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Notice

No decisions were selected in August 1995 for publication in Volume 74 of the Decisions of the Comptroller General of the United States. The Decisions of the Comptroller General of the United States will cease publication with Volume 74, so this is the final Advance Sheets notice you that will receive.

Decisions continue to be written and are available from GAO's Document Distribution Center (see ordering data, inside back cover).

Comptroller General
of the United States

Washington, D.C. 20548

124369

Decision

Matter of: Compugen, Ltd.

File: B-261769

Date: September 5, 1995

David R. Johnson, Esq., and James C. Dougherty, Esq., Gibson, Dunn & Crutcher, for the protester.
Jeffrey H. Schneider, Esq., Epstein, Becker & Green, for MasPar Computer Corporation, an interested party.
Fred Kopatich, Esq., Department of Commerce, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In light of the decision in U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), the General Accounting Office (GAO) will no longer exercise jurisdiction over subcontract procurements "for" the government, in the absence of a request by the federal agency involved; nor will GAO consider a sole-source subcontract award to be "by a federal agency" so as to justify taking jurisdiction over a protest of the award, where the prime contractor, in evaluating the protester's proposal and determining to make a sole-source award to another firm, exercised substantial responsibility for the procurement such that the prime contractor could not be said to be a mere conduit for the agency.

DECISION

Compugen, Ltd. protests the award of a sole-source subcontract to MasPar Computer Corporation by PRC, Inc. for a biotechnology sequence search computer system to be provided to the U.S. Patent and Trademark Office (PTO), Department of Commerce, under PRC's prime contract with PTO.

We dismiss the protest.

Since the early 1980s, PTO has sought to establish an automated patent system (APS), which would computerize all patent records and allow text retrieval. To accomplish this, PTO has established a master plan, under which an outside contractor--the systems engineering integrator--

would have the primary role of designing, testing, acquiring, and maintaining the APS. In 1984, PTO awarded a cost-plus-award-fee, task order contract to PRC to be the APS systems engineering integrator.

The prime contract provided that the contractor would acquire automated data processing (ADP) resources in accordance with the policies and procedures of the Federal Information Resources Management Regulation, 41 C.F.R. Part 201-39.[1] Under the prime contract, PTO would review and approve PRC's solicitation documents for APS system resources prior to release by PRC and, in this regard, PRC was required to prepare a source selection handbook and acquisition plan for each planned subcontract acquisition. PTO reserved the right to have no more than two government observers attend meetings of PRC's evaluation or source selection evaluation boards; the contract provided that PTO's observers may ask questions but were not permitted to present their own evaluations or opinions. PTO also reserved the right to approve subcontract selections.

In 1994, PRC awarded a sole-source subcontract to MasPar for that firm's chemical sequencing similarity software system with associated hardware (the 1994 procurement). Prior to the award of this sole-source subcontract, PTO prepared a sole-source justification for the issuance of a task order directing PRC to synopsize PTO's requirements for the computer system, inform potential sources of an intended sole-source subcontract award to MasPar, and acquire the MasPar system. PTO's sole-source justification documented PTO's conclusion that "only MasPar Computer Corporation hardware and software provides the needed compatibility and most cost effective procurement alternative" and "that the MasPar . . . system, was the only available software and hardware currently available that can satisfy PTO's advanced sequence searching requirements." On March 17, 1994, PRC synopsized the sole-source subcontract award in the Commerce Business Daily (CBD).

In May 1994, Compugen contacted PTO regarding the agency's possible requirements for a biotechnology research computer system. Compugen was informed that a MasPar computer system was being acquired by PRC for PTO under PRC's prime contract and pursuant to the March 1994 CBD announcement; Compugen was invited, however, to submit information on its system and was informed that "PTO's intent is simply to maintain an awareness of products that may be of use now or in the future." From May 1994 through March 1995, Compugen and PTO

[1]"ADP resources" are defined by the contract as ADP equipment, commercially available software, maintenance services, and related supplies.

communicated regarding the capabilities of Compugen's system.

On April 5, PRC synopsized in the CBD its intent to award another sole-source subcontract to MasPar for a biotechnology sequence search computer system (the 1995 procurement). The CBD announcement referenced Note 22, which invited interested persons to identify their interest and capability to respond to this requirement. In this regard, the CBD notice provided that:

> "PRC requires that the vendor of any sequence similarity searching software acquired must demonstrate that the products have successfully operated as part of a sequence data base searching service for public access. Further, PRC requires that any searching system acquired be fully compatible with existing SPARC hardware, and SunOS 4.x/Solaris 2.x operating system software at the USPTO. This is required to ensure that the existing hardware and software may continue to function as components of the network used to access the sequence searching software."

