GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

RECYCLING SOLUTIONS, INC.	)	
	)	CAB No. P-377
Under RFP No. OMS-0132-AA-KH	)	(Eagle's Costs)

For Eagle Maintenance Services, Inc.: Frederick D. Cooke, Esq., Rubin, Winston, Diercks, Harris & Cooke. For Recycling Solutions, Inc.: Robert L. Duston, Esq., Schmeltzer, Aptaker & Shepard, P.C. For the Government: Howard Schwartz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Matthew S. Watson, concurring.

OPINION

On February 1, 1993, Eagle Maintenance Services, Inc. ("Eagle") and the District purported to enter into Contract No. OMS-0132-AA-KH, for Eagle to receive, process, and market recyclable materials collected by the District. The award was protested by Recycling Solutions, Inc. ("RSI"), when it learned of the basis for award in June 1993. After extensive protest proceedings, the Board sustained RSI's protest and declared that the District's purported contract award to Eagle was void a*b initio* pursuant to D.C. Code § 1-1182.5(d)(1). The District's Department of Public Works ("DPW") sought judicial review of the Board's decision and Eagle continued to perform recycling work under the invalid contract until the end of April 1995. During the approximate 2-year performance period, Eagle submitted invoices for payments and Eagle received payments from DPW totaling \$2,070,056. Purporting to settle disputed amounts while Eagle's cost claim was pending before us, DPW paid Eagle an additional amount of \$1,071,966 in January 1996, which brought the total payments to Eagle to \$3,142,022. To avoid the harsh result of a contractor forfeiting all compensation for work actually performed, even though no valid contract ever existed, section 1-1182.5(d)(2) provides that a contractor, who enters into a contract in good faith without knowledge of or contributing to the procurement violations that rendered the purported contract void, is entitled to be compensated for reasonable costs it actually incurred. After conducting proceedings regarding Eagle's compensation under section 1-1182.5(d)(2), including a financial audit conducted by the Office of the Inspector General, submissions by the parties, and an evidentiary hearing followed by briefing, the Board concludes that Eagle is entitled to net actual costs incurred on the District recycling job of \$2,182,059. Because the District has made total payment to Eagle of \$3,142,022, the District has overpaid Eagle by \$959,963.

BACKGROUND

This matter arises from the protest of RSI in which RSI contested DPW's purported contract award on February 1, 1993 to Eagle under RFP No. OMS-0132-AA-KH. Eagle was to receive, process, and market recyclable materials collected by DPW, and to buy back recyclable containers brought to Eagle by District residents. Eagle began performance on March 22, 1993. RSI filed its protest on June 16, 1993. During protest proceedings, Eagle continued performing and the District made payments on Eagle invoices. In our April 15, 1994 decision, *Recycling Solutions, Inc.*, CAB No. P-377, 42 D.C. Reg. 4550, we sustained RSI's protest and ordered the District *inter alia* to cancel Eagle's contract on the ground that the contract was void *ab initio*. The DPW Director, who was also the contracting officer, filed an action in Superior Court, *Francis v. Recycling Solutions, Inc.*, 94-CA-5461, challenging our April 1994 decision, including the Board's holding that the Eagle contract was void *ab initio*. Eagle continued to perform recycling services for DPW and DPW continued to pay Eagle. Because no valid contract ever existed, we will refer to Eagle's work as the District recycling job.

On April 18, 1995, the Superior Court dismissed DPW's action. On the same date, we advised the parties to consult and report back to the Board if further action on our part was needed regarding the directions contained in our April 1994 decision. By letter dated April 24, 1995, DPW purported to "cancel" Eagle's contract under Article 6 of the void contract -- essentially, a convenience termination -- on the grounds that DPW had insufficient funding to continue performance. (Exhibit 1, Motion of the District of Columbia to Vacate, in Part, the Relief Ordered by the Board, filed June 5, 1995). On April 28, 1995, Eagle submitted to DPW a demand for a termination payment in the amount of $6,644,777.05. Eagle later increased its claim to $6,710,757.22. (Attachment 2, District's August 11, 1995 Status Report). In a submission of claimed costs to the District's auditors within the Office of the Inspector General ("OIG"), Eagle set forth a summary of costs totaling $4,331,706, plus additional costs of acquiring and constructing a new District-based recycling facility totaling $5,548,367. (HEX 65B, Appendix 1 (Eagle's Cost and Revenue Schedules), Schedules 1, 13). In its posthearing brief, Eagle claims that it is entitled to $9,494,907. (Eagle Brief, at 10).

Eagle ceased performing the District recycling job on approximately April 30, 1995.

