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July 6, 2006

Mr. Bernard P. Pierorazio, Superintendent
And Members of the Board of Education
Yonkers Public School
One Larkin Center
Yonkers, NY 10701

Mr. Philip Amicone, Mayor and Chairman, Board of Directors
Yonkers Industrial Development Agency
And Members of the Yonkers City Council
City Hall, 40 South Broadway
Yonkers, NY 10701

Report Number: 2006M-57

Dear Messrs. Pierorazio and Amicone, Members of the Yonkers Board of Education and Yonkers City Council:

One of the Office of the State Comptroller's primary objectives is to identify areas where local governments and school districts can improve their operations and provide guidance and services that will assist local officials in making those improvements. Our goals are to develop and promote short-term and long-term strategies to enable and encourage local government and school district officials to reduce costs, improve service delivery and to account for and protect their entity's assets.

In accordance with these goals, we conducted an audit of the \$669,455 payment the Yonkers Public School District (District) made to the Yonkers Industrial Development Agency (YIDA) in August 2002 to determine whether the payment was appropriate and adequately supported.

This report of examination letter contains our findings and recommendations. We discussed the findings and recommendations with appropriate officials and considered their comments in preparing this report. The official response is attached to this report in Appendix A. Officials generally disagreed with our findings and recommendations. Our comments to the response can be found in Appendix B.

Background, Scope and Methodology

In 2001, the District identified a need for a new headquarters and a public library. While the City of Yonkers (City) is responsible for determining the total level of funding for educational expenditures, a Board of Education (Board) appointed by the Mayor administers the District. The District is a separate public entity with its own budget and administration. It has no taxing power and relies solely on the City Council for appropriations. In accordance with State Education Law, District funds are held and disbursed by the City's Director of Finance at the District's direction.

The YIDA is a public benefit corporation established to promote and support the development of commerce in the City to encourage new employment and economic progress. The Board of Directors of YIDA consists of the Mayor of the City of Yonkers, who serves as the Chairperson, and other members appointed by the Mayor.

As part of the City's plan to construct a new District headquarters and public library in downtown Yonkers, the City allotted \$2 million of a 1997 bond issuance to acquire properties from the Port Authority and for architectural and engineering costs related to developing the acquired properties. The City also allotted \$1.5 million of a 1999 bond issuance for planning, construction and acquisition of additional land for the library. After issuing the bonds, the City purchased 38 and 46 Wells Ave, 63 and 65 Dock Street and 8 River Street from the Port Authority and later transferred the property to the YIDA to complete the construction of the new District headquarters and public library. These properties, collectively, became known as One Larkin Center.

In October 2001, the City paid the YIDA \$669,455 for certain costs outside the project's contracted costs. In October 2002, the District also paid the YIDA \$669,455 for the same costs. At the same time, the YIDA paid a nearly identical \$670,000 to Yonkers Baseball Development, Inc. (YBD), a for-profit corporation organized by YIDA for the purpose of developing a baseball stadium in Yonkers¹.

The nature and timing of these various transactions, and that they were all for essentially the same amount, raised public concerns and have been the subject of investigations by the Westchester County District Attorney and the City of Yonkers Inspector General. The State Comptroller was also requested to investigate the propriety of these transactions.

As part of our audit, we interviewed key District, YIDA and City officials, as well as key officials from Community Development Property Inc. (CDP), the not-for-profit corporation that was the developer of the project. We also reviewed relevant reports and opinions from the Yonkers Inspector General and the City's CPA firm involving the payments. In addition, we reviewed pertinent documents including accounting records, Board resolutions, lease agreements, purchase/sale agreements, the construction contract for the project, and bond prospectuses for the period August 15, 1997 to February 1, 2006.

¹ Court papers, dated October 2003, prepared by YIDA's "transaction counsel," state that not only is YBD a for profit corporation, but that YIDA owns all of YBD's stock.

We conducted our audit in accordance with Generally Accepted Government Auditing Standards. Such standards require that we plan and conduct our audit to assess adequately the operations within our audit scope. Further, these standards require that we understand management controls and compliance with laws, rules and regulations that are relevant to the operations included in our scope. An audit includes examining, on a test basis, evidence that supports the transactions recorded in the accounting and operating records and applying such other auditing procedures, as we consider necessary in the circumstances. We believe that our audit provides a reasonable basis for our findings, conclusions and recommendations contained in this report.

Audit Results

The circumstances surrounding this series of payments made by the District and City to the YIDA, and ultimately the loan for essentially the same amount by YIDA to YBD, raise serious concerns about the propriety of these transactions. Misleading and unjustified invoices were created to generate the first payment. There is no evidence that the letters/invoices that CDP submitted to YIDA, and that YIDA submitted to the City requesting payment were for legitimate expenses.

The bond funds that were used to make the first payment were used in violation of State law and while the funds have been repaid to the City, we were not provided with documentation that the funds were returned to the debt service account. Properly executed and duly authorized change orders were not provided to us to support the amount the District eventually paid YIDA. The School Board never approved the significant change orders that are supposedly the basis for these payments.

If in fact YIDA was using the second, duplicate billing, to correct the earlier inappropriate payment from the City's bond funds, then the YIDA should have simply had the District authorize the City to transfer the money from the District's account to the City's account. Payment should never have been made to the YIDA. In our opinion, the August 2002 YIDA bill to the District represented an intentional attempt to use District funds to provide YIDA with resources to make an inappropriate loan to YBD.

