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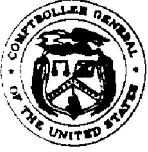

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders

File: B-240264

Date: February 7, 1994

DIGEST

The Fish and Wildlife Service may not incrementally fund research work orders performed across fiscal years because the research work orders are considered entire for purposes of the bona fide need rule, and thus chargeable to the appropriation available at execution rather than funds current at the time the research is performed. The Service should charge subsequent modifications increasing the amount allotted to the original appropriation because the Service anticipated increasing the funding available for the research when the research work order was issued.

DECISION

The Chief, Division of Contracting and General Services, Fish and Wildlife Service, U.S. Department of the Interior, asks whether research work orders issued under cooperative assistance agreements may be funded incrementally or whether funds must be fully obligated at the inception of each work order. For the reasons discussed below, we conclude that the Service may not incrementally fund research work orders of multiple year duration that are nonseverable.

BACKGROUND

Under Public Law 86-686, 74 Stat. 733 (1960), as amended, 16 U.S.C. §§ 753a and 753b (1988), the Secretary of the Interior is authorized to enter into cooperative agreements for fish and wildlife research with colleges and universities, state agencies, and nonprofit organizations. The statute limits federal participation in this joint research effort to the assignment of scientific personnel; to the provision of assistance (including reasonable financial assistance) for the work of researchers on fish and wildlife ecology and resource management projects; to the supply of equipment; and to the payment of incidental expenses of federal personnel and employees of cooperating agencies assigned to the cooperative units. Most of the funding contributed by the federal government for the actual research comes from various programs under the Service's annual resource management appropriation. The Service currently operates 41 cooperative units at 40 state university campuses in 38 states.

To help accomplish the objectives of the legislation, the Service issues research work orders that are project-specific extensions of unit cooperative agreements. The research work orders describe the research intended to be conducted through the auspices of the university cooperator and provide for the transfer of federal funds to the university for the performance of the research described. The orders frequently contemplate research extending over several years to be performed by the cooperator on a cost-reimbursement basis.

It has been the practice of the Service to fund many orders incrementally out of the annual resource management appropriation. By incrementally funding a research work order, the Fish and Wildlife Service establishes the total work effort to be performed by the cooperator over a multiple year period but allots funds only to cover the first discernible phase or increment of the total work effort. When the Service issues the research work order, it does not obligate funds for the total estimated cost of the project. Rather, the Service obligates only the funds allotted for each phase or increment of work.

In its submission, the Service gives an example of a typical research project, an anticipated 4-year study on the effects of harvesting frogs, culminating in a publishable report. The project's estimated total cost is $119,500 although the Service obligated only $60,000 of its annual 1989 appropriation for the first 16 months of the project. This $60,000 is to cover the cost of 16 months of work under the project and is not identified with any specific task to be performed. The research work order specifically stipulates that "[t]he university shall not incur costs in excess of the funds actually obligated" and provides that "[a]dditional funding is anticipated to be provided from appropriations of subsequent fiscal years."

Following an audit of the Service's activities, the Inspector General of the Department of the Interior concluded that the Service's unliquidated obligations were understated because the total dollar amount of research work orders exceeded amounts actually obligated. The Inspector General considers the research services obtained pursuant to the research work orders to be nonseverable under our bona fide need rule. Consequently, the Inspector General recommended that the Service "[o]bligate the entire amount of each research work order and cooperative agreement against the appropriation that is current at the time the document is executed." The Service disagrees with the Inspector General's recommendation and asks for our opinion on this matter.

ANALYSIS

In 71 Comp. Gen. 428 (1992), we held that contracts that cannot be separated for performance by fiscal year may not be funded on an incremental basis without statutory authority. Although procurement contracts were at issue in that case, the bona fide need rule, upon which the holding of that decision was based, applies to all federal government funding activities carried out with appropriated funds, regardless of whether the funding mechanism is a contract, grant or cooperative agreement.[1] B-229873, Nov. 29, 1988, cited in B-235678, July 30, 1990. Thus, the same principles outlined in 71 Comp. Gen. 428 apply to the research work orders and cooperative agreements at issue here.

The bona fide need rule was developed by the accounting officers of the United States to implement one of the oldest funding statutes, now codified at 31 U.S.C. § 1502(a) (1988), which provides that:

> "an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability."

As this statute has been interpreted and applied by the accounting officers of the United States, an appropriation is available only to fulfill a genuine or bona fide need of the period of availability for which it was made.

Whether an agency should charge the full cost of contract services to the appropriation available on the date a contract for services is made or to the appropriation current at the time services are rendered depends upon whether the services are severable or entire. A task is severable if it can be separated into components that independently meet a separate need of the government. B-235678, above. Thus, to the extent a need for a specific portion of continuing or recurring services arises in a subsequent fiscal year, that portion is severable and

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[1]31 U.S.C. § 6305 (1988) requires an executive agency to use a cooperative agreement when the principal purpose of the relationship with the recipient is to transfer a thing of value to carry out a public purpose of support or stimulation authorized by law instead of acquiring property or services for the direct benefit or use of the United States Government. Substantial involvement is expected between the executive agency and the recipient.

chargeable to appropriations available in the subsequent year. 60 Comp. Gen. 219, 220-221 (1981).

On the other hand, where the services provided constitute a specific, entire job with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year, the task should be financed entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future fiscal years. See 71 Comp. Gen. 428. The bona fide need rule allows time-limited funds to be used for work performed in the next fiscal period in connection with a nonseverable task since the latter effort is viewed as an inseparable continuation of work to fulfill a need that arose during the appropriation's period of availability. B-235678, above.

In our opinion, the sample research work order described above appears entire in nature. Upon execution of the research work order, the university cooperator is committed to the completion of the stated research project. The study is to culminate in a publishable report which the research work order refers to as a "final product." The cooperator agrees to perform all work set forth in the research work order during the specified period of performance, the objectives of which are described with specificity, and the total cost estimated with reasonable accuracy. The work product envisioned in the research work order is the completed study, nothing less. Since it represents a single bona fide need, the sample research work order is entire, and, consequently, the appropriation current at the time the research work order was executed should have been charged rather than funds current at the time services are rendered. See 65 Comp. Gen. 741 (1986). Thus, the Service should have obligated the full estimated cost of the sample research work order at the time it was issued.

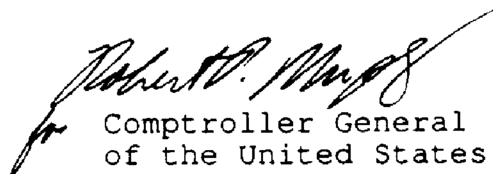
The Service argues that including a limitation of funds clause alleviates any responsibility on the government's part relative to providing full funding. Including a limitation of funds clause does limit the government's obligation to that initially incurred, and in that limited sense can alleviate Antideficiency Act concerns, see 71 Comp. Gen. 428, 431 (1992).[2] An Antidificiency Act violation would not be avoided, however, if an agency must adjust the obligation recorded for an incrementally funded

[2]The "Antideficiency Act", 31 U.S.C. § 1341(a) (Supp. IV, 1992) prohibits an officer or employee of the government from incurring an obligation in excess of amounts available or in advance of the available appropriation unless authorized by law.

contract to fully reflect the _bona fide_ need contracted for, and sufficient funds do not exist in the appropriation available when the contract was entered into to support the adjustment.

Using a limitation of funds clause does not remedy the _bona fide_ need problem described above when a contract calls for nonseverable services. The terms of the sample research work order clearly indicate that the anticipated future modifications to increase the amounts allotted are modifications for which there is already a _bona fide_ need at the time the research work order is executed, and are essential to the fulfillment of the original research work order. Consequently, the Service should have obligated the full amount estimated to be needed for the fulfillment of the work called for in the research work order at the time the order was issued.

The Fish and Wildlife Service indicated that a large percentage of the research work orders have been funded incrementally for many years. Requiring the Service to adjust its accounts now by obligating the full estimated cost of each research work order, as suggested by the Inspector General, would have serious programmatic repercussions. Thus, our holding will only apply to research work orders executed after the date of this decision.