DPW's purported cancellation of Eagle's void contract for "insufficient funds" violated the Board's April 1994 order, which required the District to cancel Eagle's contract as void *ab initio*. When we became aware of DPW's attempted cancellation, we ordered the District to notify Eagle that its contract had been declared void *ab initio* pursuant to the April 1994 decision and D.C. Code § 1-1182.5(d). We stated that to the extent that Eagle meets the conditions of D.C. Code § 1-1182.5(d)(2), compensation to Eagle shall be limited to actual costs reasonably incurred but not profit. We also directed DPW to make an initial determination, pursuant to D.C. Code § 1-1182.5(d)(2), as to compensation for costs actually incurred by Eagle. (Order dated June 6, 1995, at 3). DPW subsequently advised Eagle that DPW would be determining amounts due Eagle under D.C. Code § 1-1182.5(d)(2). (*Id.*, Ex. 6, at 2).

During the approximate 2-year performance period that Eagle performed without a valid contract, Eagle received compensation (purported contract payments) from the District for the recycling services Eagle performed. As of April 30, 1995, Eagle had received payments from DPW totaling $2,070,056. (HEX 65B, OIG Attachments, Schedule K, at 1-2). It appears that during the second half of 1995, DPW did not make any statutory determination of compensation under D.C. Code § 1-1182.5(d)(2). Meanwhile, DPW had awarded an emergency contract for recycling services to Eagle and Eagle was performing essentially the same types of recycling services as it had before. By January 1996, DPW still had not made a proper determination of Eagle's actual costs of performance under D.C. Code § 1-1182.5(d)(2). Indeed, DPW's then contracting officer apparently attempted to settle the matter directly with Eagle's president by making a $1,079,000 payment to Eagle by check dated January 2, 1996. (HEX 65B, OIG Attachments, Schedule K, at 3). That payment brought the total amount DPW had paid Eagle to $3,142,022. (*Id*.). Because DPW appeared unable to make the determination required by section 1-1182.5(d)(2), we directed that Eagle and the District prepare detailed schedules of Eagle's actual costs and revenue under the District recycling job and submit them to the Board. (Order of March 26, 1996). The Office of Corporation Counsel, on behalf of the District, requested the Office of the Inspector General conduct an audit of Eagle's costs and revenue.

I. Pertinent Portions of the Record

The Inspector General prepared an initial audit report dated August 10, 1996, entitled "Report on Audit of Costs Claimed and Revenues Earned on Eagle Maintenance's Contract No. OMS-0132-AA-KH With the Department of Public Works," OIG No. 9612-07, with OIG's Financial Schedules A-C, K, K-(A), K-1 to K-4, Appendix 1 containing Eagle's June 3, 1996 submission of Schedules 1-13, and the following supporting documentation packages assembled by OIG: (i) Supporting Documentation for Labor Costs; (ii) Eagle Financial Statements for 1993-1995; (iii) Supporting Documentation for Other Direct Costs and Subcontractor Costs; (iv) Supporting Documentation for Intermediate Facility Costs; (v) Supporting Documentation for Market Revenues; (vi) Eagle Invoices (Feb. 1993 - Apr. 1995); and (vii) Department of Public Works ("DPW") Payment Vouchers (Feb. 1993 - Jan. 1996).

On September 17, 1996, the Board held a conference with the parties and reviewed the initial audit report and supporting documentation. In a September 18, 1996 order, the Board directed that Eagle produce additional documentation and provide information by means of affidavits in order to support findings of allowability and allocability of claimed costs for labor, labor burden, other direct costs ("ODCs"), subcontract costs, and general and administrative ("G&A") costs. The OIG was directed to prepare a supplemental audit report based on the additional documentation and information. The OIG issued an interim audit report dated November 4, 1996, providing supplemental findings, stating that Eagle had not produced all required documentation and information, and that OIG would continue performing additional audit steps. The Board issued orders of November 26, December 13, and December 18, 1996, directing Eagle to produce documentation and support for claimed costs. Included in the record as Eagle Exhibits 1-64 are Eagle labor distribution summary reports ("LDSRs"), Eagle Management payroll and financial documentation, Eagle and Eagle Management tax records, Eagle general ledger detail reports, and Eagle and Eagle Management cost account indices. These records were produced to the OIG on or about December 18, 1996. On December 18, Eagle filed indices of three earlier packages of documents produced to the OIG.