Finally, our review found that the YIDA had no authority to establish the YBD, nor did the YIDA have implied authority to do so. In addition, the loan to YBD was not in compliance with the General Municipal Law. In this instance, the YIDA had no authority to loan or give public funds to YBD. In limited cases where loans are allowed, certain procedures must be followed, which YIDA did not do.

October 2001 Payment - Improper Use of Bond Proceeds

In a Resolution dated January 5, 2001, the Board approved the construction of a new headquarters and a public library. Subsequently, the YIDA obtained from the City the properties that would comprise One Larkin Center, and on February 1, 2001, the YIDA entered into agreements with the CDP to complete the project. The CDP, in turn, entered into a construction

contract with Whiting-Turner Contracting Co. (WTC) for a “guaranteed maximum price” of \$43.89 million.

The YIDA issued approximately \$53 million in bonds to cover the cost of the project. This amount covered both the cost of the construction project, various bond issuance costs, a reserve for the first year of interest on the debt and various other incidental costs.

On August 20, 2001, six months after the project started, WTC wrote to the CDP and requested the urgent approval of a \$526,173 change order for added partitions in the building. The contractor noted that if the CDP did not proceed with the change order the architect would have to redesign the building’s interior and ultimately delay the project. On September 26, 2001, the contractor requested funding for another \$540,000 change order for installation of a telephone-data service system. The two change orders totaled \$1.06 million, \$396,719 of which the CDP would eventually claim to have found other project savings to offset, leaving a balance of \$669,454.68.

We found that neither the Board’s Bylaws nor its policies include dollar thresholds and authorization limits for District officers to approve expenditures. We reviewed Board minutes and found the Board had not discussed or approved the \$1.06 million change orders stemming from the construction of the Board headquarters. This was unusual because Board minutes for the period January 2001 through December 2005, show that the Board routinely approved District contracts and change orders that were less than \$10,000. However, there was no documentation showing that the Board discussed and approved the change orders. The change orders provided to us contained no signatures or approvals by the Board or District officials indicating that they agreed with the changes and the associated costs. Therefore, these change orders were not properly executed and duly authorized. In addition, YIDA did not bill the District for these costs in the Fall of 2001.² According to the Yonkers Inspector General report issued on December 15, 2005, an interim source of funding was needed to finance the extra costs of the change orders until proceeds from bonds that were to be issued in 2002 became available. Therefore, YIDA asked the City if there were any City funds available. The City identified

² The YIDA had no right to bill the District for anything because there was no contract between the YIDA and the District. The school district’s financial obligations were to CDP pursuant to the terms of the Sublease Agreement between CDP and the School District (SbLA). However, under the SbLA, CDP had no right to bill the school district for the change orders. Rather, CDP was required to complete the “Facility” and “Premises” at its “sole cost and expense” (SbLA §4.02[a]). The School District had the right to make “reasonable suggestions” to the “Plans and Specifications” by written change order (SbLA §4.06[a]), and CDP was authorized, but not required, to accept changes suggested by the School District, “subject in all events to the terms of the Financing Lease” (SbLA §4.06[b]). CDP also had the right to make “reasonable changes” in the “Plans and Specifications,” subject in certain instances to the School District’s written approval (*id.*). CDP, however, was also expressly prohibited from accepting or making any such changes when, among other circumstances, “the change order increases the aggregate costs of completing the facility ... in excess of amounts available to [CDP] ...” (SbLA §4.06[b][i]).

There is nothing in either the FLA or SbLA which authorized or required the District to pay for change orders. This is because the FLA, in effect, required CDP to complete the “Project” from YIDA bond proceeds, and the SbLA prohibited CDP from making any changes that would increase the cost of the project in excess of the YIDA bond proceeds available to CDP to complete the project. Therefore, the CDP had no express contractual right to bill the District for the change orders.

approximately \$700,000 in unexpended monies from its 1997 and 1999 Bond Issuances. However, these bonds were issued pursuant to ordinances adopted by the City Council for the specific purpose of financing the acquisition of real property that would become part of the project, and for architectural and planning costs relating to planning construction of the project. Pursuant to Section 165.00 of the Local Finance Law, bond proceeds may only be used for the purpose for which the bonds were issued or to pay the principal and interest on the bonds. Therefore, the unexpended bond proceeds legally could not be used to pay for the change orders requested by the WTC.

As suggested in the Inspector General's report, because the City's unexpended bond proceeds could not be used to pay for the change orders relating to the additional partitions and a telephone-data service system, by letter/invoice dated September 25, 2001, the CDP asked the YIDA to reimburse it for certain other expenses. The expenses for which CDP sought reimbursement were \$529,090.00 for "previously completed planning, design and engineering work" and \$140,364.68 for "land acquisition and relocation costs associated with the new Yonkers Library and Board of Education Building located at 20 River Street," for a total of \$669,454.68, the precise amount of the net cost of the change orders which could not be funded from the City's unexpended bond proceeds. The CDP also indicated that it had previously funded these expenses from the YIDA bond proceeds and requested reimbursement from "grant funding for these items."