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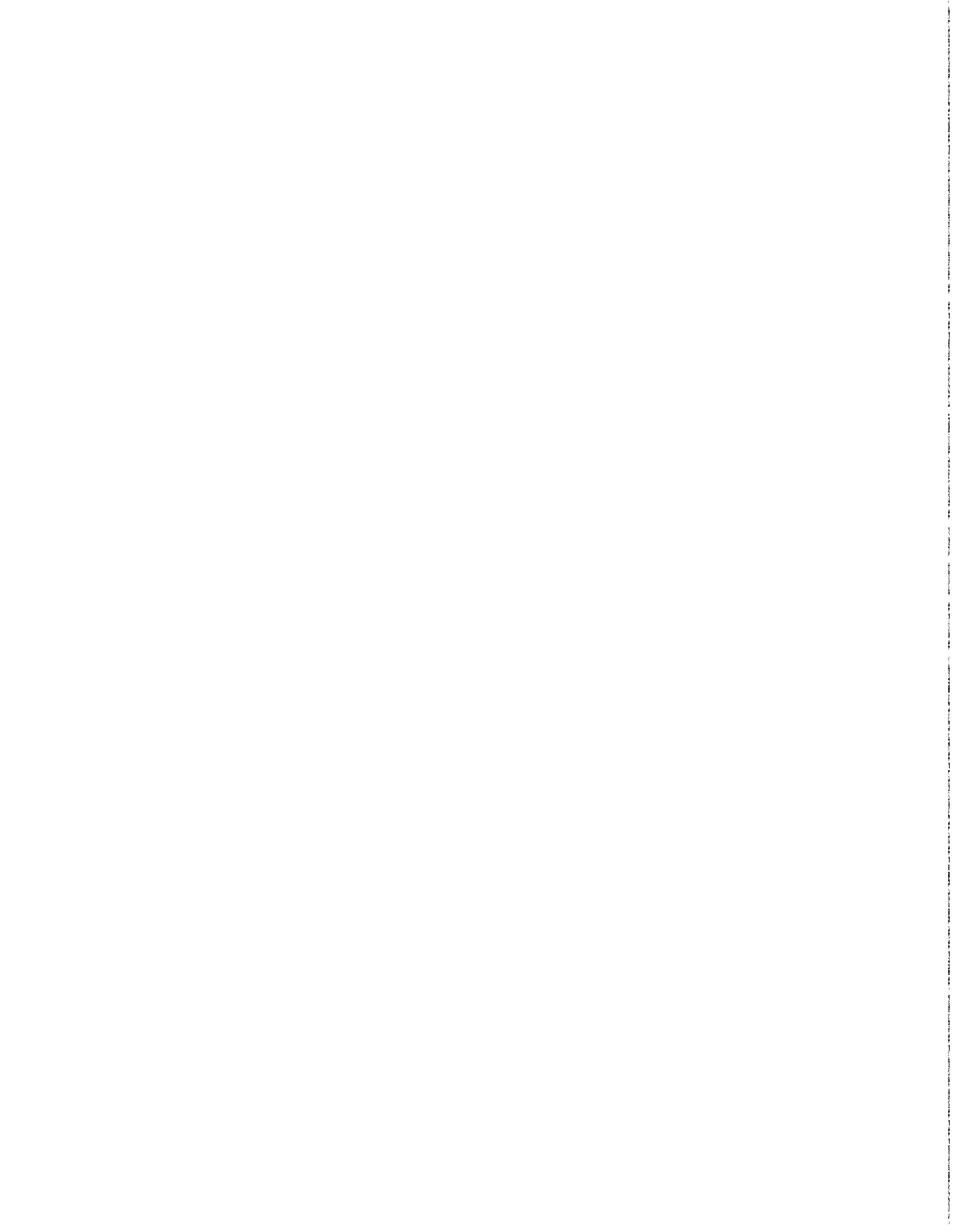

Comptroller General of the United States

Washington, D.C. 20548

102913

Decision

Matter of: Correct Payment Source for Agency Expenses Related to Litigation

File: B-251466

Date: February 25, 1994

DIGEST

The U.S. Information Agency must bear from its own appropriations the costs (including the costs of temporary legal staff) it has incurred in assisting the Justice Department defend sex discrimination lawsuit because those costs reflect the proper provision of federal agency support to Justice Department litigators.

DECISION

The United States Information Agency (USIA) asks whether its appropriations or those available to the Attorney General of the United States should be used to cover certain expenses incurred and to be incurred by USIA in connection with the government's defense of Hartman v. Catto, Civ. Action No. 77-2019 (D.D.C.). As detailed in its submission, USIA and the Justice Department disagree on the extent to which USIA's appropriation is available to cover expenses incurred assisting Justice with this litigation. Based on our review, we conclude that the expenses identified by USIA are properly chargeable to USIA's appropriations. As explained below, agency appropriations are generally available to provide Justice with factual support, policy perspectives, and general assistance in trial preparation.

BACKGROUND

According to USIA's submission, Hartman is the largest sex discrimination class action ever brought against the United States government, with potential claimants and claims in excess of 1,000 and 2,500, respectively. The court has already found liability in the government and has appointed a special master to make findings concerning appropriate remedies and relief. This suit has been and continues to be defended by the Justice Department and the United States Attorney's Office (USAO) for the District of Columbia, with substantial support from USIA. In the course of consultations, Justice, USAO, and USIA agreed to establish a special task force, under the supervision of USAO, to manage the government's defense during the special master phase.

Justice and USAO asked USIA to provide the task force with a secure suite of offices capable of accommodating two to four attorneys, four to eight paralegals, and 3,000 independent files. USIA also was asked to provide all necessary and appropriate office supplies and equipment, including, among other things, telephones, FAX machines, voice mail services, computers, modems, and photocopiers. Finally, USIA was asked to dedicate to the task force, on a full-time basis, four to six attorneys and the same number of paralegal/document specialists, along with other support staff, including typists, computer software specialists, and keypunch/data-entry specialists. With respect to the legal professionals, Justice advised USIA that "USAO and USIA GC [will] review all claims and make final determinations of which claims to contest and which defenses to assert." For their part, Justice and USAO informed USIA that, together, they would dedicate to the task force a total of two full-time attorneys and one full-time paralegal.

USIA protested that it could not provide the requested number of attorneys and paralegals from the current staff of its Office of General Counsel. USIA explained that its General Counsel staff numbers only eight attorneys, whose services were needed to handle the agency's normal legal needs. Justice and USAO, however, stressed to USIA the need to bring additional staff on board quickly in order to meet the tight deadlines imposed by the court. After Justice and USAO rejected a USIA proposal to contract with a private law firm to obtain the additional legal staff, USIA advertised, recruited, and hired five additional attorneys to serve on the task force under temporary personnel appointments.

USIA presently estimates that it will incur expenses of about $4.6 million over fiscal years 1992, 1993, and 1994 in connection with this litigation. According to the submission, USIA has already incurred substantial costs in gathering, compiling, and providing information possessed by USIA, the Office of Personnel Management (OPM) and the Federal Records Centers (FRC). These costs include such things as the special master's fees, contract services for computer data entry, duplication, office rental, travel expenses, telephone services, automated data processing and telecommunications equipment, general office supplies and support staff. These costs also include the salaries of the temporary attorneys hired by USIA at Justice's request. According to USIA, those attorneys were placed "under the direct, substantive control of [USAO]" and have been assigned tasks that "ranged from collecting facts to legal analysis of claims to preparation of affidavits." USIA adds that "[i]t is expected that the attorneys will soon be required to respond to various motions (summary judgment, discovery, etc.), conduct depositions, and prepare for and participate in hearings."

USIA thinks Justice and USAO should absorb a greater share of the expenses incurred by USIA in connection with this litigation, and reimburse USIA accordingly. Citing 39 Comp. Gen. 643 (1960) and other decisions of this Office, USIA concedes that it must bear the expenses of providing Justice with factual information to support the litigation effort. In USIA's view, however, the expenses at issue represent the provision of litigative services, not factual support. Among other things, USIA emphasizes that much of the factual information gathered by USIA came from other agencies, and that Justice insisted that USIA hire the temporary legal staff as government employees who were then placed under the direct supervision of USAO. USIA proposes that, with respect to "contract services," "duplicating," and "other services," USIA and Justice should share these costs equally. USIA also has asked Justice and USAO to reimburse it for the salaries of the temporary legal staff hired for the task force, and for the special master's fees. USIA believes that Justice's failure to bear a more "proportionate" ratio of these costs has improperly augmented Justice's appropriations and diverted USIA appropriations to purposes for which they were not intended.

