Orchard Park
Fire District
Ambulance Service

Report of Examination
Period Covered:
January 1, 2009 — May 26, 2011
2011M-217
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Division of Local Government
and School Accountability

March 2012

Dear Fire District Officials:

A top priority of the Office of the State Comptroller is to help local government officials manage government resources efficiently and effectively and, by so doing, provide accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of local governments statewide, as well as compliance with relevant statutes and observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations and Board of Fire Commissioners’ governance. Audits also can identify strategies to reduce costs and to strengthen controls intended to safeguard local government assets.

Following is a report of our audit of the Orchard Park Fire District, entitled Ambulance Service. This audit was conducted pursuant to Article V, Section 1 of the State Constitution and the State Comptroller’s authority as set forth in Article 3 of the General Municipal Law.

This audit’s results and recommendations are resources for local government officials to use in effectively managing operations and in meeting the expectations of their constituents. If you have questions about this report, please feel free to contact the local regional office for your county, as listed at the end of this report.

Respectfully submitted,

Office of the State Comptroller
Division of Local Government
and School Accountability
Introduction

Background

The Orchard Park Fire District (District) is a political subdivision and district corporation of the State, distinct and separate from the Town of Orchard Park in which it is located. The District is governed by an elected five-member Board of Fire Commissioners (Board) responsible for the District’s overall financial management. The District shares the same geographic boundaries as the Town of Orchard Park and services more than 28,600 residents. The District’s operating budget totaled $1.7 million for the 2011 fiscal year. There are three volunteer fire companies located in the District. The District owns the buildings and vehicles used by the volunteers.

Prior to September 2009, the District provided emergency rescue and first aid services with firefighters who were members of the District’s three volunteer fire companies using District-owned ambulances. As required by law, the volunteers rendered such services to calls within the District, without cost to the person(s) served.1 If the volunteers were unable to respond to the call or provide the necessary services, a private ambulance service would provide the services.

In September 2009, the Board took action to form the Orchard Park Fire District-EMS, Inc. (EMS, Inc.), a not-for-profit corporation. The purpose of this entity is to provide emergency medical services to individuals in the District requiring this type of assistance. For the 2010 fiscal year EMS, Inc. recorded ambulance service income totaling over $1.2 million and responded to over 2,300 calls for service.

Objective

The objective of our audit was to examine internal controls over selected financial operations. Our audit addressed the following related question:

- Did the Board of Fire Commissioners have the authority to use District resources to create and financially support the not-for-profit corporation known as Orchard Park Fire District-EMS, Inc.?

Scope and Methodology

We examined the District’s records and pertinent records of the EMS, Inc. for the period January 1, 2009, to May 26, 2011.

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1 General Municipal Law Section 209-b (4) expressly states that emergency and general ambulance services must be furnished without cost to the person served.
We conducted our audit in accordance with generally accepted government auditing standards (GAGAS). More information on such standards and the methodology used in performing this audit are included in Appendix C of this report.

The results of our audit and recommendations have been discussed with District officials and their comments, which appear in Appendix A, have been considered in preparing this report. In responding to our audit, District officials indicated they had implemented some of our recommendations. In Appendix B, we comment on their response.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report must be prepared and forwarded to our office within 90 days, pursuant to Section 35 of the General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Board to make this plan available for public review in the District Secretary’s office.
Ambulance Service

The Board has exclusive management and control of the property of the District. The Board may acquire real property, by purchase or lease, and construct, alter, repair and equip suitable buildings for necessary fire district purposes, such as the storing of fire apparatus. The Board may also purchase or lease apparatus and equipment for the extinguishment and prevention of fires and for the purpose of operating emergency rescue and first aid squads. Finally, the Board may sell or otherwise dispose of real and personal property of the District if the Board determines that the property is no longer needed for any District use or purpose.2

The District used public moneys to purchase assets for and provide funding to a not-for-profit organization. In September 2009, the Board, by resolution, authorized the Chairman to sign documents to establish Orchard Park Fire District-EMS, Inc. (EMS, Inc.), a not-for-profit corporation. However, based on the absence of authority in Town Law or any other statute, we believe that fire districts are not authorized to form or cause the formation of this type of corporation.3

In addition, the District paid over $17,000 of legal fees for the creation of EMS, Inc., loaned EMS, Inc. $200,000,4 purchased (for $275,000) and maintained a separate building for EMS, Inc., provided EMS, Inc. with vehicles, reimbursed EMS, Inc. for unpaid charges incurred by Town residents and allowed length of service awards program (LOSAP) credits for volunteers providing services to EMS, Inc. We estimate the value of the District assets that were given, loaned or leased to EMS, Inc. since the entity was created to be over $1.3 million.

Not-For-Profit Corporation — Fire districts in New York State can exercise only those powers granted them by statute. Therefore, if statute does not grant the power to perform an activity, either expressly

2 Under certain circumstances, the disposition of real or personal property may be subject to a mandatory or permissive referendum.
3 Article 11 of Town Law, which specifically relates to fire districts, contains no reference to the creation of not-for-profit corporations to perform district activities, and we do not believe Article 11 necessarily implies the power to do so. Although Section 1411 of the Not-for-Profit Corporation Law authorizes towns, villages, cities and counties to cause Local Development Corporations to be incorporated by public officers, it does not provide similar authority to fire districts.
4 The new corporation had no cash or tangible assets when it was created by the District. EMS, Inc. repaid the loan in full by December 2010. There is no statutory authority for the District to provide cash advances or otherwise finance costs related to EMS, Inc.
or by necessary implication, fire districts cannot perform the activity. Because there is no authority in the Town Law, or any other statute, we believe that fire districts are not authorized to form or cause the formation of a not-for-profit corporation.

In practice, the District and EMS, Inc. are so closely affiliated that they are virtually indistinguishable from one another. The Board of Fire Commissioners serves as the majority of the Board of Directors of EMS, Inc., and the District’s Treasurer, Attorney and external auditor serve similar roles with EMS, Inc.

According to the Chairman, the creation of EMS, Inc. addressed multiple concerns related to providing emergency medical services (EMS). A change in the area’s demographics was creating a situation where the number of firefighters holding the appropriate emergency medical technician (EMT) or paramedic credentials was decreasing. The Fire Commissioners were also concerned that firefighter willingness to commit to the rigorous training to acquire and maintain these credentials was waning. Additionally, diminishing shift work in the region was affecting properly credentialed volunteers who had in the past worked nights to be available to answer calls in the daytime. The creation of EMS, Inc. would ensure that a group of full and part-time paid EMTs and paramedics would be available to respond to emergency rescue and first aid calls in the District 24 hours per day and seven days per week (24/7), rather than having to rely solely on volunteer firefighters.

The lack of District EMTs and paramedics may have influenced the Board’s decision to form the new corporation. However, prior to its creation, a private ambulance service with advanced life support (ALS) capabilities was available to respond to EMS calls in the District. District officials were aware they were statutorily prohibited from charging a fee to recipients of EMS services, but were led to believe that a not-for-profit entity created by the District could do so, enabling EMS, Inc. to charge fees, and therefore, pay for itself. By creating EMS, Inc., the Board attempted to avoid the statutory prohibition against the District charging fees to recipients of ambulance services.