YIDA then sent the City a letter/invoice dated September 27, 2001 requesting payment of \$669,454.68 for "completed design work & acquisition costs" at the Board of Education Building. On October 2, 2001 YIDA wired the \$669,454.68 into the project account for CDP's use. The City sent a \$669,454.68 check dated October 19, 2001 to the YIDA, using funds from the unspent bond proceeds from the City's 1997 and 1999 Bond Issuances to make the payment. CDP then claimed to have found \$396,718.92 in savings in other aspects of the project to offset the remaining balance of the change orders. It seems extremely coincidental that CDP found enough savings to reduce the overall additional cost to an amount that approximately equaled the actual amount the City had available in unexpended bond funds.

There is no evidence that the letters/invoices that CDP submitted to YIDA, and that YIDA submitted to the City requesting payment were for legitimate and actual expenses. Neither YIDA nor the District provided information to show that there were any additional acquisition and design costs for which either the YIDA or CDP was entitled to reimbursement. Instead, it appears that the letters/invoices were created to meet the purposes listed in the 1997 and 1999 bond ordinances, so as to create the appearance of compliance with section 165.00 of the Local Finance Law. Therefore, the City violated section 165.00 in making this payment to the YIDA from the 1997 and 1999 bond issues.

August 2002 Payment – A Duplicate Payment

In June, 2002, the City issued a \$5 million bond to cover costs related to the project. With these funds now available, the YIDA submitted an invoice for \$1.06 million dated August 5, 2002, to the District for the two change orders. One change order in the amount of \$540,000 was for the telephone-data system. The second change order for \$526,173 was for partitions. The total cost

of the change orders was split with \$396,718.32 payable by the District to CDP and \$669,454.68 payable to the YIDA.

On August 26, 2002, the District authorized payment of \$669,454.68 to YIDA (\$526,173 for partitions and \$143,281 for the telephone data system) from the 2002 bond fund. (Subsequently, CDP notified the District that it had identified cost savings in other aspects of the project and no longer required payment of the \$396,718.) To ensure accountability and transparency to the public, all payments in excess of set dollar amounts should be authorized by the Board at public meetings. Instead, a Board Resolution dated January 1, 2001 authorized the former District Superintendent to transact “any business necessary” for the construction of the District headquarters. And in fact, the August 26, payment was authorized by the District Deputy Superintendent and Director of Finance without the Board’s involvement.

Also, although the invoice refers to two change orders, District officials were unable to provide us copies of properly executed and duly authorized change orders for our examination. This is important since the construction contract between CDP and WTC provided for a “guaranteed maximum price” of \$43.89 million. The Financing Lease Agreement (FLA) between the YIDA and CDP, in effect, required CDP to complete the project for an amount not to exceed the YIDA bond proceeds in the “project fund,” with CDP responsible for any overage. Under the project documents there was no option for the District to pay to YIDA or CDP a portion of the project cost; the District’s only obligation was to pay CDP the rent required by the Sublease Agreement between the District and CDP.

Our review of the construction contract found that the cost of, or at least a part of the cost of, the telephone data system and partitions was already included in the construction contract.³ The sublease agreement between the CDP and the District stipulates that the completion of the project is the responsibility of the CDP and shall be at CDP’s sole cost and expense. Without properly executed and duly authorized change orders there is no way to determine whether the Board agreed that these were true additional costs outside the existing contract or whether they should have been paid for by CDP.

Even though the letters/invoices submitted for payment by CDP and YIDA in 2001 were ostensibly for different costs, YIDA had already clearly received payment from the City on October 19, 2001 for the additional costs of the telephone-data system and partitions. Therefore, when the District was billed on August 5, 2002, YIDA was billing for the same expenses a

³ The change orders were initiated by the contractor, not the school district. Because the Financing Lease Agreement between the YIDA and CDP (FLA) contemplated the contractor completing the project in accordance with the “Plans and Specifications” (FLA 2.1[d]), the most likely reason for the contractor to have requested the change orders was because the contractor discovered some problem with the “Plans and Specifications.”

Moreover, the partition change order was needed “to avoid redesigning the building’s interior.” The change order for the “installation of a telephone-data service system” was needed even though the Offering Statement for the IDA bonds, stated that the “[t]he facility will be provided with state-of-the-art telecommunications capabilities with a fiber backbone and CAT-5 drops throughout the building” (OS p. 32). These facts suggest that the need for the change orders arose from inadequacies in the “Plans and Specifications” for the project, rather than from items outside the scope of the “Project” that were added by the District.

second time. There is no evidence in the record that the District or City were aware of this double billing, and no evidence that YIDA was intending to rectify the situation. If in fact YIDA was using the second, duplicate billing, to correct the earlier inappropriate payment from the City's bond funds, then the YIDA should have simply had the District authorize the City to transfer the money from the District's account to the City's account. Payment should never have been made to the YIDA. Given the misleading letter/invoice the YIDA submitted to the City in September 2001, we can only conclude that the YIDA was attempting to inappropriately obtain additional funds.

It was only after the public questioned the August 26, 2002 District payment to the YIDA that the YIDA admitted to the duplicate billing. The funds were eventually returned to the City on March 24, 2003. During the time that the YIDA had inappropriate use of the City's money, the City lost interest that could have been earned if the money had not been taken out of the bond fund. For the period of time the YIDA held the City's money October 1, 2001 to March 24, 2003 (18 months) the City lost \$31,383 in interest (using a three percent interest rate compounded annually for 1.5 years).

In addition, City officials claimed that the money was returned to the debt service account. However, City officials did not provide us with any documentation indicating that the \$669,455 was actually deposited to that account.

