component unit pricing which the Air Force seeks. Accordingly, we find that the Air Force's concern in this regard does not provide a reasonable basis for cancellation of the instant RFQ.

Since the Air Force has presented no reasonable basis warranting cancellation of the instant RFQ, we recommend that the Air Force issue a purchase order under the RFQ to Herman Miller. We also find that the protester is entitled to the costs of filing and pursuing its bid protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

The protest is sustained.

B-238323, February 21, 1991

Civilian Personnel

Compensation

■ **Hazardous duty differentials**

■■ **Eligibility**

■■■ **Administrative determination**

Employees' claims for hazard pay differential for handling a potentially hazardous substance may be paid retroactively for hazardous duty performed at Federal Aviation Administration (FAA) facility back to June 15, 1983, which is 6 years prior to the time these claims were constructively filed under 4 C.F.R. § 31.5. Retroactive payment may not be made for hazardous duty performed prior to that date. While the courts have recognized an equitable exception to the statute of limitations in cases where a plaintiff's cause of action was inherently unknowable, the exception is intended to apply where the plaintiff has suffered latent injury at the hands of the defendant. This exception is not applicable to these claims however since there is no evidence that FAA acted wrongly or concealed facts from its employees.

Matter of: FAA Employees—Hazard Pay Differential—Barring Act

This decision responds to a request from the Regional Administrator, Northwest Mountain Region, Federal Aviation Administration (FAA), concerning a claim for hazard pay differential. The issue is whether an exception can be made to the 6-year statute of limitations in 31 U.S.C. § 3702(b) (1982), where the employees were unaware of the presence of a particular toxic substance in their workplace until recently.[1] For the reasons that follow, we conclude that an exception may not be made.

Background

Employees of FAA's Environmental Support Unit, Air Route Traffic Control Center, Salt Lake City, have been assigned responsibility for the chemical treatment of the water at the facility since 1973.

[1] The statute of limitations bars all claims cognizable by this Office which are not received within 6 years after the claim first accrues.

The FAA made a determination on December 12, 1989, that General Sch and wage grade employees at the facility were entitled to environmental h pay differential under the provisions of 5 U.S.C. § 5545(d) (1988), and FPM plement 532-1, appendix J. A determination was made by FAA that the em ees were entitled to hazard pay when their duties included (1) treating l water, (2) treating cooling tower water, (3) inspecting cooling water treat chemicals, (4) transporting and storing chemicals.

With the exception of sulfuric acid the FAA states that the chemicals i water treatment compound were not specifically identified until recently. of the chemicals, hydrazine, has been listed by the Occupational Safety Health Administration as a potential carcinogen. The FAA reports that it ployees had no knowledge that the chemical compound they were using tained hydrazine until late in 1986 when for the first time the word "h zine" was added to the container. Prior to that there was no indication o label, nor was there any other indication, that the compound should be ha with care or that the compound contained anything potentially hazardous.[2]

The FAA employees first filed a claim with their agency on March 12, 1989 the claim was received in this Office on January 16, 1990. The claim was structively filed on June 15, 1989, the effective date of our change in proce for filing claims against the United States. 4 C.F.R. § 31.5. The FAA is awa our decisions which hold that for the purpose of computing the statute of li tions for compensation claims filed in our Office, the date of accrual of the is the particular day on which the services, for which extra compensati claimed, were rendered. *Richard C. Clough*, 58 Comp. Gen. 3 (1978); 29 C Gen. 517 (1950). However, the FAA has requested that we follow an excepti the 6-year limitation period in 28 U.S.C. § 2501 adopted by the United S Claims Court, and allow the employees' claims retroactively to 1973.

The Claims Court has indicated that in certain instances the running o 6-year statute of limitations in 28 U.S.C. § 2501 as to filing a claim wit court will be suspended when an accrual date has been ascertained, bu plaintiff does not know of his claim. To qualify for the exception, the pla must show either (1) that the defendant has concealed its acts with the r that the plaintiff was unaware of their existence, or (2) that its injury wa herently unknowable." *Japwancap, Inc. v. United States*, 373 F.2d 356 (C 1967), *cert. denied*, 389 U.S. 971 (1967), *rehearing denied*, 390 U.S. 975 (1968).

The FAA, in urging that we apply this exception to the 6-year claims limit period in 31 U.S.C. § 3702(b), states that the employees had no actual or structive knowledge of the facts supporting a claim and no reason to in whether their circumstances supported a claim prior to the time "hydra appeared on the label. The FAA however would not apply this exception t handling of known substances by the employees, *e.g.*, sulfuric acid, sin should have been obvious to the employees what they were handling at moment they first handled it.

[2] The employees also on other occasions handled sulfuric acid, a known hazardous chemical substance.