**Building Purchase/Lease** — While the Board has the power to purchase real property it may do so only for necessary District purposes. There is no statutory authority that allows a fire district to purchase property (real or personal) for the purpose of leasing it to a not-for-profit corporation. On October 13, 2009, the Board authorized the acquisition of a building at a cost of $275,000,\(^5\) almost all of

\(^5\) The District paid cash for the building; no debt was issued.
which was subsequently leased to EMS, Inc. The lease agreement requires EMS, Inc. to pay the District rent of $5,000 per month, effective January 1, 2010. The lease will be automatically extended at the end of five years, unless either party elects to terminate the lease. The District is responsible for all utilities and insurance, and all maintenance, repairs and snow removal for the property.

In total, the District spent $288,755 to purchase the property, $81,623 to upgrade the facilities, and $8,308 for furniture, appliances and other items for use on the property. The District also paid $24,953 for utilities, maintenance, repairs, snow removal and insurance through February 2011. From January 2010 through February 2011, the District received $70,000 in lease payments from EMS, Inc. Assuming that the monthly rent charged by the District, and the contractually-obligated costs incurred by the District remain stable, it may take until 2017 before the District recovers its costs related to the building.

We toured the building. While most of the space is leased to EMS, Inc., a commissioner told us that three rooms on the first floor of the building are used occasionally for District training activities. It is unclear whether the District intended to use these rooms for District purposes at the time the property was being considered for acquisition because there was nothing in the Board’s minutes discussing the use of the building by the District. Nonetheless, even if the District purchased the building in order to obtain use of these three rooms, we believe that $288,755 was an exorbitant price to pay for approximately 720 square feet of meeting room space.

Leased Vehicles — While the Board has the power to purchase vehicles and equipment, it may do so only for District purposes. The Board has no authority to purchase vehicles and equipment for the purpose of leasing it to a not-for-profit corporation. However, the Board leased four response vehicles and four ambulances to EMS,

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6 At the exit discussion, District officials indicated that EMS, Inc. operated out of the District Commissioners’ Office from the time it was created until EMS, Inc. moved to the new building in January 2010. While the District may lease to EMS Inc. unneeded space in its firehouses for fair and adequate consideration, the District may not provide the space without charge, as it apparently had done. See Town Law Section 176[14], Opinion 81-55.

7 Upgrades in the amount of $8,749 were performed and paid for by the District before the District closed on the property. We question the reason for making such improvements before the closing because the money would have been wasted had the transaction not been completed for whatever reason.

8 At the exit discussion, District officials indicated that in addition to the three rooms, the District also used some additional space in the building for storage. Nevertheless, most of the building has been leased to EMS, Inc.
Inc. In total, these vehicles cost the District $651,037. The lease agreement indicates that the District is responsible for paying the related insurance, registration, and license fees for all eight vehicles. The District is responsible for the fuel, repairs, and maintenance costs on the ambulances.

For each response vehicle, the District receives monthly lease payments of $1,000 from EMS, Inc. Of the four response vehicles the District currently leases to EMS, Inc., the District purchased one in December 2009 (after EMS, Inc. was created) for $33,672, specifically for EMS use. The District owned the other three response vehicles prior to the creation of EMS, Inc.

Three of the ambulances currently leased to EMS, Inc. were previously used by emergency rescue and first aid squads operated by the volunteer fire companies. The District purchased the fourth ambulance for $86,877 in June 2010 and leased it to EMS, Inc. The District has no authority to purchase a vehicle for the purpose of leasing it to a not-for-profit corporation, such as EMS Inc. Because the District purchased this vehicle after it stopped providing ambulance service, this purchase was clearly made to provide a vehicle for EMS, Inc.

In addition to the legal issue with the District providing vehicles to EMS, Inc., we also found that the District was not receiving the correct amount of reimbursement for the vehicle lease payments. The lease payment to the District for the ambulances is contractually set at $84 per service call. Since the inception of EMS, Inc. through February 8, 2011, EMS, Inc. paid the District $54,264 for the lease of the ambulances. The lease payments were calculated based on 646 service calls to Town residents. However, EMS, Inc. responded to over 2,300 calls for service in 2010 alone. Therefore, it appears that the District did not receive any ambulance lease payments for service calls involving individuals who were not Town residents. When we

9 The ambulances are housed at the fire halls and the response vehicles are stored at the EMS, Inc. building. When a call for service is received, the paramedic/EMT drives the response vehicle to the scene, while a volunteer drives the ambulance. The contract indicated that the ambulances were to be fully equipped at District expense, including all necessary medical supplies.

10 The Board had authority to lease vehicles no longer needed for District purposes, but any such lease was subject to a mandatory referendum if the value of the vehicles was at least $50,000. If the vehicles were valued between $10,000 and $50,000, the lease was subject to permissive referendum requirements (Town Law Section 176[23]). We found no evidence of the District having held a mandatory referendum or having complied with the permissive referendum requirements in connection with the lease of the vehicles to EMS, Inc.

11 Because the premise for the lease of the vehicles to EMS Inc. is that the vehicles are not needed for District purposes, the District may not have the authority to equip the ambulances for EMS Inc.
brought this matter to the attention of District officials, they told us that it was likely that the District did not receive any ambulance lease revenue from EMS, Inc. for these calls. Thus, EMS, Inc. could owe the District a significant amount for the lease of the ambulances. For example, the 1,654 service calls in 2010 for which EMS did not make lease payments would total more than $138,000.

**Patient Account Balances** — There is no authority for the District to pay the outstanding balance of EMS, Inc. bills for Town residents who received services. EMS, Inc. collects health insurance data from each patient and subsequently bills the patient’s insurance company. The payment made by the insurance company to EMS, Inc. often does not cover the entire amount billed for the service. However, if the patient is a Town resident, EMS, Inc. does not attempt to collect any outstanding amount from the patient.\(^\text{12}\) Instead, the District pays EMS, Inc. the outstanding balance due if the patient is a Town resident. For services provided from November 1, 2009 through September 29, 2010, the District paid EMS, Inc., nearly $58,000, representing the outstanding balance on 644 patient accounts.

**Volunteer Service** — The District established a Length of Service Award Program (LOSAP) for its volunteer firefighters in 1990. The purpose of a LOSAP is to facilitate recruitment and retention of volunteer firefighters by providing them with a pension-like benefit based upon their years of qualified service to the community. In order to receive yearly service credit, each member must accumulate at least 50 points, which are earned by participating in various approved activities.

The volunteer firefighter that drives the ambulance to an EMS call is given the choice of being paid a per diem fee, or obtaining LOSAP points for each call. The District pays the per diem to the volunteer. EMS, Inc. later reimburses the District the amount of the per diem. Reimbursing volunteer firefighters for EMS calls should not be a business function of the District. Furthermore, the availability of the per diem fee at the discretion of the volunteers raises a question of whether the individuals in question are paid firefighters.\(^\text{13}\) In addition, we believe that the service performed by volunteer firefighters on behalf of EMS, Inc., a private entity, should not qualify for LOSAP credit.\(^\text{14}\) The LOSAP was established to benefit volunteer firefighters, not individuals who work for a private entity.