Compugen subsequently contacted PRC and submitted a proposal in response to the CBD announcement. After PRC conducted discussions with Compugen concerning the capabilities of its offered computer system, PRC, by letter of May 31, informed Compugen that the firm's offered sequence search hardware and software did not meet PRC's and PTO's present needs. Specifically, PRC stated that it and the government had already invested substantial resources in the MasPar system, and that introduction of Compugen's system would cause delays and require additional training. In addition, PRC concluded that Compugen's system did not provide some of the features of the MasPar system that PTO required. Compugen then filed this protest.

Commerce requests dismissal of Compugen's protest of the subcontract award because the procurement is not by a federal agency but by PRC under its prime contract with PTO. Compugen responds that PRC's subcontract award was "by or for" the government and therefore we have jurisdiction to review this subcontract procurement.

Under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a [f]ederal agency." 31 U.S.C. § 3551(1) (1988). In the context of subcontractor procurements, we interpreted CICA as authorizing our Office to review protests where, as a result of the government's involvement in the award process or the contractual relationship between the prime contractor

and the government, the subcontract in effect is awarded on behalf of the government, that is, where the subcontract is awarded "by or for the government." See 4 C.F.R. § 21.3(m)(10) (1995); see also Ocean Enters., Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. Pursuant to this interpretation, we traditionally reviewed subcontractor selections that were "for" the government, where the subcontract awards concerned (1) subcontracts awarded by prime contractors operating and managing certain Department of Energy, or other agency, facilities; (2) purchases of equipment for government-owned, contractor-operated plants; and (3) procurements by certain construction management prime contractors. Ocean Enters., Ltd., supra.

Our review role of the award of subcontracts was called into question by U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), which held that under CICA the General Services Administration Board of Contract Appeals (GSBCA) did not have jurisdiction over protests of subcontract awards; the court of appeals held, construing statutory language basically identical to that applicable to our Office, that the GSBCA does not have jurisdiction over subcontract procurements that were conducted "for" a federal agency, in the absence of a showing that the prime contractor was a procurement agent, as defined by the Supreme Court in United States v. New Mexico, 455 U.S. 720 (1982), and the court of appeals in United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983).[2]

In response to this decision, we declined to review subcontract procurements conducted by Department of Energy management and operating prime contractors in the absence of

[2]Compugen argues that PRC under this contract satisfies the tests set out in New Mexico and Johnson Controls, so as to be considered a procurement agent for the purposes of this procurement. Those decisions held that, to be considered a procurement agent, the prime contractor must be (1) acting as a purchasing agent for the government; (2) the agency relationship between the government and the prime contractor must be established by clear contractual consent; and (3) the contract must state that the government would be directly liable to vendors for the purchase price. See 455 U.S. at 742; 713 F.2d at 1551-52. Here, there is no evidence that the prime contract established an agency relationship between PRC and the agency or provided that the government was directly liable to vendors/subcontractors for the purchase price.

a request by the agency that we do so.[3] Geo-Centers, Inc., B-261716, June 29, 1995, 95-2 CPD ¶ ___. Also in response to the U.S West decision and in the absence of any authorizing language in the recently enacted Federal Acquisition Streamlining Act of 1994, Pub. Law No. 103-355, Oct. 13, 1994, we issued final revisions to our Bid Protest Regulations confirming that we review of protests of subcontract awards only upon the written request of the federal agency that awarded the prime contract. See 60 Fed. Reg. 40,742-743 (1995) (to be codified at 4 C.F.R. §§ 21.5(h), 21.13(a)).[4] The protester here has not persuaded us that our view of the applicable law is erroneous. Accordingly, in the absence of a request by the federal agency concerned, we decline to take jurisdiction of this subcontract procurement "for" the government.

Compugen also asserts that we should take jurisdiction in any event because the agency's involvement is so pervasive that PRC is in effect merely a conduit for PTO and therefore this procurement is "by" the government.[5] We have reviewed subcontract procurements where the government's involvement in the award process is so pervasive that the subcontract is in effect awarded "by" the government. We have considered a subcontract procurement to be "by" the government where the agency handles substantially all the substantive aspects of the procurement, leaving to the prime contractor only the

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[3]The Department of Energy revised its regulations, effective June 2, 1995, to eliminate language providing for our bid protest review of its management and operating contractor procurements. See 60 Fed. Reg. 28,737 (1995).

