U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C 20001-8002

Dated: May 13, 1996

Case No.: 93-JTP-2

In the Matter of:

FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,
Complainant

v.

U.S. DEPARTMENT OF LABOR,
Respondent

Carolyn Cummings, Esq.
Tallahassee, FL
For the Complainant

Frank Buckley, Esq.
Washington, D.C.
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISIONANDORDER

This case arises under the Job Training Partnership Act, 29 U.S.C. §150 1 *et seq.* (hereinafter "JTPA"), the Wagner-Peyser Act, 29 U.S.C. §49 *et* seq., as amended by JTPA (hereinafter "WPA"), and the regulations contained at 20 C.F.R. §626 *et seq.* Complainant Florida Department of Labor and Employment Security ("FDLES") appealed the final determination of the Employment and Training Administration, U.S. Department of Labor which disallowed $847,5 15 in alleged profits received by intermediary contractors under 24 fixed unit price performance based job training and/or placement contracts funded by both Title III of JTPA and Section 7(b) of the WPA and $364,934 in administrative costs for four administrative support contracts funded solely by Section 7(b) of the WPA. A formal hearing was held in Tallahassee, Florida beginning the week of October 3-7, 1994 and reconvening from October 31 to November 16, 1994. Both parties filed timely post-hearing and reply briefs. The record was closed on July 3, 1995 with the receipt of a Joint Stipulation of Fact regarding 2 1 of the 24 fixed unit price contracts funded by both Acts and the four administrative support contracts charged to WPA, in addition to a new calculation of the disallowed costs under the job training and/or placement contracts by the Grant Officer, which have been reduced to $813,321.

Findings of Fact and Conclusions of Law[1]

A. Background

On September 7, 1983, the Governor of Florida signed an agreement with the U.S. Department of Labor ("DOL") to carry out the provisions of the Job Training Partnership Act and the Wagner-Peyser Act within the State (RX 1, at 159). The purpose of the JTPA is to establish programs which prepare youths and unskilled adults for entry into the labor force. See S. Rep. No. 97-469, 97th Cong. 2d Sess., *reprinted in, 1982* U.S.C.C.A.N. 2636, 2636. The Act targets economically disadvantaged individuals who are facing serious barriers to employment and are in need of special training to secure and maintain productive employment. 29 U.S.C. §1501. The Act is funded by federal appropriations to DOL which makes grants to the states who, in turn, create programs which conform to the standards of the JTPA and its regulations. Under the JTPA, employment and training services are provided for at the state level through service delivery areas ("SDAs") established by the Governor. 29 U.S.C. §1511. Each SDA is overseen and guided by a private industry council ("PIC") which, in partnership with the local government, establishes a job training program for the SDA. 29 U.S.C. §1513. The Governor is responsible for, among other things, preparing a statement of goals and objectives to assist local governments in the development of their job training programs and for coordinating JTPA activities with state and local agencies. 29 U.S.C. $153 1. The WPA compliments the JTPA by creating a national system of employment offices through the appropriation of funds to states for job search and placement services. 29 U.S.C. $49. Ten percent of these funds may be reserved by the Governor to provide services through joint agreements between employment services and PICs to groups identified by him or her as having special needs. *29* U.S.C. $49(f)(b)(2).

Pursuant to these requirements, the Governor of the State of Florida made displaced workers, offenders and minority youths the focus of his State's JTPA and WPA programs (TR 1255-56; RX 1, at 121). FDLES administered the program at the State level while the State Job Training Coordinating Council ran the program at the Governor's level (TR 1230). Within FDLES, responsibility for management of the JTPA program was assigned to the Division of Labor, Employment and Training ("DLET") which provided oversight and guidance to the State's 24 service delivery areas. Additionally, ten percent of WPA funds were set aside strictly to aid disabled citizens (RX 1, at 12 1). To that end, the Governor established the Florida Governor's Alliance for Employment of Disabled Citizens ("FGA"), a policy board whose purpose was to coordinate the activities of the State's employment and rehabilitation agencies, private voluntary health agencies and private employers (RX 1, at 121). FDLES was to provide administrative support to FGA through contracted service agreements *(id.).*

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[1] Citations to the record will be abbreviated as follows: RX--Respondent's Exhibit; CX--Complainant's Exhibit; JX--Joint Exhibit; TR--Hearing Transcript.

Between 1986 and 1989, DLET contracted with four service providers, the Withlacoochee Private Industry Council, Inc. ("Withlacoochee"),' the Florida Panhandle Private Industry Council, Inc. ("Florida Panhandle"), the Florida Alliance for Employment of the Handicapped ("FAEH") and the Private Industry Council of Escambia ("Escambia") to provide training and placement to dislocated workers, disabled individuals, out of school minority youths, offenders and project independence participant? (see JX 1). These service providers were selected on a competitive basis. Requests for proposals ("RFPs") were sent to interested bidders and advertised in newspapers statewide (TR 1246-47). Responses were received by DLET who, along with the staff of the Bureau of Job Training ("BJT"), scored the proposals taking into consideration such factors as the quality of the jobs into which workers would be placed, the wages to be paid those workers and the cost per placement and length of placement (TR 1247). These scores were then submitted to the State Job Training Coordinating Council which evaluated the scores and proposals and made recommendations to the Governor, who made the final determination (id.).

Using their expertise in preparing proposals and providing administrative and technical assistance and support for JTPA and WPA contracts, the service providers selected had put together bids with local organizations more familiar with regional job markets and client populations (see TR 1604). The actual training and placement work was to be subcontracted to these local entities while the service providers or prime contractors would coordinate the efforts of the subcontractors and local employers, provide technical assistance, and monitor their activities and verify each placement to ensure compliance with contract requirements (*see infra*, at 1 l-12). Subcontracting is allowable under both the JTPA and the WPA (TR 135).

Final contracts were negotiated by DLET. Although Florida had used cost reimbursement contracts in the past, due to the Governor's expressed preference all the contracts entered into between DLET and the various service providers were fixed unit price performance based contracts *(id.;* TR 1252-53). Either method of contracting is acceptable under both JTPA and WPA, but each type has distinct requirements. Under a cost reimbursement contract, the contractor incurs costs while fulfilling the terms of the contract and is paid as receipts are submitted (TR 55-56). In fixed unit price performance based contracts ("FUPPB contracts"), on the other hand, a price is set before performance begins and a contractor receives payment when benchmarks under the contract are completed *(id.).* A FUPPB contract requires a cost analysis prior to the establishment of the fixed unit price while a cost reimbursement contract does not

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'The Withlacoochee Regional Planning Council was succeeded by the Withlacoochee Private Industry Council, Inc. as the JTPA administrative body for SDA No. 8 on April 1, 1988 (JX 1, at 2).

'Project Independence is the term used for the State's welfare system and includes everyone receiving Aid to Families with Dependent Children, Medicaid, transportation support and food stamps (TR 1994).