\(^{12}\) A Commissioner told us that EMS, Inc. attempts to collect outstanding balances due from individuals who do not reside in the Town.

\(^{13}\) The Fire District cannot employ paid firefighters without first holding a public hearing (Town Law Section 176[18-a]).

\(^{14}\) While EMS, Inc. reimburses the District for the per diem costs it does not in any way reimburse the District for any costs associated with the granting of LOSAP points to firefighters who are performing services for EMS, Inc., a private entity.
We reviewed the December 2010 LOSAP service credit records for four of the 18 EMS, Inc. employees who were also volunteer firefighters. All four employees were credited with LOSAP points while working for EMS, Inc. However, we found that at least two of the four employees earned at least 50 points from other District-sanctioned activities during the year to qualify for LOSAP credit.

Workers’ Compensation — Workers’ compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment. We also question whether volunteer firefighters, while acting as EMS, Inc. drivers, would be eligible for workers’ compensation benefits through the Volunteer Firefighters’ Benefit Law (VFBL). While District officials are under the impression that volunteer ambulance drivers would be covered by VFBL, having volunteers drive the ambulances raises a number of liability issues (e.g., VFBL coverage, financial responsibility for personal injury and property damage) that District officials need to consider.

Recommendations

1. The District should not subsidize EMS, Inc.’s operations by providing cash loans, paying expenses, or purchasing property and equipment for use by EMS, Inc.

2. The District should not pay EMS, Inc. for the outstanding balance of medical bills of Town residents who were recipients of services by EMS, Inc.

3. The District should collect any ambulance lease payments due from EMS, Inc. for service calls involving individuals who were not Town residents.

4. The District should not provide monetary per diem compensation, or provide LOSAP credit to volunteers who drive ambulances for EMS, Inc.

5. The District should review the liability issues arising when volunteers drive ambulances on behalf of EMS, Inc., and ensure that it is adequately protected from loss.

15 We judgmentally selected the four highest paid EMS, Inc. employees for 2010 who were also District volunteer firefighters.
APPENDIX A

RESPONSE FROM DISTRICT OFFICIALS

The District officials’ response to this audit can be found on the following pages.
January 16, 2012

Office of the State Comptroller
Division of Local Government & School Accountability
Buffalo Regional Office
Attention: [redacted]
295 Main Street, Suite 1032
Buffalo, New York 14203

Re: Orchard Park Fire District
Our File: 3498-09-01-326

Dear [redacted]:

This will acknowledge receipt of the preliminary draft findings and recommendations in your audit. It is the Orchard Park Fire District Ambulance Service Report of Examination for the period covered from January 1, 2009 to May 26, 2011.

At the exit discussion with you and [redacted], you asked that an appropriate Official of the Orchard Park Fire District provide a letter responding to the Comptroller’s Preliminary Draft Findings by January 17, 2012.

In keeping with your request, I am enclosing the District’s response. It includes addressing the Findings and Recommendations along with the District’s initial Corrective Plan of Action.

We appreciate the effort, analysis and comments made by you and [redacted] to help make it a beneficial audit.

The Orchard Park Fire District is implementing changes discussed in the audit to reduce costs and to strengthen the controls regarding the Orchard Park Fire District’s Emergency Rescue Program.

If anything further is needed just let me know.

Very truly yours,

BOARD OF FIRE COMMISSIONERS
ORCHARD PARK FIRE DISTRICT

By

Robert Eiskant
Chairman
RESPONSE TO NYS COMPTROLLER
PRELIMINARY DRAFT FINDINGS
OF
ORCHARD PARK FIRE DISTRICT
AMBULANCE SERVICE

REPORT OF EXAMINATION

PERIOD COVERED:
JANUARY 1, 2009 – MAY 26, 2011

2011M - 2017
ORGCHARD PARK FIRE DISTRICT

RESPONSE
TO
NYS COMPTROLLER’S PRELIMINARY DRAFT FINDINGS
OF
THE ORCHARD PARK FIRE DISTRICT
AMBULANCE SERVICE EXAMINATION
FOR
THE PERIOD COVERED
FROM JANUARY 1, 2009 TO MAY 26, 2011

Organization

The origin of the Orchard Park Fire District goes back to its initial establishment by the New York State Legislature in 1880.

Chapter 512 of the Laws of 1880 established a fire district in the Village of Orchard Park.

Chapter 180 of the Laws of 1890 allowed the Board of Fire Commissioners to take title to real property.

On December 26, 1893, there was a resolution of the Board of Supervisors of Erie County pursuant to the New York State Laws of 1875 to officially create a fire district for the Village of Orchard Park.

Chapter 226 of the Laws of 1909 permitted the establishment of a town-wide fire district.

On July 23, 1924, there was a resolution of the Town Board of the Town of East Hamburg establishing a town-wide fire district known as the Orchard Park Fire District pursuant to what was §316 of the Town Law at that time.

As a result in 1924, the Orchard Park Fire District’s boundaries were expanded from the Village of Orchard Park to the boundaries of the entire Town of East Hamburg which subsequently became the Town of Orchard Park.
Under §174(7) Town Law "A fire district is a political subdivision of the state and a district corporation."

General Construction Law Section 66 defines a district corporation as any territorial division of the state which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate.

The Orchard Park Fire District has all of the powers conferred by New York Law such as the Town Law, General Municipal Law, Local Finance Law, Education Law, Public Officers Law "and such additional powers as shall be necessarily implied therefrom," See Town Law Section 176(21).

While fire districts were originally established to provide fire protection (Chapter 482, Laws of 1875), in Chapter 508 of the Laws of 1939 the State of New York authorized fire departments to provide emergency rescue and first aid squads.

In pertinent part, the General Municipal Law states:

Section 209-b Emergency Rescue and First Aid Squads

1. Emergencies

   (a) "...fire departments and fire companies may organize...emergency rescue and first aid squads composed of firemen...squads...may render services in case of accidents, calamities or other emergencies in connection with which their services may be required, as well as in the case of alarms of fire."

FIRE DISTRICT AUTHORITY AND RESPONSIBILITIES

Town Law Section 176 sets forth the powers and duties of Fire District Commissioners.

In pertinent part, the Town Law states the following:

Section 176 Powers and Duties of the Fire District Commissioners
Such Board of Fire of Commissioners

(9) Shall have the power to make any and all contracts for the purposes herein authorized...;

(10) May organize, operate, maintain and equip the fire companies...;

(13) May purchase or lease apparatus and equipment for the extinguishment and the prevention of fires and for the purposes of emergency rescue and first aid and fire police squads;

(14) For the preservation, protection and storing of fire apparatus and equipment and for the social and recreational use of firemen and residents of the district and for any other purposes authorized by law, may acquire by purchase, lease, gift, devise or by condemnation, real property and erect, construct, alter, repair and equip suitable buildings, and may furnish necessary supplies for such purposes, and may lease portions thereof not required for fire district purposes. All real property required by any fire district for any purpose authorized by this article shall be deemed to be required for public use and may be acquired by such fire district;

(19) Shall have the exclusive management and control of the property of the fire district and may insure the same against loss or damage from any risk whatsoever...;

(21) Shall have and exercise all the powers conferred upon the fire district and such additional powers as shall be necessarily implied therefrom.