[4]These revisions will become effective October 1, 1995.

[5]Compugen also argues, citing our decision in Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8, that we will take jurisdiction over a subcontract procurement where a protester merely alleges that the government is using a prime contractor as a conduit to evade the competition requirements of CICA. Compugen misreads this decision. In Premiere Vending, we considered whether a non-appropriated fund instrumentality--an employees club of the Federal Bureau of Prisons--in conducting a procurement was acting as a conduit for the agency in order to circumvent the requirements of CICA; we found that the employees club was not acting as a conduit for the agency and did not review the merits of the protest.

procedural or ministerial aspects of the procurement, i.e., issuing the subcontract solicitation and receiving proposals. See St. Mary's Hosp. and Medical Center of San Francisco, California, 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597; University of Michigan; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. On the other hand, we have found subcontractor procurements were not "by" the government, even where the agency effectively directed the subcontractor selections, where the prime contractor handled other meaningful aspects of the procurement. See ToxCo, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170; Kerr-McGee Chemical Corp., B-252979, May 3, 1993, 93-1 CPD ¶ 358, aff'd, B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120.

Here, the record establishes that PRC retained substantial responsibility for the conduct of the 1995 subcontract procurement, such that it did not act as a mere conduit for the government. Although Compugen argues that PRC does not have the expertise to evaluate the sophisticated system that is to be acquired;[6] that PRC did not comply with the documentation requirements of its prime contract for conducting APS resource procurements; and that the agency directed PRC to award a sole-source contract to MasPar in 1994,[7] we find none of these factors establishes that PRC acted as only a conduit for the agency. The evidence in the record, including the affidavits provided for PRC and agency personnel, establishes that it was PRC, and not the agency, which received and evaluated Compugen's proposal in response to the April 1995 CBD announcement and which determined that award should be made to MasPar. Specifically, PRC conducted all the discussions with Compugen regarding the acceptability of its proposal in response to the 1995 CBD announcement,[8] and the only contemporaneous evaluation

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[6]We do not find that PRC lacks the expertise to evaluate the biotechnology sequence search system that is being acquired by PRC.

[7]The relationship and conduct of the agency and PRC in 1994 with respect to the acquisition of the MasPar equipment does not ipso facto establish, as Compugen asserts, that PRC is acting as a conduit for the agency in 1995, even assuming the agency directed PRC to acquire MasPar equipment in 1994. Compugen did not timely protest the 1994 acquisition of the MasPar equipment.

[8]The affidavit of Compugen's director of marketing confirms that after the April 5, 1995 CBD announcement, PTO's only communications with Compugen regarding that firm's offered system were to inform Compugen that PRC was conducting the procurement, that PRC was acting in its own capacity as a

(continued...)

documentation in the record is PRC's letter to Compugen detailing PRC's reasons for rejecting Compugen's proposal. In addition, the affidavits of PRC's and the agency's personnel evidence that PRC acted in more than a ministerial way in making this subcontract award and that, consistent with the PRC contract, the agency was not actively involved in the evaluation and source selection. In sum, the record indicates that PRC's involvement in the procurement is more than that of a mere conduit for the government, and we therefore find that this procurement is not, in effect, by the government. See ToxCo, Inc., supra.

The protest is dismissed.

Ronald Berger
for Robert P. Murphy
General Counsel

[8](...continued)
private company, and that Compugen should have received notice from PRC that PRC was making award to MasPar.

Comptroller General
of the United States

Washington, D.C. 20548

1212119

Decision

Matter of: Precision Metal Products, Inc.

File: B-261680

Date: September 8, 1995

Sam Zalman Gdanski, Esq., for the protester.
Marvin G. Spallina, for Pratt & Whitney, an interested party.
Milton D. Watkins, Esq., and Richard P. Castiglia, Jr., Esq., Department of the Air Force, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly denied protester's source approval request for flight critical part, thereby precluding protester from competing, is denied where solicitation was restricted to qualified sources, which were actual manufacturers of the part, and agency reasonably concluded that protester's limited experience in the manufacture of similar parts, and the technical data submitted in that regard, was insufficient to demonstrate that the firm could manufacture the part in accordance with the strict quality control required.