Inappropriate Loan to YBD

According to the minutes of the YIDA's August 27, 2002 meeting, the Executive Director of YIDA mentioned that YIDA would receive \$670,000 from the District. During the same meeting the YIDA Board approved a \$670,000 loan to Yonkers Baseball Development, Inc. Our review of this transaction indicated that the loan was not in compliance with the General Municipal Law.

First, the YIDA had no authority to establish the YBD. An IDA has only those powers expressly conferred upon it by the Legislature. There is no express statutory authority for the YIDA to establish a wholly owned for-profit corporation. Nor does the YIDA have implied authority to do so.

The powers and duties of IDAs are set forth in article 18-A of the General Municipal Law. Unlike the enabling legislation for a number of other public benefit corporations, there is no express authority in article 18-A for an IDA to create, or cause the creation of, a for-profit corporate entity. Moreover, the Business Corporation Law provides that only "natural persons" may act as incorporators of for-profit corporations formed under that law, and there is nothing in the Business Corporation Law which specifically authorizes an IDA to cause the incorporation of a for-profit corporation. Therefore, there is no express authority for an IDA to create a for-profit corporation.

As to implied authority, the YIDA's express power pursuant to section 858(3) of the General Municipal Law, to acquire "personal property," does not include the power to use its own funds to acquire stock in a for-profit corporation because stock ownership is an investment and the

YIDA, in effect, is prohibited from investing its own funds in stock.⁴ Moreover, the YIDA's express power⁵ to do all things "necessary or convenient" to carry out its purposes and exercise its express powers, does not provide implied authority for the YIDA to establish a for-profit corporation. The enabling legislation of a number of other public benefit corporations includes similar language plus express authority either to form or carry out their functions through corporate subsidiaries. Therefore, the YIDA's "necessary or convenient" clause is insufficient to provide it with the authority to establish a for-profit corporation such as YBD.

Article 18-A of the General Municipal Law also authorizes industrial development agencies to provide "financial assistance" for certain types of projects. For this purpose, section 854(14) of the General Municipal Law defines "financial assistance" as "the proceeds of bonds issued by an agency, straight leases, or exemptions from taxation ...". The definition, however, does not include loans from funds for an industrial development agency's own use. Nor are we aware of any other provision of law which authorizes an agency to make loans from its own funds. Therefore, the YIDA lacked authority to make the \$670,000 loan to YBD.

Even if the loan to YBD is viewed as "financial assistance," within the meaning of article 18-A, section 859-a of the General Municipal Law establishes certain prerequisites prior to providing any financial assistance of more than \$100,000 to any project. An IDA must comply with the following prerequisites:

- The IDA must adopt a resolution describing the project and the proposed financial assistance,
- Hold a public hearing with respect to the project and the proposed financial assistance,
- Give at least 30 days published notice of the public hearing.

We found no documentation indicating that the YIDA complied with these requirements.

We also received a letter dated December 9, 2005 from an attorney for YIDA. Although the letter does not directly address the payment to the YBD, it suggests, in a different context, that the payment made to the YBD was in compliance with the General Municipal Law because it was not "financial assistance." The letter also suggests, again in a different context, that the payment was not a loan, but instead "Capitalization payments which are the equivalent of equity holdings which constitute personal property", and that the YIDA is authorized to do so. The December 9th letter further suggests that this type of payment will be accounted for as "Investments in Economic Development Entities."

There are two problems with characterizing the payment to YBD as an investment. First, the note/agreement between the YIDA and the YBD clearly states it is a "loan". The "loan" with YBD was dated November 1, 2002 and was due on November 1, 2003. (According to the YIDA's Executive Director, YIDA has not received any payments towards the loan as of December, 2005.) Secondly, if the "loan" was mischaracterized and is properly characterized as an investment in the YBD, we note that section 858-a(3) of the General Municipal Law requires funds for an industrial development agency's own use and account to be invested in accordance

⁴ see General Municipal Law §§11, 853-a[3]

⁵ section 858[17]

with section 11 of the General Municipal Law. In general, section 11 authorizes investments only in certain time deposit accounts and certificates of deposit, certain federal, State and local obligations, and certain obligations guaranteed by the federal government. Section 11, however, does not authorize investments in stock or other instruments in the nature of equity holdings. Moreover, because section 11 implements the constitutional ban on municipal ownership of stocks and bonds of private corporations,⁶ it must be read, in effect, as prohibiting the YIDA's "investment" in YBD. Therefore, even if the YIDA now considers the loan it made YBD as an investment, it is still not in compliance with the General Municipal Law.

Furthermore, the YIDA audited financial statements for the years 2002 and 2003 listed the payment as a loan. The audited 2004 financial statement includes a note which states that YBD was "Funded by an equity contribution of \$670,000." However, the note does not indicate that the loan was reclassified or the effects the change had on the financial statements.

Recommendations:

1. The Board should develop and include in its Bylaws a policy delineating dollar thresholds and authorization limits for District officers to approve expenditures.
2. The Board should review and authorize expenditures in excess of set dollar amounts at public meetings.
3. The Board should review and approve all change orders exceeding predetermined dollar amounts.
4. City officials should calculate and collect lost interest for the moneys advanced to the YIDA.
5. City officials should investigate what happened to the YIDA's repayment and ensure that unused bond proceeds are used solely for the payment of the principal and interest on the bonds.
6. The YIDA should recover its loan from the YBD, with applicable interest.
7. The YIDA should discontinue entering into financial transactions that violate governing statutes.

