

Department of Agriculture and Markets

Annual Assessment of Market Orders for 2015 and 2016

Report 2018-S-44 | May 2019

OFFICE OF THE NEW YORK STATE COMPTROLLER
Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objective

To determine whether the Department of Agriculture and Markets (Department) had adequate procedures in place during the audit period to accurately report its assessable expenses related to its administration of Article 25 of the Agriculture and Markets Law. Our audit covered the period July 1, 2014 through June 30, 2016 for the Apple and Sour Cherry Market Orders and the period April 1, 2014 through March 31, 2016 for the Apple, Cabbage, and Onion Research and Development Programs.

About the Program

During the audit period, the Department's Market Order Administration was responsible for the administration of all farm product market orders, except those involving dairy products. Each specific market order is established in Department regulations to assist the industry in achieving a variety of objectives, including product promotion, advertising, and research. These market orders include: the Apple Marketing Order, the Sour Cherry Marketing Order, the Apple Research and Development Program, the Onion Research and Development Program, and the Cabbage Research and Development Program. In addition, Article 25 of the Agriculture and Markets Law authorized market orders and allowed for the collection of funds by assessing growers to cover expenses. We note that Chapter 58 of the Laws of 2016 repealed Article 25 of the Agriculture and Markets Law and transferred the responsibility for administering marketing orders and contracts to the New York State Urban Development Corporation (UDC).

Key Findings

- The Department had established procedures to accurately report its assessable expenses for the two years ended June 30, 2016 for the Apple and Sour Cherry Market Orders and for the two years ended March 31, 2016 for the Apple, Cabbage, and Onion Research and Development Programs.
- The Department should work with UDC to improve oversight of the Market Order Program, specifically the Apple Market Order and the New York Apple Association, Inc. (NYAA) contract.
 - The Department did not always enforce contract provisions that limit expense amounts, nor did it provide adequate guidance regarding allowable expenses.
 - We identified more than \$1.5 million in questionable reimbursements for goods or services that were not competitively bid in accordance with contract requirements. Additionally, we found \$23,000 in expenses that were ineligible for reimbursement.

Key Recommendations

- Work with UDC to strengthen policies and enforce provisions of the Apple Market Order contract.
- Work with UDC to review the expenses identified by our audit and seek repayment for inappropriate, excessive, or ineligible expenses from the NYAA.
- Work with UDC to implement procedures to more effectively monitor market order expenses, such as obtaining electronic expense documentation and performing periodic analyses to identify questionable or unallowable expenses.



Office of the New York State Comptroller Division of State Government Accountability

May 16, 2019

Mr. Richard A. Ball
Commissioner
Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235

Dear Commissioner Ball:

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 *Annual Assessment of Market Orders for 2015 and 2016*. 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.

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,

Division of State Government Accountability

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Glossary of Terms

Abbreviation	Description	Identifier
Administrator	Market Order Administrator	<i>Key Term</i>
Board	NYAA Board of Directors	<i>Key Term</i>
Department	Department of Agriculture and Markets	<i>Auditee</i>
IRS	Internal Revenue Service	<i>Agency</i>
NYAA	New York Apple Association, Inc.	<i>Contractor</i>
NYCGA	New York Cherry Growers Association	<i>Contractor</i>
NYCRR	New York Codes, Rules and Regulations	<i>Key Term</i>

Background

The mission of the Department of Agriculture and Markets (Department) is to promote New York agriculture, foster agricultural environmental stewardship, and safeguard the State's food supply, land, and livestock. During the audit period, the Department's Market Order Administration was responsible for the administration of all farm product marketing orders, except those involving dairy products. In addition, Article 25 of the Agriculture and Markets Law authorized marketing orders and allowed for the collection of funds by assessing growers to cover expenses. However, we note that Chapter 58 of the Laws of 2016 repealed Article 25 of the Agriculture and Markets Law and transferred the responsibility for administering and supervising marketing orders and contracts to the New York State Urban Development Corporation (UDC).

Prior to the transfer, the Department contracted with organizations to advertise, promote, publicize, market, and/or conduct product research and informational services. For the Apple and Sour Cherry Market Orders, the Department contracted with the New York Apple Association, Inc. (NYAA) and the New York Cherry Growers Association Inc. (NYCGA), respectively. The Department also contracted with the Cornell University College of Agriculture and Life Sciences to provide research services for the Apple, Cabbage, and Onion Research and Development Programs.