Opinion

Section 5545(d) of title 5, United States Code, and the implementing regulations at 5 C.F.R. 550.901 *et seq.*, provide that a government employee who is required to engage in intermittent or irregular duties that involve unusual physical hardship or hazard is entitled to receive a pay differential in addition to the employee's usual rate of pay. We have held that where an employee was required to perform work as part of his regular duties, which his agency subsequently determines involved hardship or hazardous duty within the meaning of the regulations, the agency must retroactively allow payment for such duty, provided adequate records exist of the work performed. We have reasoned that since the regulations are mandatory, an employee who performs duties involving a hazard listed in the regulations is entitled to the differential for performance of such duties, regardless of when the agency actually identifies the duties as those for which a differential is payable. *See* B-180206, July 16, 1974, and *Ronald V. Bell*, B-221749, July 28, 1986. We have also held that any retroactive entitlement to the hazard pay differential is subject to the 6-year limitation period for filing claims. *Samuel Pavone and Robert Wilgus*, B-222948, Jan. 9, 1987.

In this case, FAA has determined that its employees are entitled to hazard pay differential for handling hydrazine at its facility. The only question is whether the differential may be paid for the hazardous duty performed before June 15, 1983, which is 6 years prior to the time this claim was constructively filed.

As the Claims Court has consistently held, a statute of limitations for filing claims against the government is jurisdictional in its nature and should be interpreted strictly. *Bevelheimer v. United States*, 4 Cl. Ct. 558, 561 (1984). Similarly, we have held that the statute of limitations must be applied without exception, since we do not have any authority to waive the limitations period or make any exceptions to the time limitations it imposes. *Frederick C. Welch*, 62 Comp. Gen. 80, 83 (1982). FAA, however, asks us to make an exception in this case based on the *Japwancap* holding.

Nothing in that case compels a conclusion that the limitations periods should be suspended for FAA's employees. *Japwancap, Inc., supra*, was a suit by a Philippines corporation, filed in 1964, alleging injury due to the government's issuance of counterfeit Japanese currency in the Philippines during World War II. The court held that the suit was barred by the 6-year limitations period since plaintiff should have been aware of its potential suit soon after the war ended. As FAA points out, the court did state that it would suspend the running of the statute when, for example, a defendant delivers the wrong type of fruit tree to the plaintiff and the wrong cannot be determined until the tree bears fruit. *Id.* at 359.

The fruit tree example is not relevant to this claim. A seller who represents to a buyer that a tree will bear one type of fruit breaches his promise when the tree bears another type of fruit and the buyer's claim for breach accrues at that point. Uniform Commercial Code, § 2-725(2), and 3 Williston on Sales, §§ 17-5,

25.19 (4th ed. 1974). In contrast, a claim for hazardous duty pay is a conti claim, for which a separate cause of action accrues on each payday that th ernment fails to include extra pay in the employee's paycheck. *Bevelhein United States*, at 561.

We recognize that, in applying the statute of limitations, the courts hav ignored equitable considerations and under certain circumstances have cr exceptions to the running of the statute. Thus, although a plaintiff's igno of his cause of action will not toll the running of the statute, two judicial ated exceptions to this general rule exist. The statute will be tolled, first, the defendant has fraudulently concealed the cause of action and, second, the cause of action is undiscoverable until later. *See Eimco-Bsp Services Davison Const. Co.*, 547 F. Supp. 57, 59 (D.N.H. 1982). The latter exception effect the inherently unknowable exception discussed by the Court of Clai *Japwancap, supra*, and cited by FAA in support of its employees' claims.

Essentially, this exception was created by the courts to protect a plaintiff the running of the statute until he has had a reasonable chance to discover he has been injured and that the injury may have been caused by the de ant's wrongful conduct. *Eimco-Bsp Services Co., supra*, at 59. The excepti intended to apply where a plaintiff has suffered latent injury at the hand defendant and equity would not be served unless the statute of limitations tolled. *Wall v. Owens-Corning Fiberglas Corp.*, 602 F. Supp. 252, 254 (N.D. 1985). As noted in the cited case, this exception is not to be applied for type of claim. *Id.* at 255.

In this case there is no suggestion that FAA engaged in wrongful con These claims for extra pay are based solely on the fact that FAA's empl performed hazardous duty for many years without their knowledge or F. The agency first found out about the hazard when that fact was revealed b manufacturer of the compound. According to FAA, there was no prior in tion that the compound should be handled with care; nor is there evidence the use of hydrazine in anti-scaling compounds is something that is comm known. In short, there is no evidence that FAA acted wrongly or concealed from its employees.

We share FAA's concern that its employees' interest should be equitably se At the same time, we must balance those interests against the congress policy embodied in the statute. Therefore, while we agree with FAA that it ployees are entitled to retroactive hazard pay differential, the period of tim which the payment is authorized is 6 years as provided by the statute.

Accordingly, the employees' claims for hazard pay differential for handlin chemical hydrazine may not be paid retroactively to 1973, but may be paid to June 15, 1983, as permitted by the statute of limitations.