The OIG issued its "Final Follow-Up Report on the Audit of Costs Claimed by Eagle Maintenance Services, Inc." (the "final audit report"), Audit Report No. 9612-07B, dated March 5, 1997. (HEX 65A). The final audit report provided its audit results based on the material provided by Eagle along with explanatory notes. The Board held an evidentiary hearing on March 19, April 15, May 7, and May 16, 1997, and the record includes transcripts of those hearings and hearing exhibits ("HEX") received into evidence during the hearings. After the first hearing day, the Board directed Eagle to supplement the record with the original vendor/subcontractor files containing all invoices, vouchers, and evidence of payment for each claimed cost. (Board Order, dated March 21, 1997). On April 3, 1997, Eagle submitted 3 boxes containing the vendor files for Eagle Maintenance, the vendor files for Eagle Management, vendor history reports for Eagle and Eagle Management, general ledger detail for two Eagle cost accounts, and several Eagle Management invoices. After the April 15 hearing date, the Board directed Eagle to supplement the record with records that were missing from earlier productions, including vendor documentation supporting the "Other" and "Other Reimbursement" categories of costs claimed by Eagle in its Schedules 2A and 3A which were part of the June 3, 1996 submission by Eagle to the OIG. The Board subsequently directed Eagle to file documentation relating to the entities that it marketed recyclable materials, whether end user or broker. (Board Order of April 28 and May 2, 1997). Eagle filed responses on May 2, May 6, and June 30, 1997. The OIG and the District submitted additional supporting documentation, including filings on May 8 and May 19. Also included in the record is the consolidated exhibit file for the underlying protest, containing *inter alia* the District's Request for Proposals, Eagle's proposal and Best and Final Offers (BAFOs), the (invalid) contract between Eagle and the District; and the pleadings submitted in connection with the underlying protest and Eagle's cost claim.

II. <u>Performance Required by the Statement of Work</u>

The RFP

The purpose of the Request for Proposals, as revised, was to solicit proposals from contractors to:

> receive, process, and market recyclable ferrous and nonferrous metal, glass, and plastic food and beverage containers (recyclables) collected by DPW or its agents;
>
> accept recyclables from District registered commercial/private recycling haulers who choose to bring designated recyclables to the contractor's facility;
>
> receive newspapers collected by DPW and to ship them to the District's existing newspaper market, Capitol Fibre, using DPW-supplied tractor trailers;
>
> and establish a "buy back" operation within the District, to receive and pay for recyclables brought to the contractor by District residents.

(Protest Consolidated Exhibit ("PCX") 3, Solicitation No. OMS-0132-AA-KH, Addendum No. 5, at 34-35). Based on DPW's then current collection of recyclables from an estimated 99,100 single family households, and 1,500 residential condominium, cooperative, and public housing buildings, and commercial haulers' collections from an estimated 146,000 apartment households and numerous businesses, and assuming a 60 percent participation rate from DPW served residential households, a 40 percent participation from condominiums and cooperatives, DPW estimated that the recycling contractor could expect annual tonnages of 31,883 from the residential sector (newspaper accounting for 20,000), or about 2,657 tons per month. The annual estimate from the commercial sector was 128,839 tons of recyclables, assuming a 40 percent participation rate. (*Id.*).

Eagle's Initial Proposal and BAFO

In its initial technical proposal, Eagle stated that its Multi-Material Resource Recovery Center, located at 5941 Central Avenue, Capitol Heights, Maryland, had sufficient capacity to process both its existing volume of recyclable materials plus the anticipated tonnage to be collected by DPW. (PCX 23, at 4, 39). It stated that it planned to build another recycling facility in the District shortly after the contract was awarded so that it could "receive and process all the recyclables collected in the District . . . ." (*Id.*, at 5, 29).

Eagle stated that the Capitol Heights facility, owned by its President, Richard W. Tynes, Jr., consisted of a building facility with a 28 foot high ceiling and a tipping floor of approximately 25,000 square feet, and a yard of approximately 25,000 square feet. (*Id.* at 12; PCX 21, at 5). The yard has a loading dock capable of accommodating tractor trailers, a parking area capable of accommodating additional tractor trailers, a 15,000 square foot storage area for finished goods awaiting transportation to recycling markets, and a scale area capable of generating computer printed weights of vehicles bring recyclables to the facility. (PCX 23, at 12). The building facility, having a 140 x 90 foot processing floor, consists of a weighing area where the scales are located, a newspaper area where newspapers are stored for processing and packaging, a commingled area where all commingled recyclables are stored for processing, a tipping area where all recyclables are unloaded and stored for processing, a processing area where both commingled and separated recyclables are sorted, processed, and packaged for shipment to various markets across the country, and a loading area where the processed goods are loaded onto tractor trailers for shipment to market. (*Id.* at 12-13).

Eagle also stated in its proposal that

> The use of automated equipment allows us to operate efficiently and effectively with the least amount of man hours. Currently we process approximately 800 tons a month using 8 laborers working an eight hour shift, five days a week. As previously mentioned, our facility is capable of processing approximately 2,000 tons of recyclable materials per month. This level of processing can be achieved with approximately 15 laborers working two eight hour shifts, five days a week.

(*Id.* at 13).