DECISION

Precision Metal Products, Inc. protests the Department of the Air Force's refusal to approve it as an alternate source, and the award of a contract to Pratt & Whitney (the original equipment manufacturer (OEM)), under request for proposals (RFP) No. F34601-95-R-53025, for 3,018 two-blade sets applicable to the TF-33/TF-5/TF-9/TF-102 engines for the C-18/C-135 aircraft.[1]

We deny the protest in part and dismiss it in part.

The blades are critical rotating engine components, whose reliability depends on strict quality control, and failure

[1]The two-blade sets, part number (P/N) 430241, are first stage compressor rotor blades and consist of two individual blades of P/N 430401.

of which can lead to loss of aircraft. The Air Force determined that the government lacked the manufacturing knowledge or technical process data essential to maintaining the quality control of the part and which would permit a full and open competitive procurement. The RFP therefore was restricted to qualified sources. Due to the complexity and criticality of the part, the agency determined that only actual manufacturers that have successfully completed all testing required by the OEM (Pratt & Whitney) could be considered approved sources; this resulted in two approved sources--Pratt & Whitney and Airfoil Textron, Inc., a division of Compressor Components. The qualification requirements, referenced in the solicitation, advised offerors that to be considered for award, they must (1) be an approved source; (2) submit evidence of having satisfactorily supplied the required part directly to the government or to the OEM; or (3) submit other documentation such as engineering data and quality assurance procedures that would allow the Air Force to determine the acceptability of the part offered.

Precision Metal submitted a source approval request (SAR), seeking qualification as an alternate approved source on the basis that it had manufactured and/or forged blades similar to those solicited.[2] According to the protester, it had (1) manufactured similar blades, P/N 9531M21P04, for the General Electric Company (GE) F-110 engine, and (2) forged similar blades, P/N 694301, for the Pratt & Whitney TF-33 engine for Ex-Cell-O Corporation (now known as Airfoil Textron, one of the two approved sources here). The protester submitted a data package with its approval request.

The Air Force denied Precision Metal's source approval. The agency determined that the firm's involvement in the manufacture of blades similar to the ones solicited was not acceptable evidence of the firm's capability to produce the blades under this solicitation, and that there was insufficient technical data to evaluate the firm as an alternate source based on similar manufacture. The Air Force's inquiry revealed that while Precision Metal had supplied forgings for GE's F-110 first stage blade, it was never an approved source for the manufacture of the blade. Moreover, the agency determined, even if Precision Metal had manufactured the GE blade, that alone would not qualify the firm to provide the Pratt & Whitney blade here, since GE and Pratt & Whitney utilize different manufacturing processes and process controls.

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[2]Manufacture of the blades includes forging, machining, and post-machine processing.

The Air Force also determined that the protester's claimed forging of the similar Pratt & Whitney blade did not warrant approval; forging alone did not qualify as manufacturing and, in any event, Precision Metal provided no evidence that its performance under that contract included the technical process data essential to maintaining the quality of the part. In this regard, the Air Force engineer specifically determined, and notified Precision Metal by memorandum, that he lacked sufficient technical process data to evaluate the firm's "proposed forging processes, subsequent changes to processes, and manufacturing nonconformances during all stages of the manufacturing process (raw material, ingot, forging, and finished product)." According to the engineer, the missing data consisted of (1) "the design data or the design margins for these fan blades," (2) "all the particulars of the Pratt and Whitney substantiation [i.e., the manufacturing processes and quality assurance data] for these types of items," and (3) "the history of waivers and deviations for these forgings and finished blades." Without this information, the engineer stated that "the potential failure of a blade and subsequent liberation of fragments remains an unacceptable risk." The engineer concluded that "[f]or the foreseeable future, only those manufacturers that have been approved by the OEM as a forging source . . . and have manufactured that forging on a production basis, will be considered as an approved forging source for a fan blade" and "only those manufacturers that have final machined this blade will be acceptable as alternate sources."

The agency rejected Precision Metal's offer as technically unacceptable, since the firm did not qualify as an approved source for the part, and made award to Pratt & Whitney, the sole offeror. The protester submitted an agency-level protest against the denial of its SAR, which the agency denied. This protest to our Office followed.