(TR 140); under a cost reimbursement contract, rather, documentation of incurred costs must be maintained and submitted in order to receive payment.

To this end, service providers had to submit a budget for their proposed costs if they were greater than the costs necessary to provide similar services under contracts in the past, according to the testimony of Roy Chilcote, a Planner IV with FDLES (TR 26 12). Each service provider took various information into account when proposing a fixed unit price to DLET. Panhandle PIC considered its fixed costs for materials, rent, and personnel, the level of risk for the retention period proposed and the cost to the subcontractor to provide training and placement; profit, though, was never calculated into the budget (TR 1445-46). Similarly, Escambia looked at historical data, staffing costs, the subcontractor's budget, state and national cost figures and the usual constant costs including rent and equipment (TR 174849). Likewise, FAEH considered the economic situation of the area where training and placement was to occur, actual cost of placement, cost of the subcontractor's overhead and incentive payments to subcontractors for fulfilling the contract (TR 2826, 2890, 3263). Using this data in conjunction with internally prepared cost analyses, the State negotiated down placement costs, according to testimony from individuals representing the various service providers (see, *for example,* TR 1752). Total contract revenue was governed by both the number of placements that had to be achieved and the length of the minimum placement period, usually 30, 60 or 90 days of full-time employment (see TR 1326, 1328).[4] Higher unit prices were negotiated for placements entailing greater risks, *i.e.,* longer retention periods were more difficult to achieve than shorter ones and entailed more paperwork, more staff for the extra follow-up necessary, and more recruitment because the drop-out rate increased with the length of the placement (TR 1797-99). Payment was received by the prime contractor for each placement lasting the required time period (TR 1326-28). According to Preston Firmin, an inspector general with DOL, it is virtually impossible to break even in a FUPPB contract; the contractor will generally make a profit or take a loss (TR 3361-62).

DLET also entered into four service contracts with FAEH between 1986 and 199 1 to be a sole source provider of administrative support to FGA (JX 1, at 23-26). Unlike the training and support contracts, these contracts were not awarded on a competitive basis. Rather, FAEH was recognized by the Governor as an organization with expertise in the placement and retention of the disabled in jobs and then was designated by him as the administrative arm of FGA responsible for maintaining and supporting the policy board (RX 1, at 12 1). In arriving at a reasonable cost for providing administrative support, costs to and expenditures by FAEH were considered including salaries, fringe benefits, cost of the Florida Governor's Board members to attend meetings (which consisted of such costs as airfare, hotel and ground transportation), operating costs such as rent, utilities and telephone, and costs incurred under previous contracts (TR 2925). Yet, like the other contracts, these administrative support contracts were fixed unit

[4]Under several of the contracts, a limited number of placements could be credited by combining the hours worked of two-part time employees (see, *for example, RX 2,* at 93).

price performance based contracts. Benchmarks which triggered payments under these contracts were the production of minutes and agendas (see *infra*, at 15- 16).

On July 10, 1990, an audit of the DLET was initiated by DOL's Office of the Inspector General ("OIG") (TR 3445). That audit initially concerned only the State's audit management and resolution process, and had no relevance to this case (TR 3446). The audit was expanded to include another issue -- the JTPA Special Revenue Account -- which again had nothing to do with this case (TR 3446-47). The audit of DLET's FUPPB contracting did not begin until approximately March 1, 199 1 (TR 3448). That audit was completed with the issuance of OIG's final audit report on March 17, 1992 (TR 3447-48; RX 1, at 75).

An initial determination was issued by the Grant Officer on June 30, 1992 followed by a Final Determination on September 11, 1992, both of which disallowed $1,2 12,449 in costs. The State of Florida responded to the Initial Determination and submitted documentation in support of its contracting methods but the Grant Officer failed to alter his conclusions or allow any costs as a result (RX 1, at 29). Interestingly, according to testimony from several PIC employees, the Grant Officer and his inspectors failed to question PICs regarding their JTPA and WPA funded contracts; rather, the directors of several PICs believed that the audits being conducted were related to computer assisted instruction programs (TR 1389, 1760). In certain cases, requests for production of documents by the Inspector General were limited to WPA contracts and inquiries did not go beyond the contract files, although other relevant documents were kept instead in personal files (TR 2337-38; 293 1).[5] The Grant Officer disallowed $847,5 15 ($158,875 funded by Title III of the JTPA and $688,640 funded by WPA) in alleged profits earned by intermediary contractors under the 24 training and placement contracts charging in essence that the State of Florida had engaged in fraud by contracting with service providers who, rather than supplying training and placement, simply subcontracted that work down but retained a portion of the funding. The Grant Officer stated in the Final Determination that

> there were no true contract costs, administrative or other, that were actually incurred by the intermediate contracting layers in support of the contracts in question. The only function of the intermediate layers was to pass funds on to subcontractors after taking a cut of the funds provided.

(RX 1, at 15). The Final Determination also found that Florida improperly billed costs under JTPA-funded contracts as single unit charges per the Act's regulations at 20 C.F.R. 629.38(e)(2) although intermediary contractors did not actually provide training and placement (RX 1, at 12).

'There is no requirement under the Acts or their regulations that cost data be kept solely in so-called "contract" files.

The basic facts regarding 2 1 of these 24 training and placement contracts have been stipulated to by the parties and are as follows:

1. Contract No. 23037
Parties: JTEST and Withlacoochee
Period of Performance: July 1, 1987 to June 30, 1988
Total Contract Revenue: $60 1,648
Total Payments to Subcontractors: $572,384
Disallowed Revenue in Excess of Costs: $29,264
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

2. Contract No. 23077
Parties: JTEST and Florida Panhandle
Period of Performance: July 1, 1987 to June 30, 1988
Total Contract Revenue: $368,396
Total Pavments to Subcontractors: $35 1,18 1
Disallowed Revenue in Excess of Costs: $17,2 15
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

3. Contract No. 23087
Parties: JTEST and FAEH
Period of Performance: July 30, 1987 to June 30, 1988
Total Contract Revenue: $26,842
Total Pavments to Subcontractors: $23,062
Disallowed Revenue in Excess of Costs: $3,780
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

4. Contract No. 23 118
Parties: JTEST and Withlacoochee
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $365,133
Total Pavments to Subcontractors: $339,848
Disallowed Revenue in Excess of Costs: $25,285
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

5. Contract No. 23308
Parties: JTEST and Withlacoochee
Period of Performance: November 1, 1988 to October 1, 1989
Total Contract Revenue: $69,000

Total Payments to Subcontractors: $62,209
Disallowed Revenue in Excess of Costs: $6,791
Source of Funds: JTPA, Title III
Target Group: Dislocated Workers