Eagle stated in its proposal that it had been in the business of processing recyclable materials since May 1990, that it keeps a daily log book indicating the customer who delivered the materials and vehicle identification, the time and date of delivery, the type of materials delivered, whether the material was separated or commingled, weight of materials delivered and weight ticket number, and a notation if the delivered material is determined to be abnormally contaminated. (*Id.* at 15). Eagle stated that it maintained management activity reports which include daily tonnages received, daily weights and percentages of unmarketable and/or contaminated materials, daily tonnages recyclables sold, daily receipts of revenue from recyclable sales, and the amount of rebates due its customers. (*Id.* at16). In accounting for commingled materials, Eagle stated that it used daily averages and that past experience had shown that approximately 15 percent of all recyclable materials delivered was non-processable material (also called "bypass") which was unmarketable and would be sent to landfills for disposal. Eagle would keep track of the percentage of marketable versus unmarketable material. (*Id.* at 16-17).

Eagle also stated that it has been receiving, processing, and marketing recyclable ferrous and non-ferrous metals, glass, plastic, newsprint, and office paper for Prince George's County, the City of Takoma Park, and the Environmental Protection Agency. (*Id.* at 17). For the PG County contract, which was for the period May 1990 to May 1992, Eagle performed processing and packaging of recyclable materials for about 72,000 homes (i*d.* at 39), but PG County marketed the material itself (*Id.* at 19). As of October 1990, Eagle processed approximately 1,000 tons of newspaper and 100 tons of glass per month. (*Id.*, Attachment I, at 3). In its April 1992 BAFO, Eagle stated that PG County recyclables accounted for about 50 percent of its total processing capacity and that Eagle would reserve the other 50 percent for the District's recyclables. (PCX 21, at 2). Eagle's contract with EPA entailed the recovery, collection, sorting, and delivery of recyclable materials. (*Id.* at 40). For the City of Takoma Park, Eagle performed processing and marketing of commingled recyclables. (*Id.* at 40).

In its BAFO, Eagle stated that its existing facility had the capacity to handle all of the estimated tonnage defined in the RFP of DPW-delivered recyclable materials, apparently excluding the estimated recyclables coming from commercial haulers. In responding to the District's question about the status of the interim facility, Eagle replied:

> As previously mentioned, our existing facility is fully operational. We are currently operating at 50% of our total capacity and processing approximately sixty (60) tons of recyclable materials daily.

(PCX 21, at 14). In other words, Eagle had a capacity of processing 120 tons of recyclables per day, or between 2,400 and 2,700 tons in a month, assuming processing only on weekdays. With the addition of the proposed new facility, Eagle said it would be able to handle commercial haulers as well as recyclable materials from other jurisdictions. (PCX 21, at 7-8). Eagle stated that its existing facility had 15,000 square feet of storage space, equating to approximately 10 storage days. (*Id.* at 8).

Eagle described its processing of the various materials using its automated equipment and methods as follows: recycled glass is emptied into a hopper which is connected to Eagle's automated conveying system (sort line); as the glass travels down the conveyor belt, Eagle's sorters separate the clear, brown, and green glass; the separated glass is fed into a glass crusher and the product is deposited into boxes for shipping to market. Metals are emptied into a hopper connected to the sort line; the nonferrous and ferrous metal are separated on a magnetized conveyor belt; the separated metals are then deposited into can condensers; and the resulting condensed blocks of metal are stacked on pallets for shipping to market. Plastics are emptied into a hopper connected to the sort line, and sorters separate the plastic which goes to a hopper connected to a baler, where the plastic is perforated and compressed into bales, stacked on pallets, and shipped to markets. Eagle stated that it is essential that paper products are separated when delivered in order to avoid contamination. The paper is loaded into paper balers which bind the paper into bales, which are then stacked on pallets, and shipped to market. (*Id.* at 18-19).

In its initial price proposal, Eagle proposed for the first year a unit price of $58.76 per ton for processing and marketing the 11,983 estimated annual tons of commingled recyclables, $15.12 per ton for the newspaper transfer service for the 20,000 estimated annual tons of newspaper, and $145 per ton for the 250 estimate tons of material purchased in the buy back operations. Eagle further offered to rebate to the District 10 percent of gross marketing proceeds. (PCX 21, Attachment A). Eagle's proposal provided gradual increases in each of the unit prices and the marketing rebate in subsequent years. In its BAFO, Eagle proposed a constant 14 percent marketing proceeds rebate over the life of the contract. (PCX 23, at 3). Its unit prices for processing, newspaper transfer, and buy back services remained unchanged in its BAFO. Eagle's BAFO Year 1 cost and pricing data showed a total labor cost of $408,444.40, consisting of one project manager ($35,006.40), two supervisors ($49,920), three workers in the category "lead worker—plant" ($56,784), 16 workers in the category "laborer-plant" ($242,944), and two workers for the buy back operations ($23,790). Although the labor costs show a gradual escalation in Years 2-5, based on increases in labor rates, the number of workers was constant in each of the five years. Eagle used a labor burden rate of 22 percent to calculate its Year 1 labor burden cost of $89,857.77. The Year 1 schedule also showed other direct costs of $440,618, consisting of occupancy ($262,500), utilities ($45,000), equipment ($109,500), repair and maintenance ($18,000), and supplies ($5,618). A note on the schedule states that: "Other direct costs are based on prior experience and estimated costs associated with the construction of the recycling facility. Building and equipment costs are depreciated based on their estimated useful life." The other direct costs remained constant throughout the five years. The Year 1 schedule shows general and administrative ("G&A") costs of $103,281.22 based on a G&A rate of 11 percent of total costs. Eagle stated that its G&A rate was actually 13.89 percent. (PCX 21, Schedule of G&A Expenses). Eagle indicated in its BAFO that it would rely on proceeds from the marketing of recyclables for its profit on the job. As a result, the Year 1 schedule shows only $569.69 for "profit/fee." (PCX 21, at 3).