Precision Metal contends that the Air Force determination that it does not qualify as an approved source lacked a reasonable basis. The protester maintains that its experience in forging and manufacturing similar blades was sufficient for approval as an alternate source. It submits evidence that it was in fact an approved source for the similar GE blade, and contends that the technical process data for the similar Pratt & Whitney blade was not necessary for the evaluation of the SAR, since it (1) "anticipates no forging process modifications to manufacture P/N 430401 [the part number solicited here] from the Pratt & Whitney-approved forging process for P/N 694301," (2) "will not request waivers and deviations and . . . its parts would be manufactured through exactly the same process as the prior TF-33 blades were produced," and (3) "certifies that there will be no nonconforming blades shipped in performance of any resultant order for this component."

Applicable regulations permit agencies to limit competition for the supply of parts necessary to assure the safe, dependable, and effective operation of government equipment. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 17.7501(b)(2). Under these circumstances, competition may be limited to the original manufacturer of the equipment or other sources that have previously manufactured or furnished the parts so long as the action is justified. Id.; see also Hill Aviation Logistics, 67 Comp. Gen. 224 (1988), 88-1 CPD ¶ 140. When a contracting agency restricts contract award to an approved product, and imposes a qualification requirement, as here, it must give unapproved sources a reasonable opportunity to qualify. 10 U.S.C. § 2319 (1994); Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2; Advanced Seal Technology, Inc., B-249855.2, Feb. 15, 1993, 93-1 CPD ¶ 137. We will not disturb an agency's technical determination concerning the acceptability of alternate products and the qualifications of offerors unless it is unreasonable. Electro-Methods, Inc., B-255023.3; B-255023.4, Mar. 4, 1994, 94-1 CPD ¶ 173.

The critical nature of the blade sets clearly brings the procurement within the scope of DFARS § 217.7501; the item is a high rotational component, the failure of which can be catastrophic and lead to loss of aircraft, and the Air Force determined that the reliability of the item is dependent on "strict quality process control" which in turn depends on unique manufacturing knowledge or technical process data that is not economically available to the agency.[3]

While Precision Metal has been involved in the manufacture of similar blades, the firm has not manufactured the actual solicited part or met all testing requirements established by the OEM for the solicited part. The GE and Pratt & Whitney blades on which Precision Metal's SAR is based are part numbers different from the one here and, in any case, there is no evidence that either of these blades met the required OEM testing for the blade solicited. Since Precision Metal also was unable to furnish the technical manufacturing process control data the agency is missing, the agency reasonably determined that the firm had insufficient manufacturing involvement with the current

[3]To the extent Precision Metal takes issue with the agency's determination in this regard, the protest is untimely; arguments based on alleged solicitation improprieties must be raised before the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1995).

part, and had submitted insufficient data, to warrant qualification as an approved source.[4]

Precision Metal's blanket statements that it will manufacture the blades in compliance with the required processes, not request waivers and deviations, and not ship nonconforming blades are not a basis for compelling the agency to grant it approved source status. See Pacific Sky Supply, Inc., 64 Comp. Gen. 194 (1985), 85-1 CPD ¶ 53.

The protester maintains that the Air Force's assertion of a lack of design data or margins for the fan blade is not a legitimate concern; it cites the fact that the Air Force allowed the blades to be weld repaired as evidence that there are no significant design concerns. Under our Bid Protest Regulations, arguments such as this must be raised within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2); Palomar Grading and Paving, Inc., B-255382, Feb. 7, 1994, 94-1 CPD ¶ 85. The basis for this argument is the agency engineer's April 19, 1995, SAR disapproval memorandum, which was faxed to the protester on May 15. Since the argument was first raised on August 2, in the protester's comments on the agency report, it is untimely and will not be considered.

The protest is denied in part and dismissed in part.

Ronald Berger

for Robert P. Murphy
General Counsel

[4]For example, as previously mentioned, the protester has not provided evidence that its part meets all testing required by the OEM. Nor has the protester provided assurances that it will use only qualified subcontractors.

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Social Security Trust Funds' Appropriations

File: B-261522

Date: September 29, 1995

DIGEST

The amount of funds appropriated to the Social Security trust funds under 42 U.S.C. § 401(a)(3) is tied to the amount of wages certified to the Secretary of the Treasury by the Commissioner of Social Security on the basis of the Social Security Administration's (SSA) records of wages established and maintained by SSA in accordance with wage information reports. The Commissioner, SSA, may consider both individual employee wages, as reported annually by employers to SSA, and wage information reported quarterly by employers to the Internal Revenue Service on Forms 941, in certifying wages to the Secretary of the Treasury.