Section 209-b General Municipal Law allows fire districts to establish emergency rescue and first aid squads. The statute does not require the creation of EMS squads in fire departments.

However, when a fire district decides to take the step of establishing an EMS squad, the squad must provide fair, adequate and reasonable protection for the residents of the fire district.
Over the years, the amount of fire calls did not increase as much as the rescue calls. As shown in the table below, in Orchard Park in 2005 there were 1,454 rescue calls and in 2010 there were 2,506 rescue calls. In five years, this is an increase of 72.3% in Orchard Park.

At the same time, in 2005, there were only 93 fire calls and in 2010 there were only 47 fire calls.

Because of the increased numbers of EMS calls and the inability of enough volunteers to respond, fire districts in the State of New York requested a change in the law. It is chronicled in the bill jacket for Section 122-b General Municipal Law requesting a change in the General Municipal Law. Supporters of the bill stated that they needed to have authority to secure backup help.

In 2003, the New York State Legislature then amended Section 122-b General Municipal Law concerning ambulance services to specifically add subdivision 5 to the statute to help fire districts.

On August 19, 2003, the law was changed to state the following:

Section 122-b General Ambulance Services

(5) Fire Districts which...provide general ambulance and/or emergency ambulance service...may contract with one or more individuals, municipal corporations, or other organizations having sufficient trained personnel, vehicles or combination of personnel and vehicles suitable to provide pre hospital emergency treatment, for the furnishing of supplemental personnel, equipment or service to cover instances or periods of time when its service may not be readily available.

This statute, when it was passed, was referred to as the "back-up ambulance service law." It authorized fire districts which already had an EMS squad to make arrangements with a back-up service so that residents receive
proper EMS protection. Its purpose is to allow fire district first responders to have adequate supplemental EMS coverage for the taxpayers.

**LEGAL LIABILITY**

A fire district has legal exposure when it provides inadequate EMS service for residents of the district. When embarking on providing EMS service, a fire district has a legal duty and the additional powers "necessarily implied" from it to carry out its legal responsibility to the taxpayers.

There is a long line of cases establishing legal liability against a municipality when a "special relationship" is created between the municipality and the injured person.

Our New York Court of Appeals has addressed the legal liability of a municipality to its residents a number of times. For example, in 1983 the Court addressed the creation of a legal duty owed by a municipality in an action which evolved around a 911 emergency call. The Court said with the creation of a 911 emergency assistance telephone number, accepting a call for emergency assistance and assuring that help was on the way, established a special relationship with and duty to the injured party sufficient to hold the municipality liable for negligently responding to the call. See DeLong v. County of Erie, 60 N.Y.2d 296, 469 N.Y.S.2d 611.

In 1987, the Court of Appeals in Cuffy v. City of New York, 69 N.Y.2d 255, 513 N.Y.S.2d 372 stated that a municipality will be responsible to the injured party if it assumes an affirmative duty towards the injured party, that the municipality's failure to take action would lead to harm, that there is direct contact with the injured party and that the injured party relied on the municipality's action.
In the matter of fire protection, if a special relationship can be established between the injured party and the firefighters, recovery may be obtained against the fire department for a failure to provide adequate protection.

The legal duty of the fire departments in New York to provide adequate EMS services has also been applied specifically to fire departments by the courts.


The mother called 911 for her infant who had gone into anaphylactic shock. Two EMT's from the fire department arrived but only in a Basic Life Support (BLS) ambulance. They stated that this was because an Advanced Life Support (ALS) ambulance was not available at the time the mother placed her call. The mother was advised that she should wait for the ALS ambulance which did not arrive until twenty minutes later.

The infant suffered significant brain damage. The mother commenced an action against the fire department for negligent treatment rendered by the emergency personnel. The trial court dismissed the action against the fire department. The trial court’s decision was appealed to the Appellate Division.

The Appellate Division unanimously reversed the lower court stating that the dismissal of the complaint against the fire department was improper because the fire department EMS assumed a special duty towards the plaintiff. The BLS ambulance did not have the necessary equipment. The mother justifiably relied
on the EMS technicians, who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance.

A fire district has no obligation to provide EMS service. However, when it chooses to provide emergency rescue service under Section 209-b General Municipal Law, the fire district must provide adequate service to the taxpayers or be held accountable to an injured party for providing substandard service.

Since the Orchard Park Fire District has an EMS first responder squad, it has a legal duty to the taxpayer/resident/injured party to provide adequate EMS protection. Otherwise, it will be held accountable for its negligence.

**FACTORS AFFECTING EMS AND FIRE SERVICE**

The Comptroller’s draft report accurately sets forth a number of the factors adversely affecting the ability of the Orchard Park Fire District to provide proper EMS service. With increased training requirements, fewer volunteers were responding. The number of volunteers available at different times of the day continued to decrease because of economic conditions and fewer local employers were providing shift work.

In the meantime, the number of calls in the Orchard Park Fire District continued to increase. For example, while there were 88 fire calls in 2003, there were 1,236 Rescue and EMS calls. By 2009, the EMS calls had increased to 1,608. In this short period of time there was a 30% increase in EMS calls. In 2011, the Rescue and EMS calls accounted for 84.5% of the District's calls.

The following are the numbers on record:
Rescue and EMS Calls and Fire Calls

<table>
<thead>
<tr>
<th>Year</th>
<th>EMS</th>
<th>FIRE</th>
</tr>
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<tbody>
<tr>
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<td>1,236</td>
<td>88</td>
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<td>2004</td>
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<tr>
<td>2010</td>
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<td>47</td>
</tr>
<tr>
<td>2011</td>
<td>2,930</td>
<td>56</td>
</tr>
</tbody>
</table>

During this time, from 2003 to 2009 a private ambulance service was used to provide back up service to respond to the EMS calls when the district could not tone out a sufficient number of volunteers. There were a significant number of times when the private ambulance service just did not respond. There were also times when the private ambulance service did not have an ambulance available to help the district and they did not provide a medic for all calls. The average response time had deteriorated to over 10 minutes per call.

The back up service therefore routinely did not provide the district with an appropriate level of care. They were asked for a period of over six months to put together a proposal for the Board of Fire Commissioners to provide adequate protection and no plan was provided. At the same time the District had a continuing legal duty to provide the residents with adequate EMS protection.

In the meantime, with increased population over the years, the Orchard Park Fire District's facilities were being stretched to the limit on all firematic fronts. In addition to EMS needs, there were many other Fire District needs.

There was inadequate room for storage of district equipment and
apparatus. There was no space available to perform routine repairs on district vehicles. More space was needed for district training; tools needed to be adequately locked up; more room was needed to store district records; supplies for firematics and medical supplies needed to be stored.

In short, the District needed to acquire a multi purpose building to be owned by the District for many uses.

**FORMATION OF EMS**

As the statistics for the Orchard Park Fire District reflect, since 2003, the number of emergency rescue calls continued to increase dramatically over the same period of time. It caused an increasing struggle with fewer volunteers and fewer qualified volunteers to try to maintain adequate service under the Public Health Law. After being toned out, the back up service became less and less reliable.