6. Subcontract No. LC939 to Contract No. 23458
Parties: Florida Department of Health and Rehabilitative Service and Florida Community College-Jacksonville
Period of Performance: January 1, 1989 to September 30, 1989
Total Contract Revenue: $228,800
Total Payments to Subcontractors: $228,800
Disallowed Revenue in Excess of Costs: $0
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

7. Subcontract No. RD1153 to Contract No. 23458
Parties: Florida Community College-Jacksonville and FAEH
Period of Performance: January 1, 1989 to September 30, 1989
Total Contract Revenue: $228,800
Total Payments to Subcontractors: $2 14,132
Disallowed Revenue in Excess of Costs: $1,849
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

8. Subcontract No. Z3458A to Contract No. 23458
Parties: FAEH and various subcontractors
Period of Performance: January 3, 1989 to September 30, 1989
Total Contract Revenue: $2 14,132
Total Payments to Subcontractors: $156,400
Disallowed Revenue in Excess of Costs: $57,732
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

9. Contract No. Z3458B'
Parties: Escambia and School Board of Escambia County
Period of Performance: January 1, 1989 to June 30, 1989
Total Contract Revenue: $27,600
Total Payments to Subcontractors: $23,460
Disallowed Revenue in Excess of Costs: $4,140
Source of Funds: JTPA, Title III
Target Groun: Dislocated Workers

10. Contract No. 27038

Parties: DLET and FAEH
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $549,643
Total Payments to Subcontractors: $385,915
Disallowed Revenue in Excess of Costs: $163,728
Source of Funds: Wagner-Peyser
Target Group: Handicapped

11. Subcontract No. Z7038B to Contract No. 27038
Parties: FAEH and Escambia
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $25,520
Total Payments to Subcontractors: $12,150
Disallowed Revenue in Excess of Costs: $13,370
Source of Funds: Wagner-Peyser
Target Group: Handicapped

12. Contract No. 27087
Parties: FAEH and Florida Panhandle
Period of Performance: July 1, 1987 to June 30, 1988
Total Contract Revenue: $41,980
Total Payments to Subcontractors: $35,683
Disallowed Revenue in Excess of Costs: $6,297
Source of Funds: Wagner-Peyser
Target Group: Out of school minority youth

13. Contract No. 27097
Parties: DLET and Florida Panhandle
Period of Performance: July 1, 1987 to June 30, 1988
Total Contract Revenue: $23,600
Total Payments to Subcontractors: $20,060
Disallowed Revenue in Excess of Costs: $3,540
Source of Funds: Wagner-Peyser
Target Group: Offenders

14. Contract No. 27099
Parties: DLET and Escambia
Period of Performance: July 1, 1989 to June 30, 1990
Total Contract Revenue: $54,900
Total Payments to Subcontractors: $35,385
Disallowed Revenue in Excess of Costs: $19,515
Source of Funds: Wagner-Peyser
Target Group: Minority Youth

15. Contract No. 27 109
Parties: T and Escambia
Period of Performance: July 1, 1989 to June 30, 1990
Total Contract Revenue: $85,050
Total Payments to Subcontractors: $7 1,539
Disallowed Revenue in Excess of Costs: $13,511
Source of Funds: Wagner-Peyser
Target Group: Handicapped

16. Contract No. 27166
Parties: T and F A E H
Period of Performance: July 1, 1986 to June 30, 1987
Total Contract Revenue: $377,4 13
Total Payments to Subcontractors: $276,875
Disallowed Revenue in Excess of Costs: $100,538
Source of Funds: Wagner-Peyser
Target Group: Handicapped

17. Contract No. 27 178
Parties: T and Escambia
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $28,800
Total Payments to Subcontractors: $24,480
Disallowed Revenue in Excess of Costs: $4,320
Source of Funds: Wagner-Peyser
Target Group: Project Independence participants

18. Contract No. 27179
Parties: T and Escambia
Period of Performance: July 1, 1989 to June 30, 1990
Total Contract Revenue: $67,500
Total Payments to Subcontractors: $48,439
Disallowed Revenue in Excess of Costs: $19,061
Source of Funds: Wagner-Peyser
Target Group: Offenders

19. Contract No. 27 188
Parties: T and Escambia
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $4,800
Total Payments to Subcontractors: $4080
Disallowed Revenue in Excess of Costs: $720
Source of Funds: Wagner-Peyser

Target Groun: Handicapped

20. Contract No. 27 189
Parties: T and Escambia
Period of Performance: July 1, 1989 to June 30, 1990
Total Contract Revenue: $36,000
Total Payments to Subcontractors: $2 1,993
Disallowed Revenue in Excess of Costs: $14,007
Source of Funds: Wagner-Peyser
Target Groun: Project Independence participants

2 1. Contract No. 27 198
Parties: T and Escambia
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $90,000
Total Payments to Subcontractors: $60,000
Disallowed Revenue in Excess of Costs: $30,000
Source of Funds: Wagner-Peyser
Target Group: Offenders

The other three training and placement contracts are:

Contract No. 27047
Parties: T and F A E H
Period of Performance: July 1, 1987 to June 30, 1988
Total Contract Revenue: $473,088
Total Payments to Subcontractors: $336,090
Disallowed Revenue in Excess of Costs: $136,998[6]
Source of Funds: Wagner-Peyser
Target Group: Handicapped (RX 5, at 9)

Contract No. 27069
Parties: T and F A E H
Period of Performance: July 1, 1989 to June 30, 1990
Total Contract Revenue: $39 1,070
Total Payments to Subcontractors: $26 1,155
Disallowed Revenue in Excess of Costs: $129,9 15
Source of Funds: Wagner-Peyser

[6]This figure represents the difference between the total contract revenue and the total subcontract revenue and conforms to the amount of revenue disallowed under each of these contracts by the Grant Officer.

Target Group: Handicapped (RX 5, at 97)

Contract No. 27138
Parties: ET and Escambia
Period of Performance: July 1, 1988 to June 30, 1989
Total Contract Revenue: $83,400
Total Payments to Subcontractors: $7 1,655
Disallowed Revenue in Excess of Costs: $11,745
Source of Funds: Wagner-Peyser
Target Group: Minority Youths (RX 5, at 347)

In addition, under Finding 2 of his determinations, the Grant Officer disallowed $364,934 in payments under administrative support contracts funded by WPA grants as excessive and unsupported by cost estimates (RX 1, at 16). The Grant Officer found that 7 1% of the total contract expenditures were payments for minutes and agendas which usually were only a few pages in length (id.). These contracts have been stipulated to by the parties as follows:

1. Contract No. 27256
Parties: ET and FAEH
Period of Performance: December 1, 1986 to November 30, 1987
Total Contract Revenue: $60,000
Amount Paid: $60,000
Source of Funds: Wagner-Peyser

2. Contract No. 27237
Parties: ET and FAEH
Period of Performance: January 4, 1988 to November 30, 1988
Total Contract Revenue: $7 1,520
Amount Paid: $59,520
Source of Funds: Wagner-Peyser