The RFP allowed the successful contractor initially to have its processing facility within a 10 mile radius from the District. Within 2 years after contract award, the RFP required the contractor to locate a processing facility within the District. (PCX 3, at 1, 3). Eagle proposed opening a 46,350 square foot facility on 5.7 acres of land on W Street, between 15th and 16th Streets, N.E., within 1 year of award. (PCX 23, at 27, 34). Eagle represented that it had a commitment to acquire the land. (*Id.* at 27, Ex. VII, at 4). Stating that its Capitol Heights facility had the capacity for handling all of the recyclables delivered by DPW, the proposed new facility would be staffed with 14-18 laborers working one 8 hour shift, five days a week, to handle the significant volume of commercial recyclables DPW estimated in its solicitation. Eagle said it could achieve economies in the new facility by using equipment that would have a greater processing capacity than the equipment in its existing facility. (*Id.* at 29-30).

Eagle's Contract

On February 1, 1993, the District and Eagle purported to enter into Contract No. OMS-0132-AA-KH. The contract provided that:

> The contractor shall receive, process and market recyclable nonferrous and ferrous metal, glass, and plastic food and beverage containers (recyclables) collected by the District. The services provided shall also include the acceptance, temporary storage and loading of

> newspapers collected by the Department of Public Works (DPW) into District supplied tractor trailers. The contractor shall provide a facility with sufficient capacity to accommodate District registered commercial/private haulers who choose to bring the recyclables defined in this section of the contract to the contractor's facility. In addition, the contractor shall establish a buy back operation within the District in order to buy recyclables at market rates from District residents.
>
> The contractor's interim processing facility shall be located within a ten (10) mile radius of the District's boarder for the first year after contract award; however, beginning on the first day of the second year of the contract, the contractor must have a fully operational processing facility within the District from which all activities, except buy back operations, associated with performance of this contract shall be conducted. . . .

(PCX 12, Art. 1). The contract identified Eagle's Capitol Heights facility as the interim processing facility, stated that 50 percent of that facility's capacity – a minimum of 1,000 tons per month -- shall be reserved for District generated recyclables, and that Eagle shall process all District generated recyclables whether delivered by the District or commercial/private haulers. (*Id.*, Art. 1, §§ 1.1-1.3). The contract incorporated the interim facility specifications set forth in Eagle's initial proposal and BAFO, including that the facility was to be a "fully automated processing facility" equipped with two fully functional loading docks capable of handling simultaneously four vehicles, a mechanized sorting line, glass crusher, balers for metal and plastic, computerized weighing system, fork lift and bobcat. (*Id.*, Art. 1, §§ 1.4-1.6). Eagle was to provide approximately 15 laborers working two 8-hour shifts, five days a week. (*Id.*, Art. 1, § 1.6.2). The contract also incorporated Eagle's automated procedures for processing the various types of recyclables and a contingency plan in the case of equipment failure in order to insure the uninterrupted delivery of District generated recyclables. (*Id.*, Art. 1, § 1.7).

Eagle was to maintain detailed daily logs to account for the recyclable materials collection, processing, and marketing phases of the work. The daily logs were to record customers, date and time of delivery, types and weight of recyclables delivered, and abnormalities such as high contamination. (*Id.*, Art. 1, § 1.8.1). From these daily logs, Eagle was to generate monthly reports containing daily weights of District generated recyclables, daily weights and percentages of unmarketable/contaminated materials, daily sales of recyclables, daily receipts of revenue from sales, and the amount of rebate due the District. (*Id.*, Art. 1, § 1.8.2). Commingled materials were to be accounted for initially by using 15 percent as the percentage of non-processable (unmarketable) recyclable material. Eagle was to examine commingled materials to calculate the percentage of recyclables by type, calculating the weight of each type of marketable recyclable delivered, and periodically redetermine the percentage of unmarketable recyclables by using the actual daily weights of unmarketable residue and processed recyclables. (*Id.,* Art. 1, § 1.8.3).