The combination of the volunteers and the back up service provided the residents of the Town of Orchard Park with an ongoing deteriorating rescue service. It was clear that something needed to be done to either eliminate EMS service or to change it to be able to provide adequate protection for the residents of Orchard Park. It was all about providing proper care to save lives.

Five residents of the Town of Orchard Park who know EMS service filed a Certificate of Incorporation with the State of New York to create a not-for-profit corporation. The purpose was to be able to provide supplemental emergency rescue service under Section 122-b of the General Municipal Law whenever the Orchard Park Fire District firefighters could not provide adequate service as it has been committed to provide for the residents of the Town of Orchard Park.
To this date, the Orchard Park Fire District continues to provide the same EMS service it always has under 209-b GML and it now relies on other organizations for supplemental coverage under 122-b GML. The combination of the volunteer EMS squad and the paid not-for-profit EMS service provides the residents with much better protection at a lower cost to the taxpayers.

Under Section 402 of the Not-For-Profit Corporation Law the New York State Department of State Division of Corporations accepted the Certificate of Incorporation filed by the five residents on September 10, 2009.

In order to provide quality back up EMS service with proper financial oversight, the By-Laws of the EMS Company were set up indicating that the members are to consist of representatives of the Board of Fire Commissioners of the Orchard Park Fire District to provide proper guidance and control. In 2012, the Board of Directors has been expanded to eight with three members of the Board who are from the community and are not members of the Board of Fire Commissioners.

The Certificate of Incorporation of the Not-For-Profit Corporation sets forth the same purpose which the District has in setting up its EMS squad. Its Certificate, as approved, states the following:

1) To provide 24 hours emergency rescue and first aid services to the residents of the Town of Orchard Park who are in need of immediate assistance;

2) To solicit, receive, administer and invest funds for charitable purposes...;
3) To do any other act...not for the pecuniary profit or financial gain of
the corporation's directors, trustees or officers;

5) The corporation is organized exclusively for charitable purposes
and educational purposes...;

6) No part of the net earnings of the corporation shall inure to the
benefit of or be distributable to its members, directors, officers or
any private person...

The EMS Company's purpose is Identical with that of the Orchard Park
Fire District which provides emergency rescue service under Section 209-b of the
General Municipal Law for the residents of the Orchard Park Fire District.

As a Not-for-Profit Corporation, the net revenue of EMS, Inc. goes right
back into the EMS service and not to the shareholder of a private corporation.

The net revenue is used to maintain and improve the first responder
service which translates into a lower cost for the Orchard Park taxpayers.

FINANCIAL STRUCTURE

The draft report indicates that the District gave assets to EMS, Inc. No
assets of the District have been given to EMS, Inc. Leases for use of District
property and equipment have been set at the market value cost which is charged
to EMS, Inc. for such use. It is for fair and adequate consideration.

To provide proper financial guidance for EMS, Inc., the corporation
retained Bevilacqua & Co., CPA, PC. They set up the chart of accounts, general
ledger, journals, payroll system, prepare and file all tax returns and provide
audited financial statements for the not-for-profit corporation.
The CPA applied for a Federal 501(c)(3) Exemption for not-for-profit corporations. It was approved by the IRS on May 27, 2010.

Likewise, the CPA was retained to secure approval for all New York State financial reporting obligations and the filing of the annual federal and state tax returns.

The CPA worked hand in hand with the President and the Treasurer of the EMS Company to assemble a budget for the operation of the EMS Company to become a self sustaining company.

The CPA, in doing so, with generally accepted accounting principles, set up an accrual basis accounting system and provided market rate calculations for the leasing of space, equipment and supplies between the EMS Company and the Orchard Park Fire District.

An interest bearing note between the District and the EMS Company to assist in the start up costs was prepared. The interest in the note was set at the market rate of 4% in discussion with the CPA.

There is presently no outstanding financial obligation between the EMS Company and the Orchard Park Fire District regarding the note. The EMS Company has completely repaid the note with interest.

The CPA has prepared and filed the audited financial statements for the EMS Company for 2010. It generated $1,600,000 in revenue from billing insurance companies for the services provided. After paying all the expenses of the budgeted operation, in 2010, the audited financial statement indicates that the EMS Company netted a return of assets of $221,528 in providing supplemental EMS service for the residents of the Orchard Park Fire District.
As stated, there has been an ongoing need for additional district space for training, setting up a place for repair of the Orchard Park Fire District equipment and apparatus and storage. Through a permissive referendum under Section 179 Town Law, the Orchard Park Fire District acquired the property at 3920 Taylor Road, Orchard Park, New York. The purchase price with closing costs was $278,413.76.

The District, because of its needs, entered into an Early Occupancy Agreement with the seller in October 2009 before the closing which itself took place on December 21, 2009.

The District spent $10,341.24 and not $81,623 as set forth in the draft report during early occupancy for lock changes, door service and repairs, parking lot drain, new telephone cables, countertop installation, carpet and floor maintenance and door work to secure the building.

In addition, an accountant operated offices in the building prior to the purchase of the property by the Orchard Fire District. In December 2009, the accountant requested that he be allowed to stay in the building on a month to month basis in the first four months of 2010. This was so that he could stay there until the busy tax season was done.

EMS, Inc. did not occupy any portion of the Taylor Road premises in 2009. The property was being acquired by the District for the purposes authorized by Section 176(14) Town Law.

EMS, Inc., did not enter into a lease with the Orchard Park Fire District to occupy portions of the premises on Taylor Road until 2010. It is not an exclusive lease. EMS occupies the unused portion of the property not otherwise used by
the District for training, repairs, storage, etc. The market rate for use of a portion of the building was set up with the guidance of the CPA.

The draft report indicates that the District may not provide space without charge. The lease requires rent from EMS, Inc. for the space it leases. Rent was due from EMS, Inc. in the amount of $60,000 for 2010. It was fully paid by EMS, Inc. to the District.

Rent was due from EMS, Inc. in the amount of $60,000 for 2011. It was fully paid by EMS, Inc. to the District.

With the guidance of the CPA, the lease payment for the vehicles was arrived at through the calculation of providing a stocked ambulance at a specified rate per call. The lease payments for use due to the District for 2009 and 2010 have been fully paid to the District by EMS, Inc. Any amounts still owed to the District for any outstanding 2011 payments have been documented and set up as an accrued receivable in the District’s General Ledger.

The Orchard Park Fire District continues to have vehicles, equipment, apparatus and supplies at all fire halls and at the Taylor Road location to provide emergency rescue service and related fire service for the residents of the Town wide Fire District.

The volunteers continue to respond to 911 calls as the First Responders. A written lease was entered into between the Orchard Park Fire District and EMS, Inc. for usage of Orchard Park Fire District vehicles and equipment when EMS, Inc. provides any supplemental service pursuant to §122-b General Municipal Law for the Orchard Park Fire District.
The draft report indicates that the Orchard Park Fire District paid $17,000 in legal fees for the creation of the EMS, Inc. In accordance with generally accepting accounting principles, during its 2010 audit, the CPA advised the Treasurer of EMS, Inc. to allocate $3,000 of the fees as its EMS expense for legal fees. EMS, Inc. therefore repaid the Orchard Park Fire District for attorney’s fees with check number 1084 dated July 23, 2010. It was deposited in the District account on July 30, 2010.