3. Contract No. 27 149
Parties: ET and FAEH
Period of Performance: July 1, 1989 to December 3 1, 1990
Total Contract Revenue: $155,000
Amount Paid: $155,000
Source of Funds: Wagner-Peyser

4. Contract No. 27430
Parties: ET and FAEH
Period of Performance: January 30, 1991 to June 30, 1991
Total Contract Revenue: $90,4 14
Amount Paid: $90,4 14

Source of Funds: Wagner-Peyser

Although the case as presented at the hearing by DOL centers on the issue of whether the State has documentation of cost analyses to support the fixed unit prices in its contracts, this is not the issue which led to this case. In fact, this issue was never raised in regard to any but the four contracts discussed under Finding 2 of the Final Determination until DOL filed its pre-, hearing statement on February 14, 1994; moreover, it was a peripheral issue even in regard to Finding 2 of the Final Determination. Rather, the audit and determinations had two major thrusts. In regard to the job training and placement contracts, DOL charged that the State "layered" its performance of the contracts through multiple levels of subcontracts by which the subcontractors skimmed off some of the contract funds without performing any services. DOL believed these subcontractors were achieving illegal "profits" through this layering, thus inflating the fixed unit prices. Although the word "fraud" was not used by the auditors or the Grant Officer, it is nevertheless abundantly clear that fraud was being alleged (for example, *see* RX1, at 14-15). As the evidence proves, this charge was preposterous; yet it was the central focus of this case even during the Grant Officer's case in chief.

In regard to the four FAEH administrative support contracts, the overwhelming thrust of DOL's case was that FAEH was grossly overpaid for simple acts such as producing minutes of meetings or agendas. But it was obvious from even a cursory scanning of the contracts in evidence that the minutes and agendas were simply the benchmarks triggering payment for all of the services performed under the contracts.

No reasonable individual would have brought this case based on the outlandish findings made by the auditors and the Grant Officer. It is amazing that the Office of the Inspector General could spend so much time investigating these contracts' and learn so little about them. That DOL chose to prosecute this case based on the allegations in the audit and the Grant Officer's determinations defies reason. Adding insult to injury, DOL's two main witnesses, Edward Donahue and Jimmy Woodward, were not well prepared and their testimony lacked credibility. Neither was able to directly answer questions; both gave inconsistent testimony regarding the issues in the case; and Woodward, the auditor-in-charge, was unfamiliar with the relevant regulations and OMB Circulars. During the hearing, while DOL refused to concede that services had been provided by all the parties to the various contracts at issue,[8] it was quite clear

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'At least six auditors spent over four months conducting the investigation of the FUPPB contracts (TR 3323, 3448).

[8]At the end of the hearing, in the Government's rebuttal case, Edward Donahue, an employee of the U.S. Department of Labor Employment Training Administration who was assigned the responsibility of resolving the audit for the Grant Officer, admitted that the intermediary contractors provided services (TR 3508). The Government's other witnesses, though, continued to insist that services were not actually provided by every contractor and subcontractor (TR

that the facts do not and never have supported a case of fraud against the State of Florida. No one from OIG interviewed any employees of the PICs to determine what services they were providing under the contracts (TR 829). The auditors simply looked at the contracts at issue and if there were subcontracts with similar-sounding services being provided at more than one level, they presumed that the initial contractor(s) failed to perform any services in connection with that contract (TR 832). In fact, each contractor, while not necessarily providing training and placement, acted as an administrator of the contracts, earning the funds they received by providing monitoring services, technical assistance, intake and eligibility determinations, referral and job leads and audit responsibility. For example, Frieda Sheffield, executive director of the Florida Panhandle PIC, testified that her organization provided monitoring services and technical assistance for the contracts and that its counselors met with counselors from Job Services biweekly (TR 133 1; CX 187, 196). Likewise, Escambia PIC prepared the grants and provided monitoring services, management information systems data entry, follow-up, audit responsibility, on-the-job training, and intake, referral and job leads to subcontractors, according to Susan Simpler, Assistant Executive Director, and James Boggs, Executive Director of Escambia (TR 1492; 15 16-17; 1757; CX 199, at 1-3, 15-19; CX 200; CX 202). The Withlacoochee PIC and FAEH monitored the service providers and acted as brokers, verifying placements and distributing payments to the subcontractors for fulfilling the contract requirements, based on the testimony of Charles Collins, Senior Vice President of the Withlacoochee PIC, and Carol Breyer, a prior employee with FAEH (TR 1564, 3214-15; CX 222; CX 223; CX 224). One need look no further than this case to understand why the move to block grants has so much support.

Instead, the Grant Officer altered the focus of his case at some point between the issuance of the Final Determination and the hearing. Rather than contending that services were not performed, he charged that the State had not maintained documentation to show that it had performed adequate cost analyses prior to entering into the contracts at issue. According to DOL, all costs going into FUPPB contract prices must be determined and documented prior to letting the contract. The State of Florida does not deny that costs must be documented prior to entering into a FUPPB contract, and contends that it indeed performed cost analyses prior to contract negotiations. However, the State maintains that DOL never requested such documentation during the audit or that supporting documents were destroyed since fraud was the focus of the audit.

The State contends that, under these circumstances, it has been denied due process by being denied the opportunity to properly defend the allegations against it raised by DOL (see, e.g., *Post Hearing Brief of Complainant* at *7).* I find merit in the States's position, at least in regard to Finding 1 of the Final Determination. For at no time -- not in the 'audit report, the Initial Determination, nor the Final Determination -- did DOL allege in regard to the so-called

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1097; 3408- *10).*

layered contracts that the fixed unit prices were unsupported by documentation of cost analyses.' Rather, the State reasonably believed that, under Finding 1, it was being charged with what essentially were allegations of fraud, i.e., that through the layering of contracts the various contractors and subcontractors skimmed off profits without performing any services. Allegations that the State failed to document the basis for its FUPPB contract prices up front were not raised until just prior to the hearing, but even at the hearing DOL was unsure just what it was alleging. Although the State attempted to defend these charges as best it could," it should never have been placed in such a position.

Accordingly, the Grant Officer should not have disallowed costs under Finding 1 due to the State's failure to produce documentation providing the basis for its FUPPB contract prices, and it is therefore recommended that all costs under Finding 1 be allowed.

DOL also contends that the contracts funded by JTPA Title III grants violated §629.38(e)(2) of the Act because (1) the contracts at issue did not provide direct occupational training, and (2) the contracts failed to list all occupations into which clients would be placed and the wage rates they would receive.

