for the fact that we regularly provide them with materials in a timely fashion, which is not always their experience with other boards on which they sit.

Recommendation 12:
The draft audit recommends that JDA request that its board vacancies be filled. JDA's Chairman and staff work very closely with the Governor's office in seeking candidates to fill vacant board positions, and will continue to do so.