DECISION

By letter dated May 24, 1995, the Deputy Commissioner for Finance, Assessment and Management, Social Security Administration (SSA), requested our opinion on whether SSA can use wage data collected by the Internal Revenue Service (IRS) in calculating the amount of employee wages for purposes of section 201(a)(3) of the Social Security Act (Act). Section 201(a)(3) appropriates from the general fund of the Treasury into the Social Security Old Age, Survivors and Disability Insurance and Medical Health Insurance trust funds (Trust Funds) amounts determined by applying the applicable tax rate to employees' wages as "certified by the Commissioner of Social Security on the basis of the records of wages established and maintained by such Commissioner in accordance with [wage information] reports [provided the IRS]." 42 U.S.C. § 401(a)(3).

Background

Section 201(a)(3) annually appropriates to the Trust Funds an amount equivalent to the amount of taxes imposed by certain employment tax laws. As a matter of practice, the Secretary of the Treasury transfers estimated amounts from the general fund of the Treasury to the Trust Funds subject to subsequent adjustments when the estimates are found to have been less than or in excess of actual taxes imposed. Section 201(a)(3) specifies that the Secretary of the Treasury is to determine the amount of taxes imposed "by applying the applicable rates of tax" to

the wages reported by employers to IRS, "which wages shall be certified by the [Commissioner of SSA] on the basis of the records of wages established and maintained by such [Commissioner] in accordance with such reports" of wages[1] filed by employers. 42 U.S.C. § 401(a)(3).[2]

Prior to 1978, Department of Treasury regulations required employers to submit to IRS quarterly reports of employee wages subject to social security taxes on a two-part Form 941, "Employer's Quarterly Federal Tax Return." One part of the form showed, in the aggregate, the wages paid by the employer and the taxes due for all of the employer's employees. In addition to this information, the other part of the form, Form 941A, listed each employee by name, Social Security number, and the amount of wages paid to the employee for that quarter. IRS sent the Forms 941A to SSA which then posted this wage information to individual employee wage records.

In response to employers' concerns about the burden imposed by these reports,[3] Congress, in 1976, directed IRS and SSA to implement a combined annual wage reporting (CAWR) system.[4] Pub. L. No. 94-202, sec. 232, 89 Stat. 1135 (1976) (codified at 42 U.S.C. § 432). Under the CAWR system, employers submit quarterly reports to IRS on Form 941. As noted above, the Form 941 includes only aggregate quarterly totals of wages paid and taxes which are due. As a result, employers no longer report quarterly, either to IRS or SSA, wages earned by individual employees. Instead, once a year, employers submit W-2 (listing Social Security wages earned by individual employees) and W-3 (providing an aggregate summary of wages paid and

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[1]SSA's earnings records include both wages and self-employment income. The issue here is limited to wages earned by individuals employed by others.

[2]Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994), under which SSA was made independent of HHS, beginning in 1995 the Commissioner of SSA must certify wages. SSA has, in the past, always certified wages on behalf of the Secretary of HHS.

[3]"The preparation and filing of this quarterly report involve[d] considerable effort and expense on the part of employers particularly in the case of small and medium-sized companies which d[id] not have the advantage of computerized payroll systems." S. Rep. No. 550, 94th Cong., 1st Sess. 9 (1975). Congress estimated the annual cost to small business as a result of this requirement for detailed quarterly reports to be as high as $235 million per year in 1975 dollars. Id.

[4]This law directed IRS and SSA to "enter into an agreement for cooperative processing of a revised annual wage reporting form (i.e., form W-2) in a manner which will most effectively and efficiently provide each agency with the information it requires." S. Rep. No. 550, 94th Cong., 1st Sess. 9 (1975).

taxes withheld) forms directly to SSA.[5] SSA records the W-2 and W-3 wage information in its individual Social Security wage account records, and forwards the W-2 and W-3 information to IRS. IRS then compares the W-3 wage totals to the Form 941 wage totals.

Under the CAWR system, employers submit wage data to IRS and SSA in different form, prepared at different times of the year. Although the total of each employer's quarterly Form 941 reports to IRS should equal the total earnings that an employer annually reports to SSA on its W-2s and W-3s, for a number of reasons, that is not always the case.[6] Employers generally report more wages on their reports to IRS than to SSA. In 1987, for example, significant differences existed between the amount of wages reported by employers to SSA and IRS. Between 1978 and 1987, cumulatively, employers reported over $58 billion less in wages to SSA than to IRS. Social Security: More Must Be Done to Credit Earnings to Individuals' Accounts, GAO/HRD-87-52, Sept. 18, 1987.