With one exception,[1] Justice has not acquiesced in USIA's request to absorb a greater share of the other costs identified by USIA. In its letters to USIA, Justice has maintained that each agency is legally responsible for whatever costs it has or will incur in connection with this litigation, without reimbursement from the other. In this regard, Justice maintains that under our decisions, USIA is responsible for the expenses in question. To resolve this matter, USIA requests our opinion pursuant to our general authority to resolve disputed interagency claims under 4 C.F.R. § 101.3(c), and the GAO Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 2.4C.3 (TS No. 7-43, May 18, 1993).

DISCUSSION

As stated in 39 Comp. Gen. 643, 646 (1960), in the absence of specific statutory directions to the contrary, "it is the duty of the Attorney General . . . to defray the necessary expenses incident [to litigation] from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings." At the same time:

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[1]Justice recently agreed to cover the fees of the special master assigned to this case. Cf., e.g., 39 Comp. Gen at 646 (citing 15 Comp. Gen. 81 (1935)) and 19 Comp. Gen. 551 (1939) (special master fees are payable from Justice appropriations).

"an administrative agency whose activities result in a suit against the United States, and which, because of the knowledge and information pertaining to the subject matter of the suit possessed by it or its personnel alone, is in a position to review reports and furnish material required by the Department of Justice to defend the action against the Government, has a duty to review or furnish such material to the Department of Justice without reimbursement."

Id. at 647. USIA interprets this decision to mean that agency appropriations are available only for the provision of "factual support" to the litigators, not for "litigative services." Rather than distinguishing between factual support and litigative services, our cases stand for the proposition that, under the relevant statutory provisions, agency appropriations are available to defray litigative expenses where such expenditures are in furtherance of the litigative policies set by the Justice Department and are otherwise authorized by law. See, e.g., 70 Comp. Gen. 647, 650-51 (1991).

The decision in 39 Comp. Gen. 643 involved a dispute between the Justice Department and the Army Corps of Engineers over the allocation of costs incurred in connection with a lawsuit arising from flood damages caused by breaks in Corps constructed levies. The costs at issue derived from the preparation by the Corps of certain "digests and studies" requested by Justice in connection with its representation of the Corps. 39 Comp. Gen. at 644. These digests and studies were characterized by Justice and the Corps as "'assemblies of data' [that were] factual in nature and would not include opinions or conclusions." Id. In our characterization of that same work, we described it as "review[ing] State-prepared reports in the light of, and furnish[ing] material based on, knowledge, information, data, and experience possessed by [the Corps] (in its files) or its personnel." Id. at 647. Once the Corps realized the full scope and cost of the work requested by Justice, it protested that "the services in question are not in the nature of services customarily rendered by an administrative office where the United States is sued because of the activities of that administrative office." Id. at 645. Instead, the Corps argued that those services could and should be performed by private engineers retained by the Justice Department.

We agreed with the Corps that private engineers might be able to perform the review and make the special studies requested by Justice. At the same time, however, we doubted that private engineers could do so without substantial assistance from the Corps. The engineers would have had to

become familiar with basic data prepared by the Corps, be briefed on it by the Corps, and receive continuing assistance from the Corps in order to complete those tasks. We found that resort to private engineers would "take as much time and effort and be as expensive to the Corps as if the Corps completed the reviews and made the special studies itself." Id. at 647.

It was in this context that we held, as quoted above, that the Corps should defray the cost of the services at issue there. That conclusion did not follow from a characterization of the work as "factual". Rather, we concluded that it was appropriate for the Corps to provide those services because "outside engineers could not perform the services in question independently of the Corps of Engineers and . . . only the Corps possesse[d] (either in its files or through its personnel) the data and information necessary to make the special studies and review the State-prepared data." Id. Thus, provision of the services at issue directly served the purposes of the Corps' appropriation, cf. 31 U.S.C. § 1301(a), and there was no reason to allow the Corps to pass the costs of the services on to Justice pursuant to the Economy Act, 31 U.S.C. §§ 1535-36.

Nevertheless, USIA argues that compelling it to perform the services at issue here without reimbursement would improperly "augment" the Justice Department's appropriation. USIA reasons that, if Justice does not reimburse USIA, Justice will have accomplished its statutory duty to provide and pay for the defense of the lawsuit by the use of funds other than those appropriated to it for this express purpose, and that this would violate the statutory limitation on the use of agency funds to perform litigative services. Cf., e.g., 31 U.S.C. § 1301(a), 3302(b), and 5 U.S.C. § 3106. The record here does not support USIA's argument. While Justice is actively managing USIA's temporary legal staff, Justice and USIA are using those resources to develop and analyze the record and to articulate USIA perspectives for use by the Justice litigators.

The limitations on the use of agency appropriations to provide litigative services originated as part of the provisions that created the Justice Department and invested it with general responsibility to act as the government's litigator. See Act of June 22, 1870, 41st Cong., 2d Sess. §§ 5, 14-17, 16 Stat. 162, codified at 28 U.S.C. §§ 515-519, 543, 547; 5 U.S.C. § 3106 (1988). These provisions were intended to reinforce Justice's control of the conduct of litigation involving the United States, 70 Comp. Gen. 647, 650-51 (1991), not to bar agencies from using their appropriations to assist in the defense of

litigation. Our cases "recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General." Id. at 650 (citing 39 Comp. Gen. at 646-47). Consistent with this, for example, we have allowed agencies other than Justice, in certain situations, to use their appropriations to provide litigative services with respect to their own employees and operations. Id.

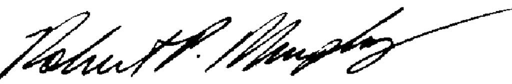
USIA also argues that, as a matter of equity, and because of the sheer magnitude of these expenses, it and Justice should split equally some of these costs, especially those for "contract services," "duplicating" and "other services." However, there is no legal or equitable requirement that litigation support costs be shared equally, or even "proportionately," between Justice and its client agencies. Based on the record before us, USIA should pay for the expenses in question. These represent no more than the cost to USIA of gathering and presenting to Justice the facts and agency perspectives necessary to allow Justice to represent USIA in court, a typical example of agency support for Justice litigators. There is nothing in USIA's submission to suggest that these expenses do not clearly fall within the scope of 39 Comp. Gen. at 647.

Finally, we note USIA's argument that it should not be responsible for the costs of litigative support activities which require it to obtain information from other agencies. This argument was based on the statement in 39 Comp. Gen. at 647 that client agencies must bear the costs where,

> "because of the knowledge and information pertaining to the subject matter of the suit possessed by it or its personnel alone, [only the client agency was] in a position to review reports and furnish material required by the Justice Department to defend the action against the Government."

Generally speaking, except as otherwise required by law, the cost of providing information in the possession of another agency would typically be an operational charge to the other agency's operating appropriation. However, where a request for information imposes an extraordinary burden on an agency, for example, where the effort necessary to provide that information extends beyond the simple production of data, documents, or perspectives already in its possession or easily generated by the agency, reimbursement under the Economy Act may be appropriate. This is consistent with the decision in 39 Comp. Gen. 643, as explained above.

The record in this case indicates that, in order to defend the lawsuit, Justice and USIA required information and copies of relevant documents concerning former USIA employees and job applicants, and OPM's past practices in certifying job applicants for consideration by USIA. Apparently, some of this was obtained from OPM and the FRC in St. Louis, Missouri and Suitland, Maryland. The record does not clearly describe the services actually performed by those agencies in this regard. With respect to any photoduplication performed by the FRC, 44 U.S.C. § 2116(c) dictates that the costs of that service must be borne by USIA, not the FRC. Cf. B-217851, July 31, 1985; B-211953, Dec. 7, 1984. Insofar as the acquisition of information and records from OPM is concerned, the record before us suggests that OPM should bear those costs since that information relates specifically to OPM's performance of its duties under law. Thus, those expenses are appropriately charged to OPM's appropriations. Cf. 39 Comp. Gen. 643.