The Orchard Park Fire District entered into a loan and promissory note with the Orchard Park Fire District – EMS, Inc. for the payment of $200,000. It indicated, "Interest will be charged on unpaid principal until the full amount of the principal has been paid. It will pay interest at a yearly rate of 4%." As stated, the note was completely repaid in 2010 with all accrued interest.

There is significant legal authority to allow a fire district to lease unused portions of fire district property. See for example Section 176(14) Town Law which states that the Board, "May lease portions thereof not required for fire district purposes."

In an opinion of the State Comptroller (Op.state/compt.81-55), it indicates that a fire district may lease part of a fire station to a private ambulance service.

New York State Comptroller’s opinion 94-12 states that a fire district may, without referendum, negotiate a lease of a portion of its premises with a not-for-profit association. The lease must be in exchange for fair and adequate consideration.

As stated, both leases have been set up at market rate after consultation with the CPA.
BILLING

Pursuant to Section 209-b(a)(4) General Municipal Law, the Orchard Park Fire District has in the past and continues to furnish emergency rescue service without cost to the person served.

Under Section 209-b(a)(1) General Municipal Law, the request for emergency service is handled by the dispatch at the Orchard Park Police Station. Through the 911 call, the dispatcher, not EMS, Inc., determines in the first instance from the information furnished, whether an emergency exists. The dispatcher tones out the Orchard Park Fire District volunteer firefighter to respond to the emergency call.

EMS, Inc. may also report to the scene in a District leased fly car to determine if assistance is needed. The next step is that the patient is stabilized.

A determination is made at the scene as to whether or not a higher level of care is needed with a medic. The volunteer may then continue on with the District ambulance to take the patient to the hospital or the EMS, Inc. medic will take the patient to the hospital with the ambulance and the volunteer then returns to the fire hall with the District fly car.

A Pre-Hospital Care Report (PCR) is prepared setting forth the treatment and care rendered to the patient.

On September 10, 2009, EMS, Inc. entered into a Billing Service Agreement with Professional Ambulance Billing, LLC (PAB). PAB examines the PCR to make a determination concerning whether or not the service rendered by EMS, Inc. can be billed.
Automobile insurance carriers, health insurance carriers, workers’ compensation carriers all collect insurance premiums for health related services. For the premium charged, they will pay for ordinary and necessary medical services.

After reviewing the PCR, PAB bills the commercial insurance companies, the no-fault carriers, workers’ compensation, Medicare and Medicaid for the services provided by EMS, Inc. It is the revenue generated from billing insurance carriers which pays for the service provided by EMS, Inc.

PAB set up the billing guidelines for EMS, Inc. including all HIPAA requirements. The billing guidelines indicate that residents of the Orchard Park Fire District will not be billed for co-payments resulting from billing Medicare and commercial payers. The District will pay EMS, Inc. for payment of co-payments not billed to the residents of the Orchard Park Fire District. Non-residents are billed for any co-payments.

Regardless of residential status, the patients are billed to the entire extent of their deductible allowance. EMS, Inc., as part of the billing guidelines, adopted a Charity Care Policy for uninsured residents who are in need of the EMS, Inc. services.

In 2009, EMS, Inc. contacted the New York State Department of Health to obtain EMS Certification for the services to be provided. The New York State Department of Health on the approval of the Wyoming Erie Regional EMS Committee on November 4, 2009 then conducted an inspection and on November 9, 2009 issued a Certificate of Need authorizing EMS, Inc. to deliver emergency service.
PAB secured the approval for Medicaid Billing with the State of New York Department of Health on November 5, 2010 effective November 17, 2009 for Medicaid billing purposes.

PAB secured the Medicare approval from the federal government through CMS on April 2, 2010 for EMS, Inc. to bill Medicare in compliance with the federal law with an effective date as of November 10, 2009.

The Medicare and Medicaid Patient Protection Act of 1987 is a federal statute at 42 U.S.C. Section 1320a-7b which provides penalties for certain acts impacting Medicare and state health care reimbursable services. It is sometimes known as the "Anti-Kickback Statute." There cannot be a routine waiver of co-payments and deductibles under this federal statute. Amongst other medical providers, EMS, Inc. is required to comply with the Federal Statute in New York just as all providers are required to comply with the Federal Statute throughout the US.

In 1996, Congress authorized the Office of the Inspector General to issue Advisory Opinions concerning whether an existing or contemplated arrangement violates the Federal Statute.

A number of OIG opinions issued by the Department of Health & Human Services have been issued concerning the proper method of handling co-pays between residents and non-residents.

For example, in OIG Advisory Opinion No. 04-06 pursuant to state law, a fire district provided Emergency Ambulance Services and Fire Protection and prevention services. To fulfill its legal obligations, the fire district used a non-profit corporation operating ambulances and providing ambulances. The fire
district continued to remain a supplier of services including Medicare Part B services.

The fire district funded its operations primarily through Real Estate Taxes levied annually to its residents. The opinion indicated that a municipality cannot require an ambulance supplier to waive out-of-pocket co-insurance amounts unless the municipality pays the co-insurance owed or otherwise makes provisions for the payments of such co-insurance.

The CMS Carrier Manual Section 2309.4 allows payment where there is a waiver of charges. The Inspector General in Opinion 02-15 and other opinions (For example 04-06, 01-10, 06-07, 08-23) concludes:

"Accordingly, since Medicare does not require the Fire District (a municipal company) to collect co-payments or deductibles from residents, we would not impose sanctions under the Anti-Kickback Statute where the waiver is implemented by the fire district categorically for bona fide residents of the Fire District."

To conform with the Federal Statute and the OIG opinions, the District is billed for the resident co-pay and the CPA has set up appropriate accrual entries to satisfy this obligation.

The Orchard Park resident co-pays of $51,698.02 in 2010 were paid in full by the District by December 31, 2010. The resident co-pays of $77,802.91 in 2011 were paid in full by the District by December 31, 2011. The District has set up an accrued Payable in the District's General Ledger for any obligation still outstanding.

In sum, in accordance with Section 209-b the Orchard Park Fire District does not bill the person served for its EMS service. The separate
Not-for-Profit Corporation bills the insurance carriers for the services which its employees render.

To insure proper Federal and New York Code and Regulation Compliance regarding billing, licensing, fraud, waste and abuse, the Office of Medicaid Inspector General in New York and the Federal Patient Protection and Affordable Care Act require providers to establish an "effective" compliance program. On September 21, 2011, EMS, Inc. entered into a contract with Watermark Health Care Compliance to examine, review and evaluate the company’s compliance with all statutes and regulations on an ongoing basis.

INSURANCE COVERAGE

As stated, Section 122-b(5) General Municipal Law was amended on August 19, 2003 to specifically allow fire districts to rely on "Other organizations"..."for the furnishing of supplemental personnel, equipment or service to cover instances or periods of time when its service may not be readily available".

Because of the increasing demands in training, the increasing number of calls and woefully inadequate back-up from a private ambulance service, the Orchard Park Fire District was faced with its EMS service failing to fulfill its legal obligations to provide adequate rescue service under Section 209-b General Municipal Law.