Title 1, Chapter IV, Parts 201 to 205 of the New York Codes, Rules and Regulations (1 NYCRR parts 201–205) stipulate that the total amount of the Department's budgeted costs to administer market orders shall not exceed 5 percent of the total of each Market Order Program budget. Administrative costs include personal service, travel, fringe benefits, and other indirect costs associated with administering the Market Order Program. For the two years ended June 30, 2016, the Department reimbursed NYAA \$4,292,805 and NYCGA \$49,623. For the two years ended March 31, 2016, the Department reimbursed Cornell University \$344,682, \$56,660, and \$37,764 for the Apple, Cabbage, and Onion Research and Development Programs, respectively. As the largest of these contracts, NYAA was the primary focus of this audit.

The Department reimburses contractors for expenses incurred in performing the work specified in their contracts related to administration of the program. According to the contracts, contractors shall not expend funds received under the contract for any purposes other than performance of the work under the contract. The Apple Market Order contract, for example, is for the advertising, promotion, and publicity of New York apples and apple products. In addition, contracts include certain provisions that limit expense amounts and include competitive bidding requirements for purchases of \$5,000 or more and maximum reimbursement rates for travel expenses.

During the audit period, the Department's Market Order Administrator (Administrator) was largely responsible for overseeing market orders, including monitoring contractors' annual budgets (as established in their contracts), reviewing and processing contract payments for each market order, and ensuring that appropriate assessments are received from the growers for each of the five market orders. The Department has developed procedures for reviewing and approving reimbursement of market order expenses to its contractors, including the appropriateness and eligibility of the expenses submitted for reimbursement.

Audit Findings and Recommendations

We found that the Department had established procedures to accurately report its assessable expenses for the two years ended June 30, 2016 for the Apple and Sour Cherry Market Orders and for the two years ended March 31, 2016 for the Apple, Cabbage, and Onion Research and Development Programs.

However, we also determined the Department should work with UDC to improve oversight of the Market Order Program, specifically the Apple Market Order. For instance, we found the Department did not always enforce contract provisions that limit expense amounts, nor did it provide adequate guidance regarding allowable expenses. Our review of a sample of reimbursements identified more than \$1.5 million in questionable purchases that were not competitively bid in accordance with contract requirements. Additionally, we found \$23,000 in expenses that were ineligible for reimbursement.

We note that, during the period March 1, 2014 through June 30, 2016, the Department experienced a high turnover in its Administrator position, with three different individuals filling that role in the 27-month period. This lack of continuity in managerial oversight of the NYAA contract may have hindered the Department's ability to ensure that expenses were appropriate and allowable.

The Department should work with UDC to provide additional guidance to strengthen and enforce provisions of the Apple Market Order contract and implement procedures to more effectively monitor market order expenses. In general, the Department agreed with our audit findings and recommendations. According to Department officials, subsequent to our audit scope, they conducted on-site audits of a sample of expenditures to determine if adequate supporting documentation was on file and if all related contract requirements were followed.

Preparation of Statements of Assessable Expenses

We found the Department accurately prepared, in all material aspects, the Statements of Assessable Expenses for the two years ended June 30, 2016 for the Apple and Sour Cherry Market Orders (presented in Exhibits A and B, respectively) as well as for the two years ended March 31, 2016 for the Apple, Cabbage, and Onion Research and Development Programs (presented in Exhibits C, D, and E, respectively). The Department's administrative expenditures were within the 5 percent limit for each market order, as required by 1 NYCRR parts 201–205.

Oversight of Apple Market Order Contract Requirements and Expenses

Non-Competitively Bid Goods and Services

The Department has not ensured that the NYAA follows the market order contract requirement to solicit a minimum of three bids for purchases of \$5,000 or more, or to document and justify, in writing, any instances where goods and services are not purchased from the lowest responsible bidder.

We reviewed bidding documentation for \$914,241 in reimbursements made to 66 vendors, and found 14 with an expenditure for goods or services in excess of \$5,000 that were not subject to competitive bidding, and without adequate justification, as required. During the two years ended June 30, 2016, these vendors were paid \$818,283 for goods and services that included a vehicle, media and public relations services, and merchandising.