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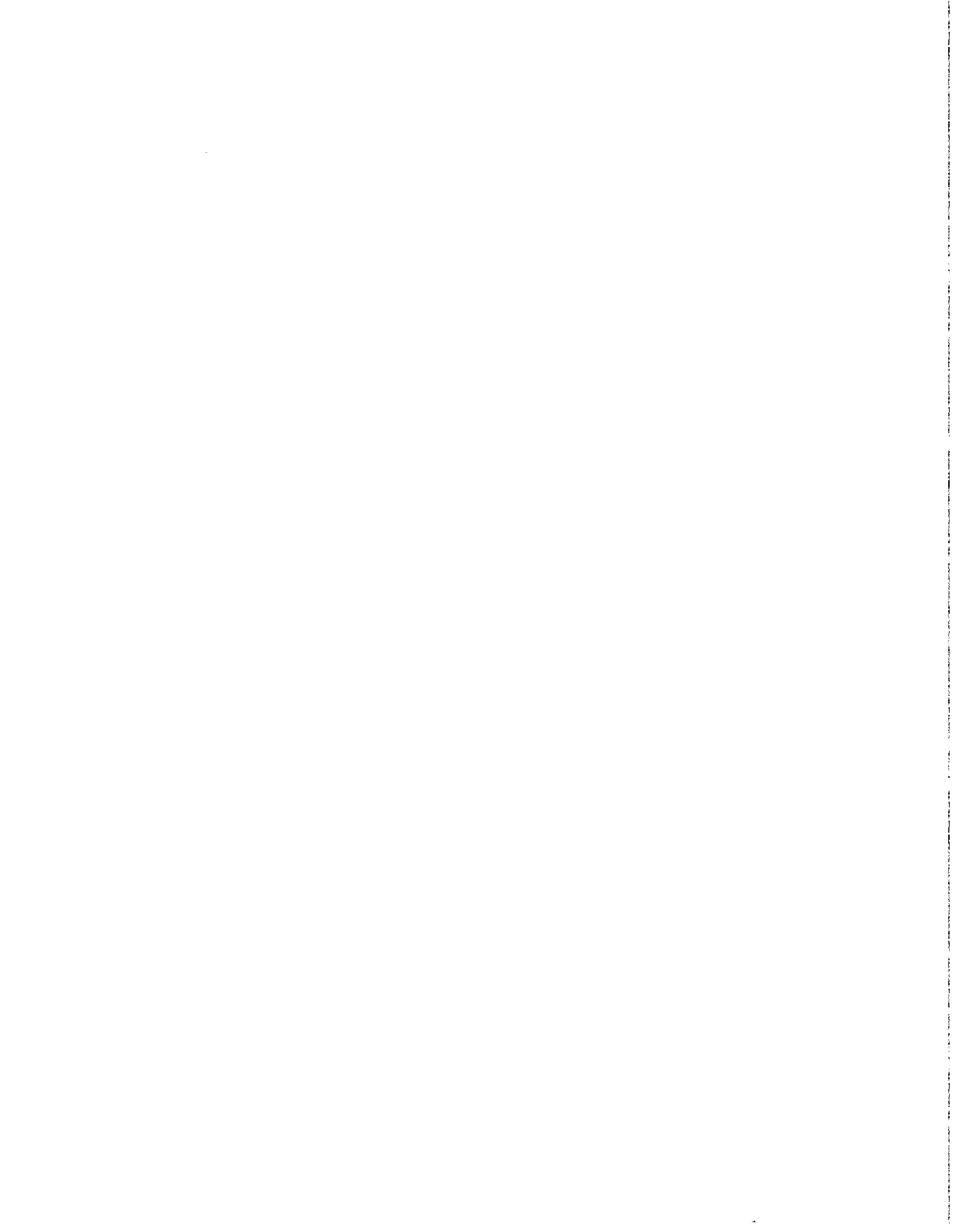

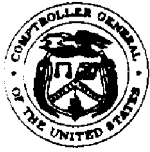

Comptroller General of the United States

Washington, D.C. 20548

1117222

Decision

Matter of: Certifying Payments when Invoice Exceeds Estimated Amounts in Purchase Order

File: B-254436

Date: March 1, 1994

DIGEST

IRS may certify an invoice that exceeds the amount estimated on a purchase order if the certifying activity can document that (1) the invoice accurately reflects services provided to the government consistent with the terms and conditions of the purchase order and (2) funds are available to adjust the obligation based on the purchase order.

DECISION

Patrick T. Flaherty, Regional Fiscal Management Officer, Central Region, Internal Revenue Service (IRS), Department of the Treasury, asks whether the Regional Fiscal Management Branch may certify payment of shipping charges based on an invoice that exceeds the amount that is estimated on the purchase order and is obligated to pay the purchase order, without the procuring activity first modifying the purchase order to reflect the actual charges. The invoice may be paid to the extent that the certifying activity can document that (1) the invoice accurately reflects services rendered consistent with the terms and conditions of the agreement, and (2) adequate funds are available to adjust the obligation based on the purchase order.

The question presented here involves certifying payments using invoices rather than basic disbursement vouchers.[1] Use of an invoice in lieu of a voucher is authorized in certain circumstances provided the invoice shows all the information required to certify a voucher for payment. Volume I Treasury Financial Manual (TFM) 4-2025.20 and 4-2035; GAO, Policy and Procedures Manual for Guidance Of Federal Agencies, (GAO-PPM), title 7, § 6.2C (TS No. 7-43, May 18, 1993). Generally, before a basic voucher is certified for payment, it is audited in order to assure that

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[1]We address the question presented here only in the context of transportation services that are otherwise authorized to be paid under applicable laws and regulations based on certified invoices. See, e.g., 41 C.F.R. Part 101-41.

it is proper.[2] The objectives of the prepayment audit include determining whether (1) the payment is in accordance with the terms of the applicable agreement, (2) the amount of the payment is correct, and (3) the appropriation or fund is available for that purpose and amount. 1 TFM 4-2020.30; 7 GAO-PPM § 6.5.[3] Similarly, before certifying an invoice for payment, it should receive the same level of scrutiny as would be appropriate for certifying a voucher.[4]

Normally, the person conducting the prepayment audit and certifying payment should be able to determine the propriety of the payment based on the documentation supporting the payment (e.g, purchase order, invoice, receiving report). 7 GAO-PPM § 6.2B. If unable to determine from the supporting documentation whether the amount claimed is proper, the certifying activity should obtain additional information to determine the amount owed in order to avoid certifying an improper payment.

IRS informally advised us that the purchase order (IRS Form 8235, Order for Supplies or Services) comprises the sole documentation provided by the procurement activity regarding the terms and conditions of its agreement with the contractor. We have also been informally advised that the purchase order states that the amount to be charged for transportation services is an estimate. The agreement clearly contemplates the possibility that charges are not firm and may vary from those indicated.

In arriving at the proper amount to certify for payment, the voucher certification process permits the certifying activity to reconcile discrepancies appearing in supporting

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[2]While payment certifying procedures are primarily directed at protecting the interests of the government, they also serve to protect disbursing and certifying officials who are personally liable for any loss to the government resulting from an improper payment. 31 U.S.C §§ 3527, 3528; 7 GAO-PPM § 7.1 and chapter 8.

[3]A prepayment audit of each voucher may not be necessary since agencies may use statistical sampling for vouchers or items in vouchers not exceeding $2,500. 31 U.S.C. § 3521(b); 7 GAO-PPM § 7.4E and App. III B. Disbursing and certifying officials are not liable for payments made on unaudited vouchers under a statistical sampling procedure provided that the agency carries out diligent collection actions on any improper payment. 31 U.S.C. § 3521(c).

[4]This principle also would apply to paying transportation charges on an expedited basis under agency post payment audit procedures authorized by law. See 31 U.S.C. § 3726.

documentation and to clarify indefinite provisions regarding price appearing in purchase orders. For example, when the procurement documentation shows that the amount claimed by a payee is less than the amount due the payee, the voucher may be administratively adjusted upward in an amount not exceeding $100 without obtaining an amendment of the claim when it is clear that the claimant otherwise intends to make a claim for the full amount due. 7 GAO-PPM § 6.5C. This is consistent with viewing certifying activities as having reasonable flexibility to reconcile discrepancies in supporting documentation when circumstances warrant and the risk to the government is minimal.