Through its implied power under Section 176(21) Town Law, with New York Court of Appeals liability exposure creating the "special duty" for negligent municipal conduct, the Orchard Park Fire District turned to the establishment of
the local EMS, Inc. to provide supplemental EMS response to render adequate medical care as a First Responder.

The program has shown that it saves lives, reduces taxes and creates high paying jobs in Orchard Park.

To fully protect the district's volunteer firefighters and the EMS, Inc. paid employees and the legal exposure of the District, the District retained Brown & Stromecki Agency, Inc. to provide insurance protection.

The Orchard Park Fire District has a General Liability Insurance Policy with Selective Insurance for coverage of $1,000,000 with an aggregate of $10,000,000. The Orchard Park Fire District also has an umbrella policy with Selective Insurance in the amount of $5,000,000.

With a common board of directors, the Stromecki Agency was able to add EMS, Inc. as a named insured on its policy. By utilizing the district's policy, EMS, Inc. was able to be in the same 497 safety group with a good experience rating. This savings can occur as long as the majority of the Board of Directors are on the Board of Fire Commissioners of the Orchard Park Fire District.

Similarly the Orchard Park Fire District has VFBL coverage with the New York State Insurance fund. Workers' Compensation was then provided under the same policy listing EMS, Inc. as an additional interest. The State Fund reviewed and approved the arrangement.

As a result, when the volunteer responds, the firefighter is provided with volunteer firefighter's benefit coverage. When the EMS, Inc. paid employee responds, Workers' Compensation insurance coverage is provided.
If a third party action is commenced both the District and EMS are covered under the $1,000,000 General Liability Policy and the $5,000,000 umbrella policy.

LOSAP

The Orchard Park Fire District established the Awards Program for recruitment and retention under Article 11-A of the General Municipal Law. To be eligible, a minimum of 50 points must be awarded each year under the Service Awards Program depending on the number of drills, fires, rescue calls which the volunteer firefighter accumulates over the course of the year.

Section 217(f) General Municipal Law states that volunteer firefighters who also serve as paid employees within a "political subdivision of the state" shall not be given credit for activities performed.

EMS, Inc. is a private corporation which is not a political subdivision of the state. Therefore 217(f) General Municipal Law does not apply.

Nevertheless, it is the District's policy that the volunteers have the option to receive LOSAP credit as a volunteer or to be paid as an EMS employee but not both.

Payment of the per diem had been made in the first instance by the District. The District was then reimbursed by EMS, Inc. for those who opted to receive payment. Any amount owed has been completely repaid by EMS, Inc. The District has discontinued this reimbursement method and payment now comes directly from EMS, Inc.
CONCLUSION

The sole reason for the existence of the program is to save lives and to reduce taxes. In the last two years, EMS response times have been reduced substantially. The average response time per call has now been reduced from 10 minutes down to 3 minutes and 51 seconds per call. A medic is now available for residents on every call thereby improving the level of care.

During these tough budget times, all towns, villages, school districts and other municipalities are all struggling just to keep budgets within the 2% cap increase without dismantling taxpayer services.

Because EMS, Inc. is a not-for-profit corporation, it has generated a net return which goes right back into the EMS service. Consequently, in the last two years, the Orchard Park Fire District has been able to reduce, not increase, its budget thereby saving the taxpayer’s money each year.

COMPTROLLER’S RECOMMENDATIONS

The Comptroller’s Draft Report contained five recommendations. For each recommendation included in the audit report, the following is our corrective action already taken or proposed. For recommendations where corrective action has not been taken or proposed, we have included the following explanations.

AUDIT RECOMMENDATIONS:

1) The District should not subsidize EMS, Inc.’s operations by providing cash loans, paying expenses, or purchasing property and equipment for use by EMS, Inc.

IMPLEMENTATION PLAN OF ACTION:

The loan was fully paid back to the District with 4% interest. EMS, Inc. is now a self-sufficient Not-For-Profit Corporation. It generated net assets of
$221,528 in the audited financial statement for the period ending December 31, 2010. In October 2010, EMS, Inc. entered into a revolving line of credit agreement with M&T Bank with a maximum borrowing limit of $50,000.

The District will, therefore, not loan any more funds to EMS, Inc.

The District will not pay expenses or purchase any property or equipment solely for use by EMS, Inc. or any other entity.

The leases for use of apparatus and a portion of the district's building have been computed at market rate at the direction of the CPA in accordance with Generally Accepted Accounting Standards.

Going forward, the District does not and will not subsidize the EMS, Inc.'s operations in any manner.

**IMPLEMENTATION DATE:** January 1, 2012

**PERSON RESPONSIBLE FOR IMPLEMENTATION:**

Board of Fire Commissioners.

**AUDIT RECOMMENDATIONS:**

2) The District should not pay EMS, Inc. for the outstanding balance of medical bills of Town residents who were recipients of services by EMS, Inc.

**IMPLEMENTATION PLAN OF ACTION:**

The District has set up the waiver of co-pay for residents of the Orchard Park Fire District for Medicare and Medicaid recipient payment obligations in accordance with the Federal Guidelines.

On September 21, 2011, the District entered into a contract with Watermark Health Care Compliance to review and implement proper New York and Federal statutory compliance in delivering EMS services to the residents of the District on an ongoing basis.
IMPLEMENTATION DATE: January 1, 2012

PERSON RESPONSIBLE FOR IMPLEMENTATION:

Board of Fire Commissioners.

AUDIT RECOMMENDATIONS:

3) The District should collect any ambulance lease payments due from EMS, Inc. for service calls involving individuals who were not Town residents.

IMPLEMENTATION PLAN OF ACTION:

At the instruction of the CPA, the District has computed the correct ambulance lease payments due for out of town residents and the District will receive payment from EMS, Inc. for those payments. The appropriate accrual accounting entries have been set up by the CPA in accordance with GAAP.

IMPLEMENTATION DATE: January 1, 2012

PERSON RESPONSIBLE FOR IMPLEMENTATION:

Treasurer for the Orchard Park Fire District.

AUDIT RECOMMENDATIONS:

4) The District should not provide monetary per diem compensation, or provide LOSAP credit to volunteers who drive ambulances for EMS, Inc.

IMPLEMENTATION AND PLAN OF ACTION:

The District will no longer provide any per diem compensation. The amounts previously provided by the District have been completely reimbursed by EMS, Inc.

Going forward, any payment for the monetary per diem compensation will be coming directly from EMS, Inc. with no involvement by the District.

IMPLEMENTATION DATE: January 1, 2012.
PERSON RESPONSIBLE FOR IMPLEMENTATION:

Treasurer for the Orchard Park Fire District.

AUDIT RECOMMENDATIONS:

5) The District should review the liability issues arising when volunteers drive ambulances on behalf of EMS, Inc. and ensure that it is adequately protected from loss.

IMPLEMENTATION AND PLAN OF ACTION:

Upon receipt of the draft report, the District has completely reviewed its insurance coverage with its insurance agent Brown Stromecki Agency, Inc.

All of the appropriate insurance coverage for general liability, umbrella coverage, VFBL and workers’ compensation have been in place since the formation of EMS, Inc.