The School Board, City and YIDA officials have the responsibility to initiate corrective action. Pursuant to Section 35 of the General Municipal Law, the Board and the City should prepare a plan of action that addresses the recommendations in this report and forward the plan to our office within 90 days. We encourage the District and the City to make this plan available for public review in the District and city clerk's offices. See the attached document for additional information on filing a corrective action plan. Our Office is available to assist you upon request.

⁶ see NY Const. art VIII, section 1

If you have any questions about this report, please contact our Albany Regional Office at (518) 438-0093.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven J. Hancox". The signature is fluid and cursive, with a prominent initial "S" and a long, sweeping tail.

Steven J. Hancox
Assistant Comptroller

APPENDIX A

RESPONSE FROM OFFICIALS

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

WILLIAM T. REGAN
DEPUTY MAYOR



LISA MURTAJ
CHIEF OF STAFF

OFFICE OF THE MAYOR
PHILIP A. AMICONE
MAYOR

June 9, 2006

Mr. Steven J. Hancox
Assistant Comptroller
Divisions of Local Government Services
and Economic Development
Office of the State Comptroller
110 State Street
Albany, New York 12236

RE: Draft Report Number: 2006M-57 (the "Report").

Dear Sir:

This letter is written to you on behalf of the following individuals and entities mentioned in the Report: the Superintendent and members of the Yonkers Board of Education (the "BOE"); the Mayor of the City of Yonkers (the "City"); the members of the Board of Directors of the Yonkers Industrial Development Agency ("YIDA"); and Community Development Properties, Yonkers, Inc. ("CDP"). This letter is signed by the Mayor of the City, by the President of CDP, which was the owner of the One Larkin Center Project (the "Project"), the subject of the Report, and by the appropriate individuals on behalf of the BOE and YIDA.

We thank you for giving us the opportunity to review the Report in draft form, prior to its release to the public. Our review of the Report discloses that it is predicated on a fundamental misunderstanding of the structure of the Project. We believe that, as a result of this misunderstanding, the conclusions reached and the recommendations made are fundamentally incorrect.

See
Note 1
Page 17

The Project consisted of the reconstruction by CDP of a long-abandoned former Otis Elevator factory. Portions of the reconstructed building were thereafter true-leased by CDP, the sole owner of the Project, to the BOE as an administration building for the BOE and to the Yonkers Public Library as its central library. A direct benefit of the Project is the rejuvenation of the Yonkers waterfront the start of which depended on the success of this project.

See
Note 2
Page 17

CITY HALL YONKERS, NY 10701 TEL. 914.377.6300 FAX 914.377.6048

The basic misunderstanding of the Project which runs throughout the Report is the erroneous notion that the Project was reconstructed, financed and owned by the BOE and the City. That is incorrect. The Project was undertaken solely by CDP, a nonprofit corporation. CDP leased the polluted land and the abandoned and contaminated factory for 45 years from YIDA for a single up-front payment of \$1,523,000. (YIDA, as the ground owner and lessor, spent the bulk of that lease payment to discharge its legal obligation to remediate the pollution and contamination in the leased property.)

See
Note 3
Page 17

CDP financed the cost of acquiring the leasehold and the cost of reconstructing the factory by having YIDA issue tax-exempt bonds in February 2001 (the "CDP Bonds"). The CDP Bonds were non-recourse to YIDA, which was acting solely as a conduit issuer. The Project was owned and operated by CDP, the only entity at risk for payment of interest and principal on the CDP Bonds. The BOE and the Library were merely tenants in CDP's Project under approximately 32-year leases. Exhibit A attached hereto contains excerpts from pages 1-3 and 31-2 of the Official Statement pursuant to which the Bonds were sold, explaining the Project. Those excerpts make it clear that CDP was the owner of the Project and that the BOE and Library were merely tenants under *true leases*.

See
Note 4
Page 17

In order to reconstruct the factory, CDP entered into a guaranteed-maximum price contract (the "Reconstruction Contract") with Whiting Turner Contracting Co. ("WTC"). Any change orders to the Reconstruction Contract during the construction period were negotiated solely between CDP and WTC. Neither the City nor the BOE were parties to the Reconstruction Contract, so that neither could originate nor approve any change orders to it. This explains why you were unable to find any such documentation for such change orders among their records, as you noted on page 4 of the Draft Report. All change orders under the Reconstruction Contract for the basic reconstruction of the Project originated with CDP, and were paid for by the Trustee with proceeds of the CDP Bonds.

See
Note 5
Page 17

The improvements to the BOE's leased space for partitions and a telephone-data service system were tenant improvements (the "Tenant Improvements"). They were not included in the Reconstruction Contract. Exhibit B attached hereto contains the Project Budget under the Reconstruction Contract. It shows that those Tenant Improvements were not part of the Reconstruction Contract.

See
Note 6
Page 18

When the BOE decided that it wanted CDP and WTC to undertake its Tenant Improvements, it had to request CDP to enter into change orders with WTC to provide them. At the same time, the BOE had to provide funds to the CDP Bond Trustee ("Trustee") so that the Trustee could pay for the change orders for those Tenant Improvements. In response to the BOE's request that it and WTC acquire and construct the Tenant Improvements, CDP entered into change orders 15 and 28 to its Reconstruction Contract with WTC. Exhibit C attached hereto is a Claimant's Voucher signed by Mr. James Grasso, acting for the BOE, processing payment for the Tenant Improvements pursuant to CDP's change orders number 15 and 28. Exhibit D attached

See
Note 7
Page 18

hereto contains copies of those change orders and copies of the BOE's Resolutions authorizing Mr. Grasso to approve them.