Similarly, whether the certifying activity must obtain a modified purchase order from the procuring activity in order to perform the reconciliation, or may make an administrative adjustment based on some alternative form of supporting documentation, would depend upon the circumstances involved and the risk to the government.[5] For example, in some circumstances it may be appropriate to have the procuring activity provide documentation verifying the invoice prior to certification. In other circumstances it may be appropriate to have the procuring activity provide oral verification prior to certification that may or may not be coupled with a post certification submission of supporting documentation.[6] Finally, the certifying activity should confirm the availability of funds and initiate steps to have

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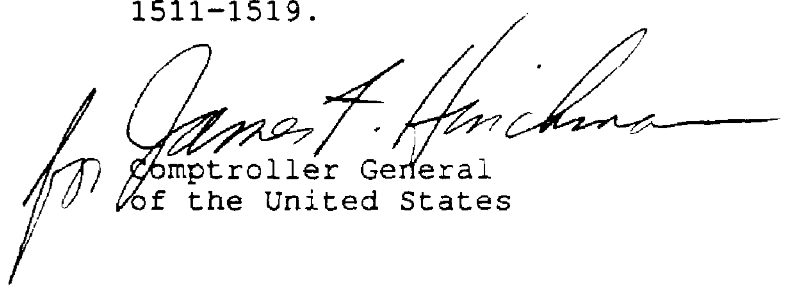
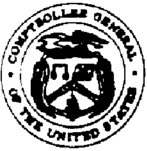
[5]Agency internal control procedures should provide for separation of duties to reduce the risk of error, waste, and wrongful acts. This includes ensuring that disbursing operations (which include the voucher audit and certifying duties) are separated from such operations as purchasing, receiving and accounting. 7 GAO-PPM §6.6B and 2 GAO-PPM App. II "Separation of Duties" (TS 2-24 October 31, 1984). Thus, the certifying activity should not normally originate the supporting documentation used to certify payments.

[6]We see no impediment to the certifying activity receiving clarifications of ambiguous provisions in supporting documentation and memorializing them in explanatory memoranda accompanying the other supporting documentation in appropriate circumstances when the risk of loss to the government is small and outweighed by the savings derived from such procedures. However, such a procedure should not be viewed as a substitute for producing accurate supporting documentation by other activities. Thus, if discrepancies in documentation are a frequent occurrence, steps should be taken to improve procedures for estimating costs to make them more accurate.

the appropriate official adjust the amount obligated to reflect the payment to assure compliance with the requirements of the Antideficiency Act, 31 U.S.C. §§ 1341, 1511-1519.



Comptroller General
of the United States



Comptroller General
of the United States

Washington, D.C. 20548

72413

Decision

Matter of: Halter Marine, Inc.

File: B-255429

Date: March 1, 1994

Anil Raj for the protester.
Albert J. Joyce, Esq., Panama Canal Commission, for the agency.
C. Douglas McArthur, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where record contains no evidence that agency considered protester's best and final offer, which offered a price reduction, in its selection decision.

DECISION

Halter Marine, Inc. protests the award of a contract to Swiftships, Inc. under request for proposals (RFP) No. CNC-92050-AG-28, issued by the Panama Canal Commission for a 53-foot pilot/linehandler launch. Halter asserts that the agency did not justify its selection of a higher-priced proposal.

We sustain the protest.

BACKGROUND

On August 5, 1993, the agency issued the solicitation for a fixed-price contract to construct, outfit, and deliver an aluminum, twin-screw, diesel-engine launch to be constructed in accordance with the RFP's specifications. The solicitation provided for award of a contract to the offeror whose proposal was most advantageous to the agency, and stated that award might be made to other than the low priced offeror if the evaluation showed that a higher-priced proposal was significantly superior to the lower-priced one. The RFP also reserved to the agency the right to make award without discussions.

The RFP listed four evaluation factors, in descending order of importance--technical merit, quality control capability, experience, and warranty--it also advised that the

evaluation process might include discussions and site visits with offerors in the competitive range. The RFP gave the following guidance about the four evaluation factors:

> "1. Technical Merit: Offerors shall provide sufficient technical information to evaluate the relative merits of their proposals, particularly in regards to the proposed systems for noise reduction and corrosion control.
>
> "2. Quality Control Capability: Offerors shall provide information to demonstrate that while regularly engaged in building vessels of the kind described in these specifications, they have exercised an effectual control over quality as contemplated in [Federal Acquisition Regulation (FAR) §] 52.246-2, "Inspection of Supplies."
>
> "3. Experience: Offerors shall provide information regarding their experience within the last five years of successfully having constructed launches similar to the one described in these specifications.
>
> "4. Warranty: Offerors shall comply with the terms and conditions of [FAR § 52.246-17], which requires a warranty of one year from date of final acceptance. However, offerors proposing a longer warranty will be scored higher."

The evaluation scheme provided for numerical scores of up to 45 points for each proposal, calculated as set forth below. First, numerical scores from 1 (poor) to 5 (outstanding) were to be awarded under each technical evaluation factor. After scoring evaluation factors, the evaluators were to use different weights for different factors in totaling the scores. The factors of technical merit and quality control received triple weight, and each was worth up to 15 points; experience received double weight and was worth up to 10 points; the warranty evaluation factor received no extra weight, and was worth up to 5 points.

Six initial offers were submitted on September 16. The agency's technical evaluation committee (TEC) reviewed the offers and determined that four of them were unacceptable, while two of them--those of the protester and the awardee--were included in the competitive range. The TEC also advised the contracting officer, by memorandum dated September 22, that it planned to perform further analysis of the two competitive range proposals.

The contracting officer sent to Halter, by facsimile dated September 23, two pages of discussion questions, all but one of which concerned the protester's quality control program.[1] There is no record of the questions posed to Swiftships, beyond the report of a site visit conducted on September 24. In this regard, the evaluators explained that a site visit was necessary to evaluate the Swiftships proposal under the technical merit and quality control capability evaluation factors. The record shows that, in part, evaluators were seeking Swiftship's assurance that it would avoid the quality problems encountered under prior launch contracts with Halter.[2]

The first written evaluation of the two competitive range proposals was prepared on September 27, after the site visit to Swiftships, and the same date as Halter responded to the agency's discussion questions. The scores of the two offerors under each of the evaluation factors were as follows:

	Halter	Swiftships
Technical Merit	9	12
Quality Control	6	12
Experience	6	6
Warranty	4	3
TOTAL	25	33

The evaluation narrative accompanying the numerical scores explains that Halter's low score under the technical merit evaluation factor was based on "[p]aint [p]roblems on the past launches as yet unresolved," the use of nonconforming materials under its prior contracts, the "lack of adequate covered assembly/outfitting areas," the "lack of adequate capacity cranes," and the "separation of offices from [the] work area." The narrative also explained the basis for Swiftships' superior ratings under the technical merit and quality control evaluation factors, its rating of superior for the experience factor, and satisfactory for the warranty factor.

[1]The one question which did not concern the quality control program, concerned Halter's ability to ensure that non-specified materials would not be used during construction.

[2]In its report on this protest, the Panama Canal Commission explains that Halter has built almost all of the Commission's recently-purchased launches. The agency also includes evidence of serious workmanship problems in the last 2 Halter-built launches.

With respect to prices, Halter offered a price of $622,741, while Swiftships offered a price of $644,877.08. The TEC concluded its memorandum detailing the initial evaluation with a recommendation of award to Swiftships. The TEC estimated that the extra cost of quality surveillance for Halter, and the additional value of Swiftships' offer to use higher-grade 5086 aluminum alloy even where not required, made the Swiftships offer a better value for the government.

On September 28, offerors were asked to provide best and final offers (BAFOs) by the next day, September 29. Also, on September 28, the contracting officer prepared a memorandum for the record disagreeing with some of the conclusions reached by the TEC. Specifically, the contracting officer determined that Halter's proposal should be downgraded from "less than satisfactory" to "poor" under the quality control evaluation factor, thus lowering Halter's score under this factor from 6 to 3. In addition, the contracting officer upgraded Swiftships's score under the experience factor from "satisfactory" to "superior." As a result of these changes, Swiftship's total score rose from 33 to 35, while Halter's total score dropped from 25 to 22.