We also identified an additional 23 vendors that were reimbursed in the aggregate amount of \$689,933 for in-store demonstrations or promotional services that likewise were not competitively bid and lacked justifying documentation. Department officials told us there is no bidding system in place for retail vendors or vendors associated with in-store demonstrations and marketing because the NYAA wants New York apple products in stores where they can be promoted and gain exposure. Furthermore, some vendors for in-store demonstrations and marketing operations are predetermined by the retailer. For these reasons, the NYAA does not consider cost to be a determining factor in the decision to work with these vendors. While the services provided by these vendors differ from those of other subcontractors, they are still subject to the bidding requirements of the contract, including supporting documentation justifying why services are not competitively bid.

We note that the lack of supporting documentation for bidding contracted services was cited as a finding in our previous audit of the market orders (Report 2014-S-58). Because this continues to be an issue, as cited in the examples provided above, further scrutiny may be warranted.

Inappropriate or Questionable Expenses and Expense Monitoring

We reviewed a judgmental sample of \$1,544,605 in expenditures from the \$4,292,805 reimbursed to the NYAA for the Apple Market Order for the two-year period ended June 30, 2016, and found approximately \$23,000 in unallowable or questionable expenses. Improper or questionable

reimbursement occurred because the Apple Market Order contract does not specify which expenses are allowable for reimbursement, and the Department has not provided any additional guidance.

Travel Expenditures

Under its market order contract, the NYAA can only be reimbursed for travel expenses that do not exceed rates applicable to State employees; where rates are exceeded, the NYAA must document and justify, in writing, the reasons why and obtain pre-approval. We found that the Department has not enforced the contract's reimbursement requirements or ensured that the NYAA's business-related entertainment expenses were properly documented.

Specifically, the Department reimbursed the NYAA for a monthly car allowance in excess of the mileage rate established for State employees. Additionally, the reimbursement did not follow the NYAA's internal procedures, which only allow reimbursement upon the submission and approval of a weekly mileage reimbursement request – similar to Internal Revenue Service (IRS) guidelines, which allow reimbursement of actual mileage traveled tax free up to an established rate. The NYAA Board of Directors (Board) approved a \$335 biweekly allowance for a former NYAA Marketing Director, with the requirement that the Marketing Director maintain vehicle logs to justify the cost of the compensation. The NYAA paid \$7,370 for the allowance. However, from January through July 2016, the NYAA erroneously paid twice the approved amount (\$670 biweekly), resulting in an overpayment of \$3,685, which the Department then reimbursed. Additionally, we determined that if the IRS compensation method was used – as is generally required – the compensation would have been about \$2,000 less than the Board-approved method.

We also identified 13 instances where lodging reimbursements, totaling \$2,495, exceeded the allowable per diem rate without documentation to support the reasons for the excess cost. For example, for an overnight stay to attend a conference in New York City, the former NYAA Marketing Director was reimbursed almost \$200 more than the State per night rate. According to the NYAA, the Marketing Director needed to stay at the hotel conference site for scheduling and networking activities. However, the NYAA Marketing Director did not stay at the hotel where the conference was held. Also, the Marketing Director did not provide comparison cost quotes for other hotels in the same area to support the need for the increased rate or take the required pre-approval steps.

Additionally, we found approximately \$5,000 in inadequately supported lodging, meal, and travel expenses, including costs for non-NYAA employees

such as the NYAA President's spouse. For example, the Department reimbursed \$788 in hotel expenses for two NYAA employees to attend the funeral of a former contractor and the father of a current contractor. These expenses were not allowed as they were not related to promoting the New York apple industry.

While we recognize that NYAA employees are not State employees and, therefore, cannot always obtain the State rates when traveling for market order purposes, similar findings in a previous audit (Report 2014-S-58, issued May 7, 2015) led to our recommendation that the Department develop written guidelines for expenses deemed necessary for the NYAA's performance under the contract, including travel reimbursement in excess of State rates. Despite agreeing with this recommendation at the time, the Department had not developed or provided any such guidance to the NYAA during the two years ended June 30, 2016. While the NYAA provided a travel reimbursement policy, approved by its Board in July 2017, to the Department, the policy did not fully address lodging rates in excess of the State-approved rate.

Benefits and Compensation

We found approximately \$5,000 in questionable payments for employee bonuses and Medicare premium reimbursements. The Department's contract with the NYAA does not specify whether these reimbursements are allowable, and the Department has provided no written guidelines supplemental to the contract. Therefore, we question whether the Department should have reimbursed these expenses.