The contract incorporated Eagle's proposal and BAFO specifications for its planned District based facility, including equipment and labor requirements. (*Id.*, Art. 1, § 2). The first and only bilateral modification of the purported contract, entered into by the District and Eagle also on February 1, 1993, provided, *inter alia*, that:

> The contractor is responsible for obtaining all permits necessary to establish the recycling processing and buy back facilities in the District. By executing this contract the District does not waive any requirements of law or the right to review permit application in accordance with applicable criteria. The processing and buy back facilities are private facilities which are the sole responsibility of the contractor.

The bilateral modification also set forth the total estimated annual payments which were to be made in accordance with Eagle's proposal and BAFO as follows:

Year 1 -- $1,042,771.08
Year 2 -- $1,068,080.00
Year 3 -- $1,094,645.57
Year 4 -- $1,122,190.12
Year 5 -- $1,150,676.49

Eagle Performance

Prior to contract execution on February 1, 1993, Eagle's contract for processing PG County recyclables (Eagle was a subcontractor of Waste Management, the prime contractor) was terminated because PG County's own processing facility had become operational. Although Eagle's president, Mr. Tynes, could not recall the approximate date of the termination, Eagle's CFO, Mr. Furby, stated that it must have occurred some time late in 1992. Nevertheless, Eagle continued to haul PG County recyclables as a subcontractor of Waste Management.

The District began collecting residential recycling and delivering the recyclables to Eagle on March 22, 1993. (Tr. 12-13). According to DPW records, compiled from reports provided by Eagle, the District had, by the end of March, delivered to Eagle 353.88 tons of recyclables, consisting of 269.15 tons of newspaper and the remainder being either unmarketable or unaccounted material for which Eagle had not furnished information in its reports. (Hearing Ex. ("HEX") 1A). Indeed, Eagle did not maintain the required daily logs. The record shows that from the start of performance, Eagle did not have sufficient capacity at its existing Capitol Heights facility (the "interim" facility) to handle the quantity of recyclables delivered to it by DPW. The District first notified Eagle of the deficiencies by letter of March 26, 1993, followed by a meeting of the parties' representatives on March 29, and by a written response from Eagle on April 1. The District agreed to assist Eagle during the last several days of March and throughout April by accepting a portion of the recyclables at a non-Eagle facility designated by the District. (RSI App., PEX 130 (DC/CAB 00067-00070); Francis letter to Tynes, dated July 27, 1993). It appears from the correspondence that the alternate facility was operated by Consolidated Waste Industries ("CWI") and located on W Street. CWI used the facility for processing and marketing District recyclables under another contract with the District. The CWI contract with the District was to end on April 30, 1993, so DPW notified Eagle that it would have to be able to accept all DPW delivered recyclables starting May 1. (RSI App., PEX. 130 (DC/CAB 00067-00070); Francis letter to Tynes, dated July 27, 1993). For April 1993, Eagle received 1,184.78 tons of recyclables and the remaining recyclables collected by DPW, probably amounting to 800-1,000 tons, were delivered to CWI's W Street facility as designated by DPW. During April, Eagle was unable to account for 400.73 tons of recyclables. (HEX 1A).

In its April 1 letter, Eagle complained that the quantities being delivered by DPW were greater than estimated in the RFP. Eagle seemed to be stating that because the newspaper was collected with the other recyclables in DPW's packer trucks using the "blue bag" system, the recyclables being delivered, including the newspaper, were all commingled recyclables. Eagle, however, was well aware in the fall of 1992 or earlier, and thus prior to contract award, of the method DPW would use for collecting recyclables. Thus, the contract's newspaper transfer service consisting of "acceptance, temporary storage and loading of newspapers collected by [DPW] into District supplied tractor trailers" (PCX 12) included separating the newspaper from the other recyclables, bundling the paper, and loading it into the trailers. Moreover, the actual quantities of residential recyclables being collected were consistent with the residential quantities estimated in the RFP. Since Eagle's recycling processing contract with PG County was terminated prior to the start of the District job, Eagle's represented capacity at its interim facility of 2,000 tons per month should have been adequate to handle the District's quantities. In fact, Eagle was unable to achieve the represented processing capacity, at least during much of 1993. Eagle's problems resulted from its labor force and interim facility being used for other jobs, the facility and recycling equipment being in various states of disrepair, and the facility's processing and storage capacity not being as large as represented. (Tynes letter to Shields, dated April 1, 1993; RSI App., PEX 130 (DC/CAB 00067-00070); Francis letter to Tynes, dated July 27, 1993; PEX 143 (DC/CAB 00007-00008)).

During the early period of performance, Eagle claimed that there was a higher than expected amount of newspaper being contaminated with broken glass caused by DPW's packer trucks crushing all of the recyclables together. DPW claimed that any glass contamination was caused by Eagle's own equipment crushing the glass into the paper while it sat piled up on the facility's processing floor stemming from Eagle's failure to promptly separate the paper from the other recyclables and load the paper into the trailers. Although DPW was probably responsible for most of the glass contamination, the problem of a number of loads of newspaper being rejected by Capitol Fiber during April 1993 appears to have been resolved quickly. (Francis letter to Tynes, dated July 27, 1993; RSI App., PEX 384, DC 7734-7738).