The JTPA limits the type of costs that may be charged under the Act. As a result, the regulations require that all costs must be charged to either training, administration or participant support. $629.38(a). Included under the training category are costs such as those for employer outreach, salaries, fringe benefits and equipment and supplies for personnel directly providing training, job related counseling and job search assistance. §629.38(e)(1). An exception exists, though, to this cost allocation rule:

> Costs which are billed as a single unit charge do not have to be allocated or prorated among the several

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[9]The language from the Initial and Final Determination cited on page 16 of the Grant Officer's Post-Hearing Brief are the auditors' recommendations, not allegations of non-compliance. In contrast, in regard to the four FAEH contracts which are discussed in Finding 2 of the Final Determination, the OIG's audit report contends that "unit prices were based on estimates of costs that were not adequately documented or justified . .." (RX 1, at 79). Likewise, although Findings 2 of the Grant Officer's determinations does not raise this issue as unambiguously, it does contend that "the contract unit prices were based on unsubstantiated cost estimates... *(id.* at 16) and "there was no information toindicate that the contracts received adequate cost analysis or that they were justified." *Id*. at 18.

[10]The Grant Officer's flip assertion that even if the State first learned of this allegation at the start of the hearing it had plenty of time to prepare evidence to rebut it since the hearing did not end until November 18 (Grant Officer's Post-Hearing Brief at 17) shows a flagrant disregard for due process.

> cost categories but may be charged entirely to training when the agreement:
>
> > (i) is for training;
> > (ii) is a fixed unit price; and
> > (iii) stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement.

§629.38(e)(2). According to testimony by Woodward, it has been the long-standing position of the Employment and Training Administration that the prime contractor must itself provide training in order to bill costs as a single unit charge under a contract (TR 12 13). Yet this interpretation of §629.38(e)(2) was not codified until March 13, 1989 when an interpretive regulation was issued effective July 1, 1989 which provided that "contracts which qualify for cost allocation provisions of 20 C.F.R. 629.38(e)(2) are contracts for the direct provision of training ... and must not. .. involve intermediary administrative entities." 54 Fed. Reg. 10459 (March 13, 1989). The JTPA contracts allegedly violative of $629.38(e)(2) were all executed prior to 1989, the effective date of this interpretive rule. Therefore, the State of Florida complied with the requirements of $629.38 as the regulation read at the time the contracts were entered into. As for listing specific occupational placements and wage rates in the contracts, DOL failed to raise this issue in a timely manner and therefore has waived its right to hold the State of Florida accountable for such a violation. The Grant Officer had adequate opportunity to raise this issue in his Initial Determination and Final Determination. By raising this issue a week and a half into the hearing despite having issued a preliminary audit report almost two years earlier, DOL has waived its right to have this issue considered.

Therefore, no costs should have been disallowed under Finding 1 in regard to the job training and placement contracts.

It was equally clear at the hearing that the Grant Officer's finding that payments under the administrative support contracts were excessive was based on an absurd position,"[11] unsupported by the language of any of the contracts or other evidence in the record, and wisely appears to have been abandoned as a basis for disallowing costs charged under the four administrative support contracts. DOL, until the rebuttal phase of the hearing, during which Donahue conceded that agendas and minutes represented benchmarks under the contracts, stubbornly insisted that minutes and agendas were the sole services for which payments were

[11] Woodward testified that this finding was based on his "gut reaction" that the charges were excessive (TR 572).

being made under these contract? (TR 35 13). In fact, it is obvious from both the testimony and the actual contracts at issue that the agendas and minutes merely represented evidence that the activities required under the contracts, such as arranging and holding board meetings, had occurred. For example, contract 27256 specifically states that performance units include attendance at Board meetings, participation in committee meetings and the preparation of annual reports and plans (RX 7, at 38-39). For the same contract an activity/payment schedule is included as Attachment D which enumerates several performance units to be completed and states that evidence of their achievement in most cases would be the production of minutes and/or reports (id. at 47). Similar evidence is reflected in the record for contracts 27237 (*see* RX 7, at 81-82, 87-89), 27430 (see RX 7, at 345-46, 350) and 27149 (see RX 7, at 188-93, 208, 237).

Therefore, the only issue left for resolution in this case is whether the State, in regard to the administrative support contracts discussed in Finding 2, provided adequate documentation to support its fixed unit price performance based contracts prices. However, out of an abundance of caution, I will also discuss whether the State had adequate documentation to support its fixed unit price performance based job training and placement contracts.

B. Expiration of Document Retention Period

As a preliminary matter in regard to the issue of documentation of the cost analyses for these contacts, the State has challenged DOL's attempts to disallow costs for its failure to produce documentation for contracts where the three-year period for retention of documents has expired. It seems to be beyond question that DOL cannot require a grant recipient to produce documentation beyond the period the grant recipient is required to maintain such documentation.[12] Therefore, any costs which were disallowed despite the fact that the three-year retention period had expired must be allowed.

Having reached this conclusion, the issue which immediately comes to the fore is how the three-year period for retention of records is calculated. The JTPA regulations provide that records pertaining to all grants and supporting documentation be maintained "for a period of three years from the date of obligation of funds."[13] §629.35(e). OMB Circular A-102,

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[12] The Grant Officer does not contend differently in either his initial post-hearing brief or his reply brief.

[13] "The language of $629.35(e), which went into effect in 1983, was amended subsequent to the date these contracts were entered into. The first amendments, in 1989, changed the time period from which the three year record retention date begins to run to "the last date authorized for the expenditure of funds allotted to a State for a given program year." In 1992, the language was again altered, limiting the record retention requirement under the Act to two years from the date the final expenditure report is submitted to DOL.

Attachment C, on the other hand, requires that records for grants must be maintained for three years from the date of the submission of the final expenditure report. Under either provision, if an audit is begun involving a grant documented by such records, they must be maintained until the audit has been finally resolved. §629.35(f); OMB Circular A- 102, Attachment C. The State of Florida argues that §629.35(e) applies and that the date of the obligation of funds is the date on which the State signed contracts with the prime contractors "and obligated federal funds thereto" (Complainant's Brief, at 38). DOL contends that the State of Florida must present affirmative evidence to establish either of these trigger dates, which it contends they have not done (Respondent's Brief, at 67).

The requirements of §629.35(e) and OMB Circular A-l 02, Attachment C are inconsistent. This conflict must be resolved using general principles of statutory construction which hold that the specific controls the general absent contrary congressional intent. See *United States v. Louwsman, 970* F.2d 797, 799 (1992), *cert. denied,* 113 S.Ct. 1383 (1993) (holding that a precisely drawn statute addressing a specific subject controls a statute dealing with a generalized topic). Therefore, the specific JTPA regulations covering the retention of records under the Act govern the outcome of this inquiry rather than OMB Circular A- 102, which sets out uniform administrative requirements for grants-in-aid to state and local governments.

Unfortunately, neither the legislative history of the Act nor the regulations define the phrase "obligation of funds." But the plain language of this phrase indicates that the funds are obligated when a grant contract is entered into."[14] This action will necessarily place on each party obligations which must be adhered to including placing funds for various programs at stake. Consistent with this interpretation of this phrase is § 16 1 of the Act, 29 U.S.C. §1571, particularly subsection (b), which states that

> Funds obligated for any program year may be expended by each recipient during that program year and the two succeeding program years . . . .