Advertising

According to 1 NYCRR part 201.7, no advertising, promotion, or publicity programs shall be conducted with reference to any particular private brand or trade name. We found that the Department reimbursed the NYAA \$1,600 for two advertisements that were specific to Beak & Skiff, a private label, which is not allowable under the regulations. Additionally, the contract requires that advertising expenses be for New York apple products or industry research and related informational services. We found two transactions totaling \$900 for advertising that was not related to either of these categories and thus was not eligible for reimbursement under the contract.

Expense Monitoring Process

Although NYAA uses an electronic spreadsheet to record its expenses, the Department did not receive electronic registers of contractor expenses (e.g., electronic spreadsheet) during the audit period. Instead, the NYAA mailed monthly hard-copy claim packages to the Department, including copies of

monthly disbursements. This paper-based, non-automated system makes it more difficult to detect expense errors compared with an electronic format. For example, using the electronic spreadsheet that NYAA provided, we identified errors in several processed monthly vouchers that resulted in an overpayment of \$1,584 – an overpayment that otherwise would have gone undetected. Further, electronic reporting would enable improved data analysis, allowing the Apple Market Order contract to be monitored more effectively and efficiently. We note that, in addition to the example above, other findings in our report were also identified through analysis of the electronic data provided by the NYAA.

Recommendations

1. Work with UDC to strengthen policies and enforce provisions of the Apple Market Order contract, including but not limited to:
 - Developing written guidelines for reimbursement of contract expenses that should be deemed necessary for the NYAA's performance under its contract, such as travel reimbursement in excess of State rates; and
 - Enforcing contract requirements for documentation to support expenses, such as vehicle cost allocations, contractor bidding records, and sole source justifications.
2. Work with UDC to review the expenses identified in this audit and seek repayment for inappropriate, excessive, and ineligible NYAA expenses.
3. Work with UDC to implement procedures to more effectively monitor market order expenses, such as obtaining electronic expense documentation and performing periodic data analyses to identify questionable or unallowable expenses.

Audit Scope, Objective, and Methodology

The objective of our audit was to determine whether the Department had adequate procedures in place during the audit period to accurately report its assessable expenses related to its administration of Article 25 of the Agriculture and Markets Law, which was repealed by Chapter 58 of the Laws of 2016. Our audit covered the period July 1, 2014 through June 30, 2016 for the Apple and Sour Cherry Market Orders and the period April 1, 2014 through March 31, 2016 for the Apple, Cabbage, and Onion Research and Development Programs.

To achieve our audit objective, we reviewed relevant laws, regulations, policies, and procedures and interviewed Department officials. We also assessed the Department's internal controls related to preparing the appropriate cost reports. We applied audit procedures to market order financial reports and records maintained by the Department. These audit procedures included analytical reviews to identify areas of risk and unique expenses that warranted additional consideration. Based on our analytical review, we chose a judgmental sample of high-dollar transactions and other expenses that appeared questionable, representing \$1,718,101 of \$4,781,534 in expenses reimbursed by the Department for the Apple and Sour Cherry Market Orders and the Apple, Cabbage, and Onion Research and Development Programs. In addition, we reviewed all contractors that received an aggregate of \$5,000 or more during our scope period. The results of our sample cannot be projected to the population as a whole.

We conducted site visits to the NYAA to further review applicable expense records associated with our judgmental sample. We also substantiated the assessable costs presented in these statements by tracing them to the financial records maintained by the Department.

Statutory Requirements

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.

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

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 therefore be considered management functions for purposes of evaluating threats to 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.

Reporting Requirements

We provided a draft copy of this report to Department officials for their review and formal comment. We considered the Department's comments in preparing this final report and have included them in their entirety at the end of the report. In their response, Department officials agreed with the audit recommendations and indicated the actions they will take to address them.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Agriculture and Markets 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 recommendations were not implemented, the reasons why.