In his memorandum, the contracting officer also states that he agrees with the TEC that the "hidden costs" in the Halter proposal made the Swiftships proposal more advantageous to the government. Further, the contracting officer's September 28 memorandum concludes that award should be made to Swiftships because:

> "the price difference in accepting the lower price proposal would not be in the best interest of the government. Technical merit and quality control are of greater importance than the lower priced proposal."

On September 29, as requested, Halter submitted its BAFO and lowered its price by more than $30,000, to $592,000. Swiftships offered no change to its price of $644,877.08. On September 30, the agency awarded a contract to Swiftships.

By letter dated October 7, the contracting officer notified Halter that the award had been made on September 30, and Halter filed a timely protest thereafter. Since Halter did not receive the letter until more than 10 days after award--most of which passed before the contracting officer prepared the notification letter--the agency refused to stop performance on this contract.

DISCUSSION

In reviewing protests against an agency's technical evaluation and decision to eliminate a proposal from consideration for award, we review the record to determine whether the agency's judgments were reasonable and in accordance with the listed evaluation criteria and whether there were any violations of procurement statutes or regulations. CTA, Inc., B-244475.2, Oct. 23, 1991, 91-2 CPD ¶ 360. Here, we find that the agency made its price/technical tradeoff decision, resulting in award to Swiftships, prior to receiving BAFOs. In addition, it appears that the evaluation focused almost entirely on Halter's performance under prior contracts, and failed to consider the evaluation factors set forth in the RFP.

Our review of the record shows that the TEC's recommendation of award to Swiftships was made at the time of initial evaluations, and prior to receipt of Halter's BAFO, in which Halter lowered its price by more than $30,000. The TEC's recommendation was based upon its attempt to quantify the additional merit of the Swiftships' proposal. In this regard, the TEC concluded that accepting Halter's proposal would require the agency to expend an additional $38,000 to maintain an inspector onsite at Halter's facility,[3] and that Swiftships' proposed use of a higher-quality aluminum alloy for the ship's hull was worth an additional $6,000. Thus, the TEC calculated that this $44,000 advantage of Swiftships' proposal more than offset Halter's $22,000 lower price.

While we have no basis to question the TEC's conclusions in its memorandum,[4] there is nothing in the record to show that after Halter lowered its price in its BAFO by $30,000, the TEC or the contracting officer considered whether Halter's lower price was offset by Swiftships' higher quality. Using the calculations of the TEC, it appears that Halter's price reduction might have offset the claimed value of the Swiftships proposal--i.e., once Halter lowered its price to $592,000, even if one includes the additional

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[3]The additional $38,000 represents the difference between the cost of an on-site inspector at Halter's facility ($50,700) less the per diem cost of an inspector visiting Swiftships' facility on occasion ($12,700).

[4]Agencies frequently attempt to quantify additional costs related to an offeror's unique approach, and where such attempts have a reasonable basis, we will not question them further. See Allied Signal Aerospace Co., B-250822; B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201.

cost of an on-site quality inspector ($38,000) and the cost of the higher-quality aluminum alloy ($6,000), its evaluated price of $636,000 is lower than Swiftships' price of $644,877.08

After Halter filed its comments on the agency report noting that the contracting officer's memorandum was prepared before BAFOs were received, the agency filed a one-page submission stating that the memorandum adopting the TEC's cost technical tradeoff was misdated. According to the agency, the contracting officer's memorandum should have been dated September 29--the day BAFOs were received--rather than September 28. While we do not reach a conclusion regarding the correct date of the contracting officer's memorandum, the record contains no evidence that the agency made its price/technical tradeoff using Halter's lower BAFO price. The contracting officer's memorandum--regardless of whether it was prepared the day before or the day of receipt of BAFO's--references and adopts the TEC's analysis as conducted on the initial proposals. In addition, there is nothing to indicate that the TEC ever revisited its tradeoff decision. Since the tradeoff recommendation was based on prices that have since been sufficiently altered to suggest that the selection decision might have changed, we have no basis to conclude that the award has a reasonable basis.[5]

In addition, the solicitation here gave no indication of the overwhelming weight given to past performance in the evaluation of technical merit and quality control capability, the two most heavily weighted factors. Instead, the only guidance for addressing technical merit related to noise reduction and corrosion control. It is fundamental that offerors must be advised of the basis upon which their proposals will be evaluated. Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406; B-252406.2, June 25, 1993, 93-1 CPD ¶ 494. In particular, contracting agencies are required by the Competition in Contracting Act of 1984 (CICA) to set forth in the solicitation, at a minimum, all significant evaluation factors that the agency expects to consider and their relative importance. 41 U.S.C. § 253a(b)(1) (1988); H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203.

Although evaluators favorably considered Halter's proposal for noise control, their assessment under the technical

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[5]We also note that after the protester argued this point in its comments, the agency did not rebut the substance of the contention; rather, it simply stated that the memorandum was incorrectly dated, and that the correct date was September 29.

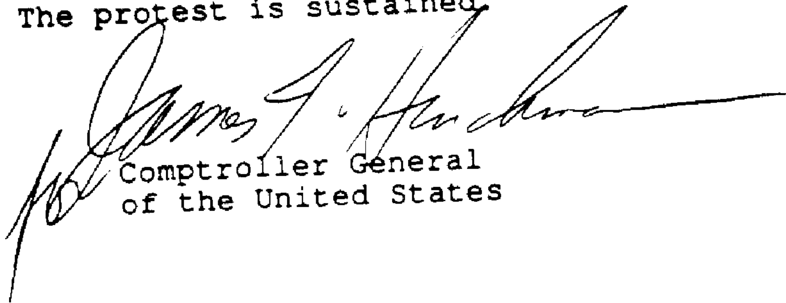
merit and quality control evaluation factors largely reflected their consideration of Halter's experience under its previous launch contract. Evaluators identified their major concerns under the technical merit factor as paint problems on prior launches, and the use of other than 5086 alloy in hull construction--one of the alleged problems under earlier contracts. In addition, the evaluators commented on the lack of covered areas for welders, the lack of adequate capacity cranes, and the isolation of corporate headquarters from the shipyard, which according to the agency, might have been responsible for problems in Halter's prior contracts. In our view, none of these concerns relate either explicitly or implicitly to the statement of work or to the solicitation's description of the technical merit evaluation factor.

Under the quality control evaluation factor, the evaluators focused on Halter's past performance problems in the areas of welding defects, shaft alignment, and material control. While the evaluation scheme envisioned that the agency would consider experience in constructing similar launches over the past five years, there is no indication that past performance problems would assume this level of importance in the evaluation of other factors. In short, the agency gave overwhelming emphasis to past performance by repeated consideration of that factor in conjunction with the other major factors. The Center for Educ. and Manpower Resources, B-191453, July 7, 1978, 78-2 CPD ¶ 21; see also Management Servs., Inc., B-206364, Aug. 23, 1982, 82-2 CPD ¶ 164; Earth Envtl. Consultants, Inc., B-204866, Jan. 19, 1982, 82-1 CPD ¶ 43. This repeated assessment of the proposal based on the agency's unfavorable experience with the protester was inconsistent with the solicitation criteria and rendered the evaluation unreasonable.

Since Halter did not qualify for an automatic stay of performance because its protest was not filed within 10 calendar days of contract award, and the work here is substantially performed, it is not feasible to recommend that the agency terminate Swiftships' contract. Instead, we find that the protester is entitled to its proposal preparation costs and the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1) and (2) (1993); RBE, Inc., B-252635, July 16, 1993, 93-2 CPD ¶ 27. In accordance with 4 C.F.R. § 21.6(f), Halter's certified claim for such costs, detailing the time expended and costs incurred, must be

submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.



Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

634311

Decision

Matter of: Hilda M. Rapp - Court of Veterans Appeals Employee - Salary Overpayments Waiver

File: B-253937

Date: March 2, 1994

DIGEST

1. The U.S. Court of Veterans Appeals, established by Congress pursuant to Article I of the Constitution in the executive branch, is an "Executive agency" as that term is defined in 5 U.S.C. §§ 105 and 104(1), and therefore is an "agency" covered by the waiver statute, 5 U.S.C. § 5584. Accordingly, GAO has authority to consider for waiver a debt arising out of an erroneous payment of pay to an employee of that court.