This indicates that funds are obligated at the beginning of the program year, before they are spent. This would generally coincide with the date the contracts to fund the State's programs are entered into.

Section 629.35(e) applies only to those contracts which are funded under JTPA. The disallowed costs under the JTPA contracts still contested by DOL are as follows:

23037 Withlacoochee PIC	$29,264

[14] *See The American Heritage Dictionary* (2d College ed.), which defines "obligation" as "a duty, contract, promise, or other social, moral, or legal requirement that compels one to follow or avoid a give curse of action." Similar definitions are found in *Black's Law Dictionary.*

23077 Panhandle PIC	17,215
Z 087 FAEH	3,780
23 118 Withlacoochee PIC	25,285
23308 Withlacoochee PIC	6,791
23458 - LC 939 FCC-JAX	0
- RD 1153 FCC-JAX	1, 849[15]
- Z 3458A	57,732
23458-B Escambia PIC	4,140
	$146,056

Of these contracts, three were entered into more than three years before the audit relating to this case was begun in March, 1991: 23037 (see RX 3, at 100-10); 23077 (id. at 188-89); and Z3087 (id. at 210-l 1). Therefore, under $629.35(e), the State was no longer obligated to maintain records regarding these contracts by the time the audit was begun; and funds cannot be disallowed for the failure to maintain records for these three contracts. Accordingly, of the $146,056 in JTPA funds disallowed by the Grant Officer, $50,259 should have been allowed because the three year period during which the State was required to maintain supporting documents has expired.

Finally, even if an audit is begun, it stands to reason that unless the grant recipient is aware that the audit is being conducted no obligation to maintain documents beyond the three-year period can be imposed. There is clear and consistent testimony from State employees and its subcontractors in this case that none of them were aware an audit of the fixed unit price cost analyses was being conducted until sometime after the audit was completed. Rather, they were aware only of an audit of other aspects of their programs. This testimony is very credible. That DOL's auditors did not question the contractor or subcontractors in regard to the issues in this case is the only possible explanation for how the auditors arrived at such erroneous conclusions.

Consistent with this testimony is that, unlike DOL's usual procedure when an audit is begun, no entrance conference was held when the audit was expanded to include the fixed unit price contracting (TR 3404). Further adding to the confusion is that the audit of another aspect of the States' JTPA contracts -- the JTPA revenue account -- also started on about March 1, 1991, the same time the audit leading to this case began (see TR 3445-46).

However, an exit conference at which the auditor's initial findings were presented occurred on December 3, 1991 (see RX 2, at 149), and these initial findings clearly concerned aspects of the fixed unit price contracts. Accordingly, not later than December 3, 1991, the State

[15]This was reduced from an initial disallowance of $14,668. See ***Brief of the Grant Officer*** *at* ***61.***

was on notice that these contracts were being audited, and at that point an obligation arose on the State and its subcontractors to retain its documentation.

The three-year period from the obligation of contract funds would have expired prior to December 3, 199 1 in regard to only one additional JTPA contract, 23 118. However, since I find that the State provided adequate documentation in regard to setting the FUPPB price under this contract (see *infra*, at 22), that the State was no longer required to maintain such documentation is irrelevant.

In regard to the contracts funded under the WPA, the records retention requirements of OMB Circular A- 102 apply, under which records must be retained for three years from the date of the submission of the final expenditure report. The State has not submitted evidence establishing this date for any of the WPA contracts. Therefore, there is no basis to find that final expenditure reports were submitted for any of the WPA contracts, and thus no way to calculate whether three years have passed since then. Accordingly, the Grant Officer could require the State to provide documentation under all the WPA contracts.

C. Adequacy of the State's Cost Analyses

The regulations promulgated under the JTPA require that:

> To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient.

20 C.F.R. §629.37(a). Additionally, provisions of OMB Circular A-87 and A- **102** apply to expenditures under both JTPA and WPA and have been adopted by the State of Florida. The relevant provisions of A-87 reiterate that costs must be necessary and reasonable in order to be allowable under the Acts. OMB Circular A-102, Attachment 0 states that:

> Grantees shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

Exactly what information is sufficient to substantiate a cost or price is not detailed in either the circulars or the regulations. At best, the regulations regarding procurement state that "[t]he method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent assessments before receiving bids or proposals." 29 CFR §97.36(f)(1). More important, DOL's witness were

not able to adequately describe the type of information that would have satisfied these requirements. Edward Donahue, who has worked in the field of audit resolution for 12 years (TR 44), testified that a proper documentation of costs requires an examination of what prior experience indicates that it costs an organization to provide similar services in past years combined with a consideration of the type of costs an organization anticipates incurring in administering a contract now, such as present staffing needs (TR 164). Proposed costs must be verified and elements of cost must be evaluated, in his opinion (TR 1208). This statement was supported by rebuttal testimony from Preston Firmin, the assistant regional inspector general for audit for DOL's Atlanta office, who contends that historical data for similar contracts is important; where the placement period remains the same and a contract is successfully performed in one year for a fixed price and the following year a second contract is entered into for the same fixed unit price, there is a presumption that the costs under the second contract are reasonable (TR 3450). Jimmy Woodward, an auditor for 23 years, 11 years with the Office of Inspector and 12 with the Internal Revenue Service (TR 254), testified, though, that in his opinion historical cost data alone does not establish a basis for setting a fixed unit price. Apparently it is a starting point, but there must be detailed back-up documentation justifying the allowed costs (TR 770, 778). Adding to the confusion, Woodward stated that there are no criteria by which to judge an adequate cost analysis; the Department of Labor has not promulgated regulations on how to negotiate a contract nor has the Inspector General written rules from which it can be determined that a fixed unit price has been arrived at properly (TR 647). The Office of Inspector General applies OMB Circulars A-87 and A-102 and the regulations at $629.37 to determine the reasonableness of the FUPPB contracts (id.) All three witnesses concluded, though, that there was no evidence that a cost analysis was performed by the State; the documentation submitted by the State was insufficient to justify the contract costs which, in many cases, increased from year to year.