Exhibit E attached hereto is CDP's January 17, 2001 letter to the Trustee under the Indenture pursuant to which the tax-exempt bonds were issued and secured. It noted that the additional cost of the requested Tenant Improvements was \$1,066,173.00 but that only an additional \$669,454.68 was required to be received from the BOE. That is because the Trustee had three amounts that would not be spent as expected for the reconstruction of the building. The original design for the building was "fast tracked" and, when the design was efficiently finalized, \$249,865 was saved. Further, draws on the construction fund to pay WTC did not occur as rapidly as originally projected and, as a result, extra earnings on the investment of the construction fund amounted to \$100,000. Finally, \$46,853 was available from the contingency fund, reflecting contingencies that did not arise. Consistent with its corporate purposes, CDP contributed all of those savings to the BOE to reduce the BOE's cost of its Tenant Improvements.

As the City was ultimately responsible for the funding of the BOE, it decided to advance the \$669,454.68 needed for Tenant Improvements from unspent monies remaining from its 1997 and 1999 bond issues. As your Draft Report correctly states, the ordinances adopted by the City Council authorizing those City bond issues limited the use of their proceeds to the acquisition of real property that would become a part of the Project and for architectural and planning costs of the Project.

See
Note 8
Page 18

In order to comply with those ordinances, CDP and the Trustee, in accounting for the Project, allocated the \$669,454.68 received from the City as a contribution for real property acquisition and architectural and planning cost purposes of the Project. These amounts would otherwise have been paid for from proceeds of the CDP Bonds. The City's contribution to the project for purposes permitted by the ordinances freed up the identical amount of CDP Bond proceeds to be used by the Trustee to pay for the Tenant Improvements. Exhibit F attached hereto is CDP's September 25, 2001 letter to YIDA explaining how to wire the funds to the Trustee to accomplish the reimbursement of CDP's expenditures for real property acquisition and architectural and planning cost purposes. This wire freed up CDP Bond funds in an identical amount that the Trustee used to pay for the Tenant Improvements pursuant to change orders 15 and 28.

See
Note 9
Page 18

While it was working on the Project, WTC's policy was not to begin any new work (including Tenant Improvements) until the Trustee had the funds to pay for that work. As YIDA had the funds available to pay for the Tenant Improvements before the City did, it wired them to the Trustee on October 2, 2001. Exhibit G attached hereto is a copy of the wire instructions. YIDA advanced the funds to enable WTC to continue at top speed to provide the Tenant Improvements. It was not until 17 days later on October 19, 2001 that the City was able to reimburse YIDA by sending it a check for \$669,454.68. Exhibit H is a copy of that reimbursement check.

See
Note 10
Page 19

No further YIDA funding was required by the Trustee and WTC to pay for the BOE's Tenant Improvements. The 1997 and 1999 bonds were issued in anticipation of

the financing and ownership of the Project by the City. However, the Project was developed by CDP rather than the City. When the City issued bonds specifically for BOE's Tenant Improvements the proceeds of that issue superseded the use 1997 and 1999 bonds which were issued in anticipation of a City financing that did not occur. Therefore the City decided it was more appropriate to use bond funds specifically issued for the CDP Project. The decision was made to repay the previously advanced bond funds thereby leaving the project funded only with proceeds of the bonds specifically earmarked for the CDP owned building. To accomplish the reimbursement, two repayments were made.

See
Note 11
Page 19

First, YIDA requested that the BOE reimburse it from the 2002 capital improvements bond issue for the \$669,454.68 that it had wired to the Trustee for the Tenant Improvements. Exhibit I attached hereto is a copy of that request, (which also erroneously requested reimbursement for the \$396,718.32 which was never advanced and therefore was not reimbursed) and a photocopy of the actual reimbursement check. Second, after it had received that reimbursement, YIDA passed that amount back to the City for replacement in the 1997 and 1999 bond funds. Exhibit J is a letter dated March 24, 2003, from Edward Sheeran at YIDA to Jim LaPerche at the City which forwards a check for \$669,454.68 to the City in reimbursement for the check received on October 19, 2001. Also attached as part of Exhibit J are the Ledger Records of the City along with a narrative description prepared by the Commissioner of Finance showing that those funds were returned to the issues from which they were borrowed.

See
Note 12
Page 19

YIDA's officials have explained the business reason for the delay between when YIDA received the funds from the capital improvements issue and when those funds were forwarded to the City. YIDA's Mr. Sheeran prudently delayed forwarding those funds out of concern that the BOE might require other Tenant Improvements that might be more expeditiously paid by YIDA from those funds. Indeed, the possibility of additional BOE Tenant Improvements had already proved to be real. In a letter dated July 19, 2002, Exhibit K attached hereto, WTC priced out the cost of fitting out an additional 10,000 square feet on the fourth floor of the Project (which had not originally been rented out to the BOE). The cost of fitting out that additional 10,000 square feet and five other change orders for the BOE's rented space was, when completed, approximately \$1,300,000. That cost was also paid with proceeds of the BOE capital improvements bond issue.