Because of difficulties in reconciling amounts reported by employers on their Forms 941 and on their W-2s and W-3s, SSA has not made a final certification of wages for purposes of section 201(a)(3). In 1992, we reported that there was a cumulative difference of over $55 billion between IRS's and SSA's wage records. Reconciliation Improved SSA Earnings Records, but Efforts Were Incomplete, GAO/HRD-92-81, Sept. 1992 (1992 GAO Report).

Soon after Congress enacted the CAWR system, SSA and IRS entered into a formal Memorandum of Understanding (MOU) to share wage data and to resolve, or reconcile, the differences in the wages reported to them. Generally, the reconciliation process includes SSA contacting employers to obtain corrected wage information. SSA also refers certain cases to IRS to contact employers and to assess penalties. Penalty enforcement became a critical component of the reconciliation process beginning in 1988, and remains so under the most recent MOU, implemented in 1994.

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[5]W-2 and W-3 forms are due by the end of February following the tax year ending December 31. The date for the 4th quarter filing of the Form 941 is the end of January.

[6]SSA informed us that the primary reason for the discrepancies is the different reporting due dates for the Forms 941 and the W-2 and W-3 forms. See n. 5 supra. Other reasons include (1) employers misunderstanding of the wage reporting instructions, (2) businesses terminating operations during the year, and (3) errors made and corrected with either IRS or SSA but not both. See Reconciliation Improved SSA Earnings Records, but Efforts Were Incomplete, GAO/HRD-92-81, Sept. 1992, at 22-26.

SSA and IRS established a three-step process to determine trust fund revenues: (1) initial transfers based on revenue estimates in the President's annual Budget submission to the Congress; (2) interim adjustments based on SSA's certification of taxable wages reported by employers on quarterly 941 reports to IRS; and (3) final certifications based on SSA's detailed wage records of earnings, including the W-2 and W-3 forms filed by employers.

Currently, SSA is unable to reconcile approximately $11.1 billion. Of the amounts of social security taxes employers have reported as owed to the IRS, SSA cannot allocate, on the basis of the W-2s and W-3s submitted to it by employers, the unreconciled amounts to individual employee accounts. SSA carries the unreconciled amounts in a suspense account for allocation to the record of wages of the proper employees once the amounts are reconciled. Because of its concerns about the completeness of the wage records submitted to it, SSA has only made interim certifications of Trust Fund revenues to the Secretary of the Treasury. On this basis, the Trust Funds have been "provisionally" credited with the unreconciled amount.

Analysis

Until last year, SSA recorded the "unreconciled" amount (the $11.1 billion) as part of the Trust Fund's revenues on its financial statement. At the encouragement of its Inspector General, SSA showed this amount as a liability to the general fund on its fiscal year 1994 statement. The Inspector General has argued that under section 201(a)(3), the Trust Fund is entitled only to the amount of taxes imposed based on wages shown in "records of wages established and maintained" by SSA.[7] According to the Inspector General, when SSA cannot reconcile its W-2 and W-3 data to IRS's Form 941 data, SSA must defer to the W-2 and W-3 data. Because SSA cannot account for the additional $11.1 billion shown on the Forms 941, the Inspector General reasoned, the Trust Fund is not entitled to it.

SSA argues, on the other hand, that in certifying wages pursuant to section 201(a)(3), SSA can take into account information reported to IRS on Forms 941. SSA maintains that the information reported on the Forms 941 is the most accurate and complete wage information available to the government. SSA also argues that to the extent unreconciled Form 941 wages exceed W-2 wages, it is logical to include the unreconciled wages in the amount certified. In this regard, SSA points out that the employers treated the unreconciled amount as Social Security wages and reported social security taxes on such wages. Further, according to SSA, there

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[7]This opinion is consistent with the view expressed in an earlier GAO report, Reconciliation: Improved SSA Earnings Records, but Efforts Were Incomplete, GAO/HRD-92-81, Sept. 1992, at 27-30.

is insufficient evidence to conclude that they do not represent actual Social Security wages. Finally, SSA observes that excluding wages reported on Forms 941 from the amount certified would result in crediting to the general fund amounts that employees had paid to satisfy their social security tax liability.