IMPLEMENTATION DATE: January 1, 2012

PERSON RESPONSIBLE FOR IMPLEMENTATION:

Board of Fire Commissioners.

Dated: January 16, 2012
Orchard Park, New York

Respectfully submitted,

Board of Fire Commissioners
Orchard Park Fire District

by

Robert Eiskant
Chairman
APPENDIX B

OSC COMMENTS ON THE DISTRICT’S RESPONSE

Note 1

Section 122-b(5) of the General Municipal Law (GML), cited several times in the District’s response, as well as 209-b(3-a)(a) of that Law, provides limited grants of authority for a fire district to contract with private ambulance companies to receive “supplemental” or “back-up” services when the district’s emergency rescue first aid squad is not “readily available” or “unavailable” (see generally 2010 Opinions State Comptroller No. 2010-4). In our view, neither statute applies in this instance because the District has essentially transferred to EMS, Inc. the primary responsibility for responding to emergency rescue and first aid calls, rather than having EMS, Inc. provide “back-up” or “supplemental” services. We believe this to be the case because (1) the District has leased to EMS, Inc. its ambulances and response vehicles, (2) we were advised by District officials at the exit conference that EMS, Inc. responds to every emergency rescue and first aid call, and (3) according to the New York State Department of Health (DOH), the District transferred to EMS, Inc. its ambulance operating authority, without which the District may not legally operate an ambulance or transport patients. Section 122-b(5) does not apply for the additional reason that the District does not provide ambulance services as part of a fire protection contract (see Opinion 2010-4, supra, footnote 4).

Note 2

Fire districts have only those powers expressly granted by statute and “necessarily” implied therefrom (Town Law Section 176[21]). To the extent that the District has a legitimate concern about potential liability arising from a shortage of properly trained volunteer firefighters, the District’s express statutory options include hiring paid employees to provide coverage when volunteers are not available (see Town Law Section 176[18-a]), insuring the risk (Town Law Section 176[19]; General Municipal Law Section 6-n), or both.

Note 3

The “five residents” that are referred to apparently are the five members of the Board of Fire Commissioners, who were in office at the time EMS, Inc. was formed. As we state in the report, fire districts are not authorized to form or cause the formation of a not-for-profit corporation.

Note 4

Here, and in several later instances, the District’s response refers to the District continuing to provide emergency medical services. As previously indicated, however, according to DOH, the District no longer has legal authority to operate an ambulance or transport patients.

Note 5

This statement is not accurate. Our report states that, “The District used public moneys to purchase assets for and provide funding to a not-for-profit organization.”
Note 6

This statement is misleading. The building purchased by the District and leased to EMS, Inc. has four apparatus bays. According to the building lease agreement, all four bays have been leased to EMS, Inc. No space was retained for storage of District equipment. A mechanic, employed by EMS, Inc., may repair District vehicles; however, when that occurs, EMS, Inc. bills the District for the services provided.

Note 7

The published legal notice for the permissive referendum states the following: “The Orchard Park Fire District is in need of a building in which the Orchard Park Fire District-EMS, Inc. may maintain and operate emergency medical services out of.” The notice does not mention use of the building for any District purpose.

Note 8

It is unclear how the District calculated this amount, because the documentation we reviewed during the course of our audit supports the $81,623 we included in the report.

Note 9

The District had no authority to use its funds to pay any part of the cost of creating EMS, Inc., including the portion of the cost for which the District was reimbursed.

Note 10

While fire districts may lease unused portions of fire district property, they do not have authority to acquire property with the primary purpose of leasing the property to another entity as was the case with this transaction.

Note 11

At the exit discussion, District officials told us that EMS, Inc. responds to all requests for emergency service and bills for the services provided.

Note 12

As previously noted, if GML Section 122-b(5) were to apply as the District maintains, or if GML Section 209-b(3-a)(a) were to apply, EMS, Inc. would be prohibited from charging persons served or third parties for the “backup” or “supplemental” services provided when the District’s emergency rescue first aid squad is not “readily available” or “unavailable” (Opinion 2010-4, supra; Opinion 91-20, supra). If EMS, Inc. is actually providing backup or supplemental services, as the District contends, the District should instruct EMS, Inc. to stop charging and to seek legal advice regarding previous charges.
Note 13

We believe the District’s reliance on the Federal “Anti-Kickback Statute” is misplaced. As previously noted, EMS, Inc. may not charge persons served or third parties for the “back-up” or “supplemental” services provided when the District’s emergency rescue first aid squad is not “readily available” or “unavailable” (Opinion 2010-4, supra Opinion; 91-20, supra).

Note 14

Even if the Federal “Anti-Kickback Statute” applies to EMS, Inc., the District has no authority to expend District funds to ensure that EMS, Inc. is compliant with that statute. The District may only expend District funds in furtherance of its own purposes (see 1993 Opinions State Comptroller No. 93-24, page 42). Because the District and EMS, Inc. are separate corporate entities, ensuring that EMS, Inc. complies with legal requirements is not a District purpose. The District should cease making such payments and seek legal advice regarding the steps that should be taken in regards to previous payment.

Note 15

The District may not obtain insurance coverage to protect EMS, Inc. As previously noted, the District may only expend District funds in furtherance of its own purposes. Purchasing insurance to protect EMS, Inc. is not a District purpose. Moreover, because there is no authority for the District and EMS, Inc. to purchase insurance jointly, EMS, Inc. should not be included on District policies. The District should immediately inform its insurance carrier and stop using District resources to purchase insurance for unrelated parties.

Note 16

We agree that GML Section 217(f) does not apply in this instance, but there is no authority in the service award statute for the District to provide service credit for activities performed for EMS, Inc. Under the service award statute, the District may only provide service credit for activities performed by volunteer firefighters under the auspices of the District’s fire department (see 1994 Opinions State Comptroller No. 94-32, page 57). Because the District leased its ambulances to EMS, Inc. and no longer has legal authority to operate the ambulances, the individuals who drive the ambulances to the scene of an emergency are not doing so in their capacity as volunteer firefighters and should not receive service credit.
APPENDIX C

AUDIT METHODOLOGY AND STANDARDS

To accomplish the objective of the audit and obtain valid audit evidence, we interviewed appropriate District officials and employees, tested selected records, and examined pertinent documents for the period January 1, 2009, to May 26, 2011. Our audit focused on the creation of the not-for-profit corporation known as Orchard Park Fire District-EMS, Inc. Our procedures included the following steps:

- We interviewed Board members about the creation of Orchard Park Fire District-EMS, Inc.
- We reviewed minutes of the proceedings of the Board of Fire Commissioners.
- We reviewed available New York State Department of State incorporation documentation.
- We reviewed disbursement records, claims, and canceled checks to determine the level of District financial support given to Orchard Park Fire District-EMS, Inc.
- We examined District fixed asset records for values of certain vehicles leased to Orchard Park Fire District-EMS, Inc.
- We toured the building recently purchased by the District and leased to Orchard Park Fire District-EMS, Inc. The Chairman provided us with the tour.
- We conferred with our Legal Services division about the propriety of the District creating and financially supporting a not-for-profit corporation.

We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS). 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.
APPENDIX D

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