See
Note 13
Page 20

Finally, the Draft Report suggests that YIDA used the \$669,454.68 that it had delayed forwarding to the City in order to make a \$670,000 loan to Yonkers Baseball Development, Inc. ("YBD"). The YIDA staff and their attorneys state that there is no connection between the two sums other than the totally accidental similarity in their amounts. YIDA did not delay forwarding the funds to the City in order to make the loan to YBD. At the time of making funds available to YBD, YIDA had cash and cash equivalents in excess of the total amount of the YBD funding. See Exhibit L attached hereto.

See
Note 14
Page 20

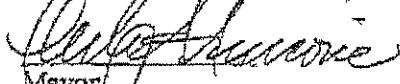
The Draft Report also reaches conclusions of law about the power of YIDA to create and own the stock of YBD and to lend money to it. However, these exact questions have in fact been litigated and settled in YIDA's favor by the appropriate courts of the State of New York: Martin Goldman, L.L.C. v. Yonkers Industrial Development Agency and Yonkers Baseball Development, Inc. a/k/a Yonkers Baseball, Inc. See Exhibit M attached hereto, the final order of the Court filed on June 14, 2005. Thus, the conclusions of law in the Draft Report are precisely contrary to the findings of law of the appropriate court and should be deleted. The questions they raise have been settled and any recommendations based on them are now inappropriate.

See
Note 15
Page 20

In summary, the findings of fact in the Draft Report are based upon a fundamental misunderstanding of the transaction. The appropriate documentation is present in every case and all of the parties to the transaction acted properly to complete the Project, which was built on time and under budget. The Project is the basis of the subsequent and ongoing revitalization of the Yonkers waterfront and is a Project in which the City of Yonkers and the State of New York can take pride. We share your goal of having efficient government operations and believe that the Project demonstrates such efficiencies. If we can be of further assistance, please do not hesitate to contact us.

Very truly yours,

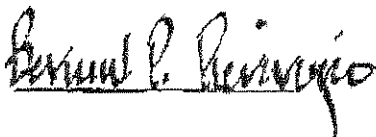
THE CITY OF YONKERS, NEW YORK


Mayor

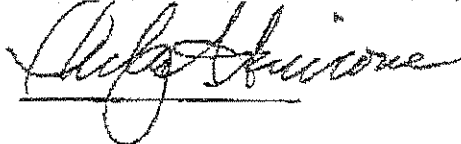
COMMUNITY DEVELOPMENT PROPERTIES, YONKERS, INC.


President

YONKERS BOARD OF EDUCATION



YONKERS INDUSTRIAL DEVELOPMENT AGENCY



APPENDIX B

OSC COMMENTS TO OFFICIALS' RESPONSE

Note 1:

We believe this report demonstrates a full understanding of the issues surrounding these transactions. Our report outlines the parties to the transactions and lists the responsibilities of the parties based on relevant legal documents such as the Guaranteed Maximum Price Contract between CDP and WTC, the Lease Agreement between CDP and the BOE and the Financing Agreement between the CDP and the YIDA. In addition, our report is based on interviews of City, CDP, YIDA and BOE officials and analysis of documents obtained from these officials.

Note 2:

At no time do we argue against the benefits provided by this project to development in Yonkers. Our sole concern is how City officials handled this particular series of transactions. City officials did not follow appropriate procedures. The City of Yonkers, the Yonkers City School District, YIDA and YDB are separate organizational entities, even if they have interlocking officers and boards. Transactions between these entities and the use of their resources must follow legal and appropriate processes. Instead, City officials treated them and their financial resources as a single entity that could be used in any manner that City officials chose. Invoices between these entities must be real invoices for real costs. Significant financial transactions must be approved by the governing body of the individual entity. When one of the entities overpays another one, the money must be returned expeditiously. For example, YIDA has no right or corporate purpose to hold money that rightfully belongs to the School District or City.

Note 3:

Nowhere in our report do we state that the BOE and the City owned and financed the project. To the contrary, on page 3 of our report we state that after YIDA obtained the property from the City it entered into agreements with the CDP to complete the project.

Note 4:

We are aware of the roles the CDP, YIDA and the BOE had in the transactions. Our conclusions are based on the Maximum Price Contract between the CDP and the Whiting-Turner Contracting Company, the Financing Lease Agreement between the CDP and the YIDA, and the Sublease Agreement between the CDP, the YIDA and the BOE.

Note 5:

As outlined on page 6 of our report, the Financing Lease Agreement between the CDP and the YIDA and the Sublease Agreement between the CDP and the BOE made the CDP responsible for the cost of change orders. Furthermore, the Sublease Agreement between the CDP and the

BOE required BOE written approval for change orders. We were never given change orders that had been approved by the BOE.

Note 6:

If the improvements for partitions and the telephone-data service system were “Tenant Improvements” as indicated in the City’s response, then we question why the YIDA and the CDP were parties to this transaction. Furthermore, if the change orders are now being reclassified as “Tenants Improvements” then they should have been competitively bid by the BOE.

Note 7:

During the audit, we obtained and reviewed the voucher signed by Mr. Grosso. The voucher did not include any specific information that would allow for an informed decision as to the appropriateness of the transaction. The only information on the voucher was that it was for change order #'s 15 and 28 for \$669,454.68. We also note that the Board Resolution that the City references in its response was a general resolution that authorized the entire project in January 2001 and was not a specific authorization of this transaction, as implied by the City’s response.

Note 8:

The City did not have the authority to use the 1997 and 1999 bond issues to pay for change orders related to a property the City no longer owned.