Eagle also complained on April 1 that DPW was not timely providing the trailers and transporting the newspapers from Eagle's facility to Capitol Fiber. According to Mr. Tynes, the District probably hauled 50 or 60 percent of the newspaper during 1993 and less than half for the remainder of the performance period. (Tr. 41-43). For the months of March through December 1993, Eagle processed and marketed a total of 10,402.66 tons of newspaper. (HEX 1, 1A). For the months of January 1994 through May 1995, Eagle processed and marketed a total of 21,492.02.66 tons of newspaper. (HEX 1, 1A). Based on Mr. Tynes' testimony, we find that the District hauled to Capitol Fiber 55 percent of the newspaper during 1993 and 45 percent of the newspaper during the remainder of the performance period. Thus, we find that Eagle had to deliver 45 percent (for 1993) and 55 percent (for the remainder of performance) of the newspaper to Capitol Fiber. Expressed in tons, Eagle had to transport to Capitol Fiber 4,681.20 tons of newspaper during 1993 and 11,820.61 tons of newspaper during the remainder of the performance period. Both the District and Eagle contributed to the newspaper transfer problem. DPW's witness admitted that the District had problems fulfilling its responsibility of hauling the loaded newspaper to Capitol Fiber. (PCX 21, at 8; Tr. 572-573). By the same token, Eagle had represented in its BAFO that it had 15,000 square feet of storage space equating to a capacity of approximately 10 storage days for recyclables, but the record shows that it was having difficulty storing one days worth of newspaper. (Tynes letters to

Shields, dated November 4, 1993, December 8, 1994, and January 12, 1994; Tr. 572-573). The record also indicates that at times Eagle was slow in loading the paper into the District trailers, even when trailers were available. (RSI App., PEX 130 (DC/CAB 00067-00070), PEX 143 (DC/CAB 00007-00008)).

When DPW advised Eagle that the District would not continue to provide it an alternate facility for receiving delivery of recyclables after April 30, and that Eagle would have to devise a contingency plan to fulfill its responsibility of accepting all DPW delivered recyclables, Eagle entered into a memorandum of understanding with CWI, effective May 1, 1993, whereby CWI would receive a portion of DPW recyclable deliveries at its Olive Street facility in Capital Heights, separate the newspaper from the other recyclables, and transport the newspaper to Capitol Fiber. Eagle would then have the other recyclables delivered to its interim facility. (RSI App., PEX 357 (RSI LIT 654-655). Mr. Tynes testified that Eagle employees, not CWI employees, performed the processing at the CWI facility. (Tr. 113-115). According to the MOU, Eagle would pay CWI $65 per ton received from DPW but Eagle would receive a payment from CWI of $30 per ton for the non-paper recyclables. In other words, CWI would receive $65 per ton for receiving and transporting the newspapers to Capitol Fiber and would receive $35 per ton for receiving the non-paper recyclables. Mr. Tynes stated that he could not remember how he arrived at the MOU pricing. (Tr. 113-115). Although Mr. Tynes denied that a component of its cost was for use of CWI's facility, we find that the $35 per ton price for simply receiving DPW delivered non-paper represents a facility usage cost. We also find that $35 of the $65 per ton price for the newspaper services represents facility usage cost. Of the 2,220 tons of recyclables for May 1993 collected by DPW, CWI received 1,395 tons. (HEX 1A, 10). For June 1993, CWI received 978 tons of recyclables out of a total of 2,363 tons. (HEX 1A, 11). According to correspondence from Capitol Fiber, they had received during June a total of 781 tons of paper from Eagle but only 241 tons of paper from CWI, indicating that CWI "continue[s] to divert tonnage to other markets" notwithstanding that Capitol Fiber did not reject any paper delivered in June by CWI. (Jones letter to Shields, dated July 1, 1993). For July 1993, CWI received 906 tons of recyclables out of a total of 2,037 tons. (HEX 1A, 12). Eagle's correspondence indicates the following destination of recyclables received by CWI during July: 425 tons of newspaper went to Capitol Fiber, 56 tons of other non-paper recyclables went to BFI, 249 tons of non-paper recyclables went to Eagle, and 153 tons of newspaper and 23 tons of non-paper recyclables went to Laidlaw. (HEX 12). The record also shows that on July 2, 1993, a fire at Eagle's interim facility damaged portions of the facility as well as equipment including the sorting system and the scales. (Attachment to May 2, 1997 filing). Mr. Tynes stated that the fire destroyed various company records including many personnel records.