Exhibit A

Apple Market Order Statement of Assessable Expenses for the Two Fiscal Years Ended June 30, 2016

Assessable Expenses	Fiscal Year Ended June 30	
	2015	2016
Contracted Expenses	\$2,109,133	\$2,183,672
Administrative Expenses	103,433	56,154
Total Assessable Expenses	\$2,212,566	\$2,239,826

Exhibit B

Sour Cherry Market Order Statement of Assessable Expenses for the Two Fiscal Years Ended June 30, 2016

Assessable Expenses	Fiscal Year Ended June 30	
	2015	2016
Contracted Expenses	\$24,684	\$24,939
Administrative Expenses	156	263
Total Assessable Expenses	\$24,840	\$25,202

Exhibit C

Apple Research and Development Program Statement of Assessable Expenses for the Two Fiscal Years Ended March 31, 2016

Assessable Expenses	Fiscal Year Ended March 31	
	2015	2016
Contracted Expenses	\$228,521	\$116,161
Fruit Quarterly Expenses	9,200	14,300
Administrative Expenses	11,221	1,849
Total Assessable Expenses	\$248,942	\$132,310

Exhibit D

Cabbage Research and Development Program Statement of Assessable Expenses for the Two Fiscal Years Ended March 31, 2016

Assessable Expenses	Fiscal Year Ended March 31	
	2015	2016
Contracted Expenses	\$26,760	\$29,900
Administrative Expenses	–	148
Total Assessable Expenses	\$26,760	\$30,048

Exhibit E

Onion Research and Development Program Statement of Assessable Expenses for the Two Fiscal Years Ended March 31, 2016

Assessable Expenses	Fiscal Year Ended March 31	
	2015	2016
Contracted Expenses	\$37,764	–
Administrative Expenses	290	\$695
Total Assessable Expenses	\$38,054	\$695

Agency Comments



ANDREW M. CUOMO
Governor

Agriculture and Markets

RICHARD A. BALL
Commissioner

May 10, 2019

Mr. Brian Reilly, Audit Director
Office of the State Comptroller
Division of State Government Accountability
110 State Street 11th Floor
Albany, New York 12236-0001

**New York State Department of Agriculture and Markets
Response to Draft Audit Report 2018-S-44 - Annual Assessment of Market Orders for 2015 and 2016**

Dear Mr. Reilly,

The New York State Department of Agriculture and Markets (Department) has reviewed the Office of the New York State Comptroller's (OSC) findings titled "Annual Assessment of Market Orders for 2015 and 2016" dated April 2019 and, by this letter, responds to OSC's findings and recommendations.

The Department's Division of Agricultural Development, through its administration of the Market Orders and other programs, works to strengthen the viability and raise consumer awareness of New York's food and agricultural industry. The Department is pleased to learn that OSC has confirmed in its findings that the Division has accurately prepared the Statements of Assessable Expenses for the two years ended June 30, 2016 for the Apple and Sour Cherry Market Orders as well as for the two years ended March 31st, 2016 for Apple, Cabbage and Onion Research and Development Grants and that the Department's administrative expenditures were within the 5 percent limit for each market order, as required.

The Department appreciates the work of the State Comptroller's audit team and the recommendations offered based upon the results of its review. Department responses to the State Comptroller's recommendations can be found below:

Recommendations:

- 1) **Work with Urban Development Corporation (UDC) to strengthen policies and enforce provisions of the Apple Market Order contract, including but not limited to:**
 - **Developing written guidelines for reimbursement of contract expenses that should be deemed necessary for the New York Apple Association's performance under its contract, such as travel reimbursement in excess of State Rates; and**
 - **Enforcing contract requirements for documentation to support expenses, such as vehicle cost allocations, contractor bidding records, and sole source justifications.**

The Division will work to provide UDC, which now has the statutory responsibility for administering and supervising market orders, with suggested controls that will help ensure that UDC contract terms are adhered to and will enhance the monitoring of UDC contracts. Additional suggested controls and guidance will be developed to ensure that only necessary and appropriate expenses are reimbursed from each market order.

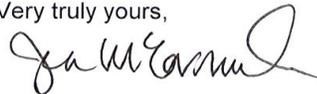
2) Work with UDC to review the expenses identified in the audit and seek repayment for inappropriate, excessive, and ineligible NYAA expenses.

The Division will work with UDC to recover inappropriate, excessive and/or ineligible expenses paid by the Apple Market Order fund. The NYAA has been notified that such expenses should not be submitted and will not be reimbursed.

3) Work with UDC to implement procedures to more effectively monitor market order expenses, such as obtaining electronic expense documentation and performing periodic data analyses to identify questionable or unallowable expenses.

The Division recognizes the opportunity to improve its monitoring of market order expenses and will improve the process to better ensure that all expenses are thoroughly reviewed and paid only if appropriate.

Very truly yours,



Jen McCormick
First Deputy Commissioner

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