Note 9:

We disagree that the proceeds of the City’s 1997 and 1999 bonds were properly paid to the YIDA. The proceeds of those bonds should have been used to pay debt service on the bonds.

The City argues that “[i]n order to comply with [the City’s bond] ordinances, CDP and the Trustee, in accounting for the Project, allocated the \$669,454.68 received from the City as a contribution for real property acquisition and architectural and planning cost purposes of the Project.” According to the City, the effect of this accounting treatment was that “[t]he City’s contribution to the project for purposes permitted by the ordinance freed up the identical amount of CDP bond proceeds to be used by the Trustee to pay for the Tenant Improvements.” The Tenant Improvements consisted of partitions and a tele-data system.

The City’s 1997 and 1999 bonds were issued to pay for architectural and planning costs incurred by the City for the Project. Under the Project documents, architectural and planning costs incurred by the CDP were to be paid from the Project Fund, which consisted primarily of the proceeds of bonds issued by the YIDA. Prior to the transfer of the City’s 1997 and 1999 bond proceeds to the Project Fund, the architectural and planning costs incurred by the CDP had already been paid from the Project Fund.

As noted in our audit report, section 165.00 of the Local Finance Law requires bond proceeds to be used only for the object or purpose for which the bonds were issued or to pay debt service on the bonds. Here, because the architectural and planning costs incurred by the CDP had been paid from the Project Fund prior to the transfer of the City's 1997 and 1999 bond proceeds, the City's 1997 and 1999 bond proceeds were used to reimburse the Project Fund, rather than to pay for architectural and planning costs incurred by the City. Because the City's 1997 and 1999 bond proceeds were used to reimburse the Project Fund, and not to pay for architectural and planning costs incurred by the City, we continue to believe that the City's 1997 and 1999 bond proceeds were not used for the object or purpose for which the bonds were issued and, instead, should have been used to pay the debt service on the bonds.

Moreover, as pointed out in the audit report, the need for the City's 1997 and 1999 bond proceeds stemmed from the need to pay for partitions and a telephone-data system, not architectural and planning costs. Neither the letter/invoices prepared by the CDP and the YIDA "to comply with [the City's bond] ordinances," nor CDP's accounting ledger alters the fact that, in effect, the City's 1997 and 1999 bond proceeds were used to finance the partitions and a telephone-data system.

Finally, in our report, we stated that neither the YIDA nor the District provided us with documentation to support that additional acquisition and design costs were incurred for the project. The City's response supports our conclusion that no additional costs were incurred. According to the City, the CDP "reallocated"/reclassified previously paid expenditures to comply with the requirements of the Bond ordinance; it did not incur additional expenditures that were not covered by the bonds issued for the Project.

Note 10:

Per the City's response, the YIDA was not a party to the contract and therefore should not have "advanced" WTC \$669,454.68 for change orders.

Note 11:

Section 165.00 of the Local Finance Law stipulates that bond proceeds may only be used for the purpose for which the bonds were issued or to pay the principal and interest on the bonds. Therefore, the City cannot use the 1997 and 1999 bond issue other than for their stated purpose. See also Note 8 above.

Note 12:

As our report states, the City did not deposit the funds to the debt service account. The City did make a number of journal entries. However, we are unable to conclude that the moneys were actually returned to the debt service fund. In addition, the City has not provided us with bank statements showing that the money was actually returned to the Capital accounts originally charged or the debt service funds.

The City's argument that the City had sufficient funds available to pay all current debt service is irrelevant. These unused proceeds were to be set aside and used for the payment of principal and interest on the bonds issued. If the unused moneys were returned to the debt service fund, the Comptroller's office also should have been notified of the transfer so that we could monitor their use.

Note 13:

On June 11, 2002, the BOE issued \$5 million in bonds that included line items for its new headquarters; therefore, there was no reason for the YIDA to hold the City's money in anticipation of possible future change order costs. Also, as previously mentioned, the Financing Lease Agreement between the CDP and the YIDA, and the Sublease Agreement between the CDP and the BOE, held CDP responsible for the change orders. Therefore, it was not YIDA's responsibility to hold the City's bond money to pay for potential future change orders. Furthermore, contrary to the City's response, the Lease Agreement between the CDP and the BOE was for the rental of the entire four story building which includes the fourth floor.

Note 14:

Exhibit L is the YIDA minutes of its August 27, 2002 Board meeting. As mentioned in our report, the vote by the Board to loan the YBD \$670,000 was subsequent to the YIDA Executive Director's statement at the meeting that the YIDA will get \$670,000 from the BOE.

Note 15:

The City's reliance on Goldman v YIDA, n.o.r., Supreme Court, Westchester Co. (June 14, 2005) is misplaced. In Goldman, the owner of a building that was to be condemned for the Yonkers baseball stadium project challenged the authority of the YIDA to establish the YBD. The Court dismissed the proceeding as moot because City officials had announced that the plaintiff's building would not be condemned, but noted in passing that "[i]t is undisputed that an industrial development agency has the right to own personal property, pursuant to General Municipal Law §853(3), such as stock in a corporation." We reviewed this case in preparing our audit report and did not find this dicta, essentially a conclusion without any analysis, to be either dispositive or persuasive with respect to the YIDA's authority to cause the formation of a for-profit corporation such as the YBD, or the YIDA's authority to expend moneys for its own use and account to acquire the YBD's stock. For the reasons set forth in our audit report, we believe the YIDA lacked authority to cause the formation of the YBD and to acquire the YBD's stock.