The State did examine proposed costs through a comparative analysis using historical costs. The State required a line item budget for all JTPA Title III funded contracts; a similar requirement was instituted for WPA grants in 1989 (TR 2741).[16] Proposed costs below historical costs required little more in terms of support; the State required a justification from the prime contractors for proposed prices in excess of past costs. According to Hayden Gray, an administrator in the Bureau of Compliance, Division of Labor, Employment and Training with the Florida Department of Labor, prior to entering into a fixed unit price with a service provider, he would research the costs incurred by organizations running similar programs factoring in geographical differences in cost and examine the historical data available from the Comprehensive Employment and Training Act, the predecessor program to JTPA, in order to

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[16]Under these line item budgets, however, administrative costs did not have to be broken down if the service provider rolled these costs into an administrative cost pool (TR 28680-8 1). The JTPA limits administrative costs to 15% of the total contract price. §629.39(a)(2). The WPA does not have the same administrative cost limit but the State held contractors receiving funding under this Act to the same percentage (TR 2682).

produce an acceptable range of costs (TR 2059-60, 2071). The reasonableness of the contracted for fixed unit price would be determined by performing a comparative cost analysis. The State would produce an average cost for each targeted group for both actual cost and cost per placement (TR 2576) based on the experience by statewide service delivery areas and local Job Services and other state departments such as the Department of Education of running similar programs in the past to see if a contractor's proposed costs were reasonable within the local area (TR 2059-63, 2074, 23 16; RX 1, at 37). If the proposed fixed unit price was below historical cost, the State usually did not probe further (TR 2614). Prices higher than historical costs were allowed in several contracts because they were justified. Many contracts entered into required retention periods of at least 90 days, up from 30 days under prior contracts, which meant more risk and a larger staff (see TR 1797-99); additionally, under certain contracts service providers were combining WPA grants for placement with JTPA training funds which required a great deal of coordination (TR 1787).

Documentary evidence in the record supports these contentions. Although not present for every contract at issue, negotiation worksheets and projected budgets were included in many contract files. It is clear from the paperwork generated during negotiations that the State either required service providers' cost per placement to be no more than historical cost or justify a higher proposed cost with budget figures. For example, Escambia proposed a $900 per placement cost under contract 27109 (CX 284, at 6). The State average was $675 but DLET was willing to offer 10% above the state average, or $742, because Escambia proposed a 90 day retention period for all placements (id.). After Escambia documented the actual cost of its staffing necessary to provide 90 day placements and the amount of time each employee would spend on this particular contract, the State agreed to pay $895.26 per placement (id.). Similar supporting documentation exists for contracts 23118, Z3037, Z3077, Z7189, Z3458, Z7188 and 23308 (CX 276, 277, 278, 279, 287, 275, 288), while cost explanations, documents breaking down costs generally into numerous categories such as cost per attendee at an annual meeting, have been provided for two of the FAEH administrative contracts, Z7149 (RX 8, at 70) and 27430 (RX 8, at 75; RX 7, at 343). An independent audit was also performed on all FAEH contracts (RX 7, at 17).

Moreover, actual costs incurred under several contracts are documented in the record. The salaries and fringe benefits such as health insurance received by FAEH employees under contracts 27047 and 27256 are documented through photocopies of checks to those employees and bills for insurance premiums (CX 11, at l-34). Operational expenses are likewise chronicled; the record contains, for instance, accounting reports and bills, airline tickets, taxi and hotel receipts, rental car bills, cost for tolls and banquets, and interpreter and consulting service invoices (CX 11, at 36-215). For other organizations like Florida Panhandle and Escambia, records detailing the time and money spent on each specific contract for administrative work is not available because, according to Sheffield and Boggs, an administrative cost pool was used; records are available for contract-specific costs related to training and equipment for Florida Panhandle (TR 1445) while Escambia has extensive back-up documentation for staff

expenditures including salaries, health insurance reimbursements and itemized statements of travel (TR 1917; CX 201).

Experience is the best way to determine costs. The State's reliance on historical cost data was not *only* reasonable, but it remedies any lack of detail in their cost analyses for the current contracts at issue because the necessary support was gathered in the years similar contracts were written. Respondent's witnesses, although not in agreement over what constitutes a proper cost analysis, each stated that historical costs were an important factor in evaluating the reasonableness of a proposal. Their criticisms of Florida's specific use of historical data lacks merit. Firmin testified that Florida used a state-wide average which meant costs from expensive areas were factored in with costs from poor areas, yet contracts were bid on by individual localities. Unfortunately, Firmin also stated that he was not very knowledgeable about the method used by the State to average costs. The record shows that these averages are available by SDA and that both client groups and geographical location were taken into account by the State of Florida when it developed acceptable cost ranges (TR 2059; RX 1, at 37). Therefore, costs should be allowed to the extent that historical data were used during negotiations and budgets were provided that were borne out by actual costs expended.

Specifically, all questioned costs will be allowed for the following contracts: Z3118, Z3037, Z3308, Z7099, Z7109, Z7179, Z7189 and 27188. Documentation submitted for contract Z3 118 shows that the average cost per training hour proposed by Withlacoochee, $2505.00, is below the state average of $3890.75 (CX 276). Moreover, while the cost per placement submitted by Withlacoochee is slightly higher than the state average, $2505 versus $2453, this increase in cost was justified for two reasons. In addition to increasing the number of proposed placements exceeding 30 days from 25% of its total placements under the 1987 contract to 66% under the current proposal, Withlacoochee added 400 hours of training to the services it would provide under the contract *(id.).* The same information is available for contract 23308. **A** negotiation summary reveals that the state average cost per training hour times average training hours was $3447 while Withlacoochee was only proposing a similar cost per training hour of $2453. Likewise, Withlacoochee's cost per placement, reduced during discussions from $2500 to $2300, is below the state average cost per placement of $2453. These figures are, moreover, supported not only by a back-up budget but also by evidence that the SDA serviced by Withlacoochee is one of the most economically depressed SDA's in the State when measured by factors such as average personal income and the percentage of individuals below the poverty level.

Similarly, the proposed costs for contract 23037 were agreed to by DLET only after negotiations both increased the number of actual placements and reduced the cost per placement to a level considered reasonable when compared to the 1986 contract and budget (CX 279). More important, the total contract revenue was below the cost of current contracts with the same type and length of training *(id).* Negotiation summaries also support the allowance of increases over historical costs for contracts 27109 and 27189 (CX 284, 285, 287). Escambia requested a cost per placement 33% higher than its approved cost per placement the previous year for both

contracts and 25% higher than the five year State average for contract 27 109 and 32% higher than the five year State average for contract 27 189 (id.). These requested costs were only approved by DLET after budget data for the additional staff necessary to fulfill the proposed 90 day placements periods was submitted (id.). This same budget data is applicable to contracts 27099 and 27179, agreements between DLET and Escambia which cover the same time period and propose the same cost per placement and minimum placement period as contracts 27 189 and 27109. See CX 285. Thus, although the record does not document negotiations for these contracts, the reasonableness of the final contract revenue for contracts 27099 and Z7 179 is supported by this budget data.. Finally, the proposed cost per placement for contract Z7 188 was $63 less than the State average cost per placement; no further justification for this proposed cost is necessary since its reasonableness is supported by past experience (CX 288).