For August 1993, CWI received 1,176 tons of recyclables out of a total of 1,974 tons. (HEX 1A, 13). For September 1993, CWI received 662 tons of recyclables out of a total of 1,945 tons. (HEX 1A, 14). Eagle's documentation indicates the following destination of recyclables received by CWI during September: 435 tons of newspaper went to Capitol Fiber, 8 tons of non-paper recyclables went to Eagle, and 28 tons of newspaper and 190 tons of non-paper recyclables went to Laidlaw. (HEX 14). After September 1993, it appears that Eagle continued to use CWI's Olive Street facility for receiving District recyclables. (*E.g.*, Friend's Tire & Fleet Service invoices dated 8/24/94, 4/29/94, in Eagle Management original invoice files). We find that in lieu of payments pursuant to the May 1, 1993 MOU, Eagle was able to continue using CWI's facility based on later fee arrangements for the sizeable amount of hauling, disposal, and truck weighing services that

Eagle committed to send to CWI. In a January 10, 1994 letter to DPW, Eagle designated CWI's Olive Street facility and two other vendors' facilities as alternative sites for receiving DPW recyclables should Eagle's interim facility be unavailable. It is not clear from the record whether DPW trucks were ever diverted to sites other than Eagle's and CWI's. Nevertheless, CWI continued to provide hauling, weighing, and disposal services for Eagle throughout the remainder of the District recycling job although it was paid under arrangements differing from that provided in the May 1993 MOU. (HEX 2, at 58; HEX 2C, at 1; HEX 54 (Tynes letter to Lash, dated July 5, 1994)). In a March 1, 1994 Eagle letter to CWI, Tynes "confirms our understanding regarding the [recyclable] materials we anticipate delivering to your facility . . . ." (HEX 54). It is not clear from the letter what the details of the proposed arrangement were but it appears to contemplate that materials would be delivered to CWI's facility and that processing would take place at the facility.

In responding to a Board order of October 10, 1996, questioning whether Eagle's claimed labor costs were incurred only on the District recycling job, Eagle filed an affidavit of Mr. Tynes in which he averred that Eagle "had no other recycling jobs involving recycling processing" during the entire period of February 1, 1993, through April 30, 1995. (Tynes Aff. ¶ 2, dated October 16, 1996). During the hearing in 1997, we discovered that this statement was misleading. Because Eagle entered the recycling business as an extension of its janitorial business where it collected items which could be processed and marketed as recyclables, Eagle continued to use the Capitol Heights facility for processing recyclables obtained from its existing janitorial contracts. It also had obtained some recycling contracts in the 1991-1992 period. Thus, Eagle used the Capitol Heights facility for processing recyclables from the janitorial contracts, other recycling contracts, and private haulers who brought material to Eagle's facility. During the proposal phase, Eagle touted its recycling experience by citing its contracts with Prince George's County, the City of Takoma Park, and the Environmental Protection Agency. (PCX 23, Sec. B, at 17, 19; PCX 21, at 8). Although its contract for processing PG County recyclables had been terminated prior to March 1993, Eagle continued to collect PG recyclables and deliver them to PG County's facility on Richie Road, using its own trucks and drivers. (*See* Tr. 65-66). In responding to a DPW pre-contract request for responsibility data in September 1992, Eagle identified two other recycling contracts involving the processing and marketing of recyclables: one with Dow Chemical for processing recyclables collected from containers on the National Mall, and another with the U.S. Public Health Service for recyclables collected from its Parklawn Complex in Rockville, Maryland. (RSI App. DC 001705). A 1995 invoice indicates that the National Mall recycling was at some point performed under a contract with the National Park Service. (RSI App., at DC 003670-003671). The National Mall recycling covered the entire period from February 1993 through April 1995 and beyond. (Tr. 67-69). Tynes could not recall whether Eagle was collecting recyclables at the Crystal City complex. (Tr. 75). Eagle also collected recyclables from a residential development within the District called The Cluster under a contract with Waste Management. (Tr. 79-82). Eagle may also have been collecting recyclables from the Washington Design Center. (Tr. 83). During the hearing on its actual costs, Mr. Tynes downplayed Eagle's other contracts involving handling and processing of recyclables at the interim facility, stating that the quantity from non-DPW sources was quite small, amounting only to one percent. (Tr. 21-24). He testified that the one percent of recyclables came from the Washington Convention Center janitorial contract. (Tr. 23-24). He could not recall all of the janitorial and other recycling contracts from which recycling materials were brought to the Central Avenue facility, but he claimed that the amount was "slight." (Tr. 24). Finally, the contract required Eagle to accept recyclables delivered by commercial haulers though Mr. Tynes said there were very few of such deliveries. We find that Mr. Tynes was not credible in his testimony concerning the allocation between DPW and non-DPW delivered recyclables. The documentary evidence suggests that substantially more than 1 percent of the recyclables processed at the interim facility came from non-DPW sources. We also draw an adverse inference from Eagle's failure to produce documentation to support its claimed allocation for the interim facility. We find that it