2. A reemployed annuitant upon entry on duty had her pay properly reduced as a result of her receipt of a civil service annuity. However, although she furnished appropriate notices to agency officials of cost-of-living increases in her annuity each January, due to administrative error additional reductions in her salary were not made for those increases, and this resulted in her receiving salary overpayments. She is found not to be at fault and her debt is waived since based on the documents she received the errors were not readily apparent and she was expecting general salary increases at the same time as the annuity increases each January.

DECISION

This concerns the request by Ms. Hilda M. Rapp, for waiver of her debt in the gross amount of $4,500 which arose out of overpayments she received due to errors in computing her pay as a reemployed annuitant incident to her employment as a secretary to a judge of the United States Court of Veterans Appeals.[1] The initial matter for us to determine is whether the Court of Veterans Appeals is included as an agency covered by provisions of the waiver statute, 5 U.S.C. § 5584, granting our Office authority to consider for waiver

[1]Ms. Rapp's request was referred to the Claims group of this Office by the Executive Officer and Clerk of the Court.

the debt of an employee of the court. As explained below, it is our view that the Court of Veterans Appeals is an agency covered by the waiver statute and, therefore, we do have authority to consider Ms. Rapp's debt for waiver. We also find that the debt qualifies for waiver, and therefore we grant waiver.

The Waiver Statute and the Court of Veterans Appeals

The waiver statute, 5 U.S.C. § 5584, provides authority to waive a claim of the United States arising out of an erroneous payment "to an employee of an agency," and such authority is granted to:

(1) the Comptroller General;

(2) the head of the agency when the claim aggregates not more than $1,500; or

(3) the Director of the Administrative Office of the United States Courts when the claim aggregates not more than $10,000 and involves, as pertinent in this case, an officer or employee of "any of the courts set forth in" 28 U.S.C. §610. See 5 U.S.C. § 5584(a).

For the purposes of section 5584, "agency" is defined as:

"(1) an Executive agency;

"(2) the Government Printing Office;

"(3) the Library of Congress;

"(4) the Office of the Architect of the Capitol;

"(5) the Botanic Garden; and

"(6) the Administrative Office of the United States Courts, the Federal Judicial Center, and any of the courts set forth in section 610 of title 28." See 5 U.S.C. § 5584(g).

Under these statutory provisions, the determination of whether a debt arising out of an erroneous payment to an employee of the Court of Veterans Appeals is subject to waiver depends on whether such employee is an employee of an "agency" within the meaning of one of the six definitional categories set out in section 5584(g), supra.

In submitting Ms. Rapp's case to our Office for waiver consideration, the Executive Officer and Clerk of the Court states that the Court of Veterans Appeals was established

under Article I of the Constitution and is a court of law exercising judicial power, but it is not one of the courts enumerated in 28 U.S.C. § 610, referred to in 5 U.S.C. § 5584(g)(6), supra. On that basis, the Executive Officer states that, absent a specific legislative grant of authority, the court's chief judge lacks waiver authority under 5 U.S.C. § 5584.

As the court's Executive Officer states, the Court of Veterans Appeals is not one of the courts listed in 28 U.S.C. § 610, and thus it is not an agency as defined by category (6) of 5 U.S.C. § 5584(g), nor is it one of the agencies listed in categories (2)-(5) thereof. However, based on the following, we believe it falls within the meaning of category (1), "an Executive agency."

The United States Court of Veterans Appeals was "established" by statute enacted in 1988, now codified at 38 U.S.C. §§ 7251-7298 (1988), "under Article I of the Constitution of the United States." 38 U.S.C. § 7251. The court is composed of a chief judge, who is "the head of the Court," and at least two and not more than six associate judges, the terms of office of all of whom are 15 years. 38 U.S.C. § 7253(a), (c), (d). They are appointed by the President, by and with the advice and consent of the Senate, and may be removed from office on grounds of "misconduct, neglect of duty, or engaging in the practice of law," but "not on any other ground." 38 U.S.C. § 7253(b)(f). The court's jurisdiction is limited to exclusive jurisdiction to review decisions of the Board of Veterans' Appeals of the Department of Veterans Affairs, but the court was not made a part of that department or of any other department or agency. 38 U.S.C. § 7252. The clerk of the court is appointed by the court, judges of the court may appoint their secretaries and law clerks, and the clerk of the court may appoint necessary deputies and employees with the court's approval. 38 U.S.C. § 7281.

As noted, the court was created pursuant to Congress's power under Article I of the Constitution, and not as an Article III, judicial branch court. The legislative history of the statute creating the court states that it was intended to be established in the executive branch.[2]

The term "Executive agency", used in category (1) of 5 U.S.C. § 5584(g), is defined by 5 U.S.C. § 105, for the purposes of title 5, U.S. Code, to mean "an Executive department, a Government corporation, and an independent establishment", which are further defined by 5 U.S.C.

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[2]H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 5, reprinted in 1988 U.S. Code & Ad. News, Vol. 7, 5786.

§§ 101, 103, and 104. The Court of Veterans Affairs clearly does not fall within the definition of an "Executive department" (5 U.S.C. § 101), nor of a "Government corporation" (5 U.S.C. § 103). However, we believe it falls within the following definition of an "independent establishment" provided in 5 U.S.C. § 104(1):

> "(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment;"

As noted above, the court was "established" in the executive branch, but it is not an Executive department, government corporation, or any of the other entities excluded by section 104, supra, nor is it a part of any other named entity. Therefore, it is our view that the Court of Veterans Appeals is an independent establishment in the executive branch within the meaning of section 104, and as such it is included within the category, "Executive agency" as defined by section 105, and as used in 5 U.S.C. § 5584(g).

Accordingly, it is our view that the Court of Veterans Appeals is an agency covered by the waiver statute, 5 U.S.C. § 5584. Therefore, our Office has jurisdiction to consider for waiver a debt of an employee of that court.[3] It also appears that the court's Chief Judge, as "the head of the Court" (38 U.S.C. § 7253(d)), does have the waiver authority granted "the head" of an Executive agency by 5 U.S.C. § 5584(a)(2) to waive a debt aggregating not to exceed $1,500, although he does not have the authority granted the

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[3]We also note that Ms. Rapp is an "employee" for the purposes of 5 U.S.C. § 5584. Section 2105, title 5, U.S.C., defines an "employee", as used in section 5584, as "an officer and an individual who is appointed in the civil service" by, as pertinent here, "the President; or an individual who is an employee." Ms. Rapp's position is in the "civil service," as defined by 5 U.S.C. § 2101(1). See also 50 Comp. Gen. 329 (1970). And, she was appointed to it by an "individual who is an employee," since she was appointed by a judge of the court who would be considered an "officer," and thus included in the definition of "an employee" provided by 5 U.S.C. § 2109, supra. See in this regard 71 Comp. Gen. 522 (1992), wherein we held that a judge of the Court of Military Appeals (also an Article I court), a position similar to that of a judge of the Court of Veterans Appeals, is an officer as defined by 5 U.S.C. § 2104(a).

Director of the Administrative Office of the United States Courts to waive a debt aggregating not to exceed $10,000 for employees of courts named in 28 U.S.C. § 610. Since Ms. Rapp's debt exceeds $1,500, we will proceed to consider it for waiver.[4]

Waiver Consideration - Ms. Rapp's Debt

The report submitted by the Executive Officer and Clerk of the Court on Ms. Rapp's waiver request indicates that she was receiving a federal civil service annuity when she was appointed in October 1989 to her position as a GS-11 secretary to a judge of the court. At that time she was the court's only reemployed annuitant and it was the first year of the court's existence. The court had contracted with the Department of Agriculture (USDA) to handle the improcessing of all court staff and for payroll and personnel services through USDA's National Finance Center (NFC). When Ms. Rapp was appointed, she supplied the USDA personnel office with the appropriate information regarding her civil service annuity which at that time was $14,496 per annum. USDA entered the information into the NFC payroll and personnel database to permit adjustment of her court salary to take into account her receipt of the annuity. As a reemployed annuitant she was entitled to continue to receive her monthly annuity payments from the Office of Personnel Management, but her biweekly salary from the court was required to be reduced in the amount of her annuity allocable to each pay period. Apparently, initially the appropriate entries were made into the payroll system and Ms. Rapp received correctly reduced salary payments into December 1989.