More difficult is the task of resolving the fate of disputed funds where historical data was not supplied, but documentation in the record reflects an effort to justify the contract costs. Costs for two of the four administrative support contracts, 27149 and 27430, will be allowed based on submitted cost explanations as will costs for contracts 23077 and 23458 (which encompasses four subcontracts, RD1153, LC939, Z3458A and Z3458B), based on supplied projected budgets and budget spreadsheets. These budgets and cost explanations are broken down into categories such as staff, travel and tuition, books and supplies for each of the disputed contracts. Most of these categories -- personnel salaries, fringe benefits and tuition and books -- are fixed costs. Admittedly, however, certain budget categories such as travel and supplies lack specificity, *i.e.,* the categories are not broken down into components such as the number of estimated trips that would need to be taken and the method of transportation and type of accommodations that would be used. Yet this type of information is speculative at best prior to actual travel or purchase. Thus, the contracting PICs should not be penalized for proposing generalized estimate for certain budget categories since these figures were drawn from their previous experience administering similar contracts which necessarily entailed travel and the purchase of supplies.

Therefore, the following costs will be allowed: (1) job training and placement contracts -- $25,285 for contract Z3 118; $29,264 for contract 23037; $19,5 15 for contract 27099; $13,511 for contract Z7 109; $19,061 for contract Z7 179; $14,007 for contract Z7 189; $720 for contract Z7 188; $6,791 for contract 23308; $1,849 for subcontract RD1153; $57,732 for subcontract Z3458A; $4,140 for subcontract Z3458B; and $17,2 15 for contract 23077; (2) administrative support contracts -- $155,000 for contract Z7 149; and $90,4 14 for contract 27430.

Just as documented costs should be allowed, fixed unit prices unsupported by adequate documentation must be disallowed. Little to no information was provided in support of contracts Z3087, Z7038, Z7166, Z7178, Z7198, Z7069, subcontract Z7038B and two of the four administrative support contracts, 27237 and 27256. Therefore, all disputed costs under these contracts, totalling $565,17 1, of which $445,65 1 is for job training and placement contracts and S 119,520 is for the administrative support contracts, will be disallowed. Similarly, documentation insufficient to support proposed costs was submitted for several contracts. The

record contains proposal summaries for'two contracts, 27087 and 27097, without providing any support for the requested costs such as budgets, negotiation summaries or historical data (CX 280,281). These costs of $9837, too, must be disallowed. In addition, the submission of actual costs incurred under contract 27047 after the fact does not cure the State of Florida's duty to justify such costs prior to letting the contract.

Finally, the record also fails to contain any documentation in support of costs proposed under contract 27138. Susan Simpler of the Escambia PIC contends that such documentation did indeed exist but was destroyed in 1992 since there was no indication that DOL was conducting an audit in regard to the performance of a proper cost analysis at the time (TR 1705-07).[17] However, contract Z7 138 was a WPA contract, under which records must be maintained for three years from the date of submission of the final expenditure report, pursuant to OMB Circular A- 102, Attachment C. Since there is no evidence in the record identifying the date of submission of the final expenditure report, the State had an obligation to maintain the documentation which supports the fixed unit prices under that contract. Accordingly, the disallowance of $11,745 under this contract would be upheld had it been proper for DOL to consider this issue.

D. Summary

To summarize my findings, all of the disallowed costs still being challenged by DOL under Finding 1 regarding the job training and placement contracts, $813,321, will be allowed because; (1) DOL failed to raise the adequacy of the cost analyses of the fixed unit prices for these contracts as an issue in a timely manner; (2) DOL failed to allege a violation of §629.38(e)(2)(iii) in a timely manner; and (3) the State's subcontracting of the job training component of its contracts did not violate §629.38(e)(2) as that regulationexisted when the relevant contracts were entered into. In regard to Finding 2 regarding the FAEH administrative support contracts, of the $364,934 disallowed by the Grant Officer, $245,414 will be allowed because adequate cost analyses for the fixed unit prices were provided for two of the four contracts, and $119,520 will remain disallowed.

Although unnecessary in light of the above, to the extent it may be found relevant:

(I) the following costs regarding the job training and placement contracts would be allowed as adequately documented: $25,285 under contract 23 118; $29,264 under contract 23037; $19,5 15 under contract 27099; $13,5 11 under contract 27 109; $19,06 1 under contract

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[17] "The same argument could have been put forth by the State of Florida for other records tending to support cost analyses that were not produced at the hearing, but the State is only alleging that documentation relating to contract Z7 138 was destroyed; in fact, throughout the hearing the State maintained that adequate supporting documentation existed for all other disputed contracts, and thus it is surprising that such records were not produced.

Z7 179; $14,007 under contract 27 189; $720 under contract 27 188; $6,79 1 under contract Z3308; $1,849 under subcontract RD 1153; $57,732 under subcontract Z3458A; $4,140 under subcontract Z3458B; and $17,2 15 under contract 23077, for a total of $209,090; (2) an additional $3780 under contract 23087 will be allowed because the three-year documentation retention period had expired before the audit in this case was conducted.[18]

ORDER

IT IS ORDERED that:

(1) All of the costs disallowed by the Grant Officer under Finding 1 of the Final Determination will be allowed; and

(2) Of the $364,934 disallowed by the Grant Officer under Finding 2, $245,414 will be allowed and $119,520 will remain disallowed.

JEFFREY TURECK
Administrative Law Judge

[18]The previously disallowed costs under contracts Z3037, Z3077 and Z3 118 which would be allowed because of adequate documentation also should be allowed due to the expiration of the documentation retention period prior to the audit.

SERVICE SHEET

Case Name: Florida Department of Labor & Employment Security

Case No.: 93-JTP-2

Title of Document: Decision and Order

A copy of the above-titled document was mailed to the following individuals on May 13,1996.

Brenda D. Smith
Legal Technician

David 0. Williams
Office of the Special Counsel
Employment & Training Admin.
Room N-457 1
200 Constitution Ave., N.W.
Washington, D.C. 202 10

Harry Sheinfield
Counsel for Litigation
Office of the Solicitor
Room N-2101
200 Constitution Ave., N.W.
Washington, D.C. 202 10

Regional Solicitor
U.S. Department of Labor
1371 Peachtree Street, N.W.
Room 339
Atlanta, GA 30367

Shirley Gooding, Secretary
Department of Labor and
Employment Security
20 12 Capital Circle, Southeast
Suite 307
Hartman Building
Tallahassee, FL 32399-2 189
Attn: Carolyn D. Cummings, Esq.

R. Lance Grubb
Grant/Contract Officer
Office of Grant and Contracts
Management
U.S. Department of Labor
Employment & Training Admin.
200 Constitution Ave., N.W.
Washington, D.C. 202 10

Sylvia Horowitz, Esq.
Counsel to the Inspector General
U.S. Department of Labor
Washington, D.C. 202 10

Frank P. Buckley, Esq.
Office of the Solicitor
Room N-2101
200 Constitution Ave. N.W.
Washington, D.C. 202 10