The issue is whether SSA can use wage data collected by IRS in certifying the amount of wages for purposes of section 201(a)(3). To the extent relevant here, section 201(a)(3) provides as follows:

> "There is hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund . . . out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of . . . (3) the taxes imposed . . . with respect to wages . . . reported to the Secretary of the Treasury or his delegates pursuant to subtitle F of Title 26 after December 31, 1954, as determined by the Secretary of the Treasury by applying the applicable rates of tax . . . to such wages, which wages shall be certified by the Commissioner of Social Security on the basis of the records of wages established and maintained by such Commissioner in accordance with such reports . . . ."

As the Inspector General points out, section 201(a)(3) requires the Commissioner to certify wages "on the basis of the records of wages established and maintained" by the Commissioner. In analyzing the issue at hand, it is important to view section 201(a)(3) as a whole. The certification requirement imposed on SSA by section 201(a)(3) refers to records of wages established and maintained by SSA "in accordance with such reports." The reference to "such reports" includes the Form 941 mentioned earlier. The word "accordance" is defined to mean in agreement, harmony, and consistent with. Webster's Ninth New Collegiate Dictionary (1987). The plain meaning of the language of section 201(a)(3), referring to SSA records maintained "in accordance with" the Forms 941, clearly indicates that the law expects SSA's records to reflect the wage data reported to IRS on the Forms 941.

One could argue that the reference to "such reports" only meant the old Form 941A (not the aggregate wage data captured by the Form 941) that reported individual employee wage information by employee name and social security number. This reading would, however, render the statutory phrase "in accordance with such reports" meaningless, contrary to established maxims of statutory construction. We also find no indication of a congressional desire to exclude reliable sources of information such as the Forms 941 from the Commissioner's consideration when certifying wages. To the contrary, Congress in section 205 of the Social Security Act, 42 U.S.C. § 405, did not limit the sources of information the Commissioner could use in establishing individual wage accounts. Section 205(c)(2)(A) provides as follows:

"On the basis of information obtained by or submitted to the Secretary, and after such verification thereof as he deems necessary, the Commissioner of Social Security shall establish and maintain records of the amounts of wages paid to and the amount of self-employment income derived by, each individual and of the periods in which such wages were paid and such income was derived . . . ."

Section 232 of the Act appears to confirm this reading. Before section 232 was enacted in 1976, SSA received essentially the same wage information that was sent to IRS, and the information went to both agencies at the same time. Before 1976, therefore, SSA had little difficulty in concluding that the wage information in its individual employee files were "in accordance with" wage information reported to IRS and Treasury. Thus, SSA had no problem making its final certification of wages required under section 201(a)(3). When Congress enacted section 232 in 1976, initiating the CAWR, Congress anticipated the need for SSA to access IRS wage data to ensure that SSA's wage records would be as accurate after implementation of CAWR as before. Section 232 directs the Secretary of the Treasury to make the Forms 941, as well as other necessary tax information, available to SSA. It authorizes Treasury and SSA to enter into an agreement to accommodate such exchange of information; and it instructs SSA to process that information. 42 U.S.C. § 432.

Reading section 232 together with sections 201(a)(3) and 205(c)(2)(A) suggests that SSA should not rely, for purposes of the section 201(a)(3) wage certification, solely on data collected from the W-2s and W-3s, but also may refer to data from the Forms 941.[8] We find support for this view in the legislative history of section 232. The Senate Finance Committee explained that IRS and SSA should "enter into an agreement for cooperative processing of a revised annual wage reporting form . . . in a manner that will most effectively and efficiently provide each agency with the information it requires." S. Rep. No. 550, 94th Cong., 1st Sess. 9, 10 (1976). Moreover, the Senate Finance Committee stated that "the information sharing should not have any impact on the financial status of the social security program." Id.

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[8]"In ascertaining legislative intent, whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together." 2A J.G. Sutherland, Statutes and Statutory Construction, § 51.02 (4th ed. C.D. Sand ed. 1972). See Morton v. Mancari, 417 U.S. 535, 550 (1974); 54 Comp. Gen. 371, 373 (1974); B-236057, May 9, 1990.

SSA's characterization of the reliability of the IRS Form 941 wage data is, we believe, sound. SSA asserts that the Form 941 data is the most accurate and complete wage data available primarily because employers, when reporting it as wages subject to social security taxes, claimed taxes as due on it. SSA's assertion is compelling, especially in light of the fact that the information reported on a Form 941 is subject to IRS audit and the employer is subject to penalty for filing incorrect information. Consequently, we conclude, to the extent SSA believes the Form 941 data will improve the accuracy of its own records, SSA may consider, and where appropriate use, this data in making a final certification.

James F. Hinchman

Comptroller General
of the United States

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