In January of 1990, 1991, and 1992, Ms. Rapp received cost-of-living increases in her annuity and at about the same time received annual comparability increases in her court salary. Each January she furnished a copy of the "Notice of Annuity Adjustment" she received from OPM to the court's personnel specialist who forwarded it to USDA to make the appropriate adjustments to her salary. At the same time, her court salary was being adjusted upward due to the annual raises. Although the upward salary adjustments were made, through administrative error, the downward adjustments for the annuity increases were not made. This resulted in biweekly gross salary overpayments to Ms. Rapp of from $25.60, when they began, to $80.00 in December 1992 when the errors were discovered.

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[4]Under 5 U.S.C. § 5584(a)(1), our waiver jurisdiction is unlimited as to amount of the debt. See also 4 C.F.R. § 91.4 (1993).

Ms. Rapp states that because the overpayments resulted from a gradual process of a succession of administrative failures, and she had neither the formulas for calculation of her pay split or the regulations to recheck the payroll office's computations, she did not perceive the problem. She indicates that she promptly furnished the annual notices of annuity increases to the court, but because she lacked access to and knowledge of the regulations, she was compelled to rely on the personnel office of the court and the USDA and NFC to make the necessary adjustments.

The Executive Officer and Clerk of the Court indicates that without knowing the calculation process, Ms. Rapp had no means to check the correctness of her pay increases. Upon consideration of all the facts, he states that he finds Ms. Rapp blameless in the matter.

We note that when Ms. Rapp was first employed by the court she received a standard form 50 (Notification of Personnel Action) that stated that as a reemployed annuitant her annual salary was to be reduced by the amount of her retirement annuity and by future cost-of-living increases. She also received from OPM the annual notices of annuity adjustments which she provided the court and which showed the old and new monthly annuity amounts. In addition she received biweekly earnings and leave statements which showed the full annual GS-11 rate of her court salary before reduction for her annuity, the actual reduced biweekly gross and net amounts paid to her in salary, and year-to-date gross and net amounts paid. A person with full knowledge of how a reemployed annuitant's salary is to be reduced could determine the possibility that she was being overpaid by converting the new monthly annuity amount shown on the OPM notice to an annual figure by multiplying it by 12, subtracting that amount from the unreduced gross annual salary rate shown on her earnings and leave statements, dividing that amount by 26 and comparing it with the reduced gross biweekly amount shown on the earnings and leave statement. However, without performing such computations, the documents Ms. Rapp received would not make it readily apparent that her pay had not been further reduced due to the annuity increases.

Pursuant to 5 U.S.C. § 5584, and the implementing Standards for Waiver, 4 C.F.R. Part 91, waiver may be granted in a case such as this if the erroneous payment occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. In Ms. Rapp's case there is no indication of fraud, misrepresentation or lack of good faith on her part. As to fault, it is imputed when an employee receives a significant unexplained increase in pay, or otherwise knows or reasonably should know that an erroneous payment

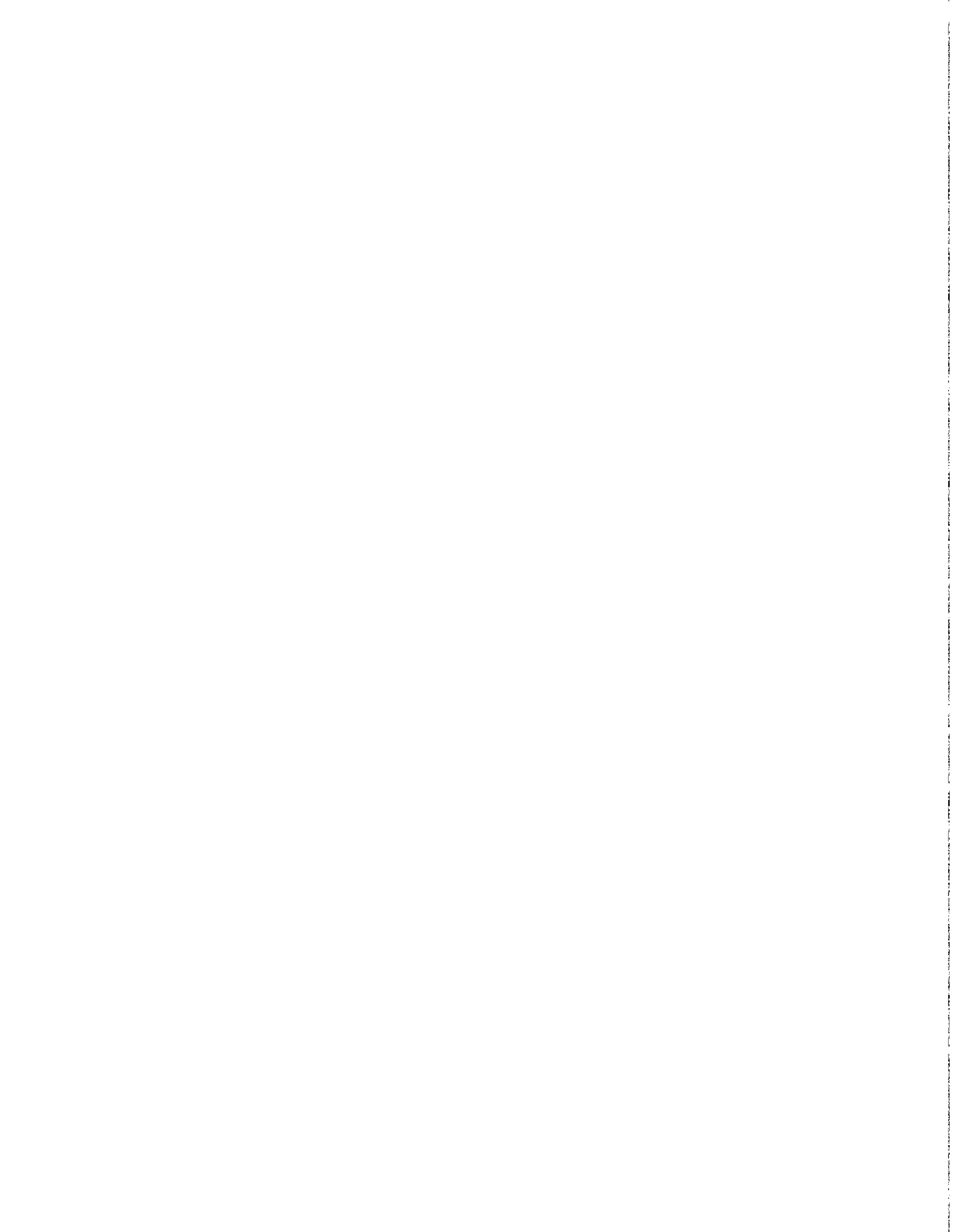
has occurred, and fails to bring the matter to the attention of the appropriate officials. See also, Edward W. Allen, B-232219, Oct. 28, 1988. We have repeatedly held that where an employee is furnished documents, such as earnings and leave statements, which if reviewed would indicate to a reasonable person the likelihood of error, and he or she does not alert responsible officials, he or she is considered at least partially at fault in the matter. See e.g., Frederick D. Crawford, 62 Comp. Gen. 608 (1983).

In Ms. Rapp's case, while as noted above with appropriate knowledge she may have been able to use the documents she received to perform computations which would have indicated an error, on their faces the documents did not readily indicate the error. Also, considering that Ms. Rapp had taken appropriate actions to have her pay reduced because of her reemployed annuitant status, and in fact her pay was substantially reduced, and that when the under reductions were made she was also entitled to and expected general pay increases, we do not think she was at fault in not noticing the errors. Compare, Hollis W. Bowers, 65 Comp. Gen. 216 (1986); and Richard W. DeWeil, B-223597, Dec. 24, 1986.[5]

Accordingly, we hereby waive the claim of the United States against Ms. Rapp for the erroneous payments of salary she received as a result of the under reductions for the civil service annuity she was receiving.

Comptroller General
of the United States

[5]See, however, Edward E. Wolfe, B-204973, where the opposite conclusion was reached when such mitigating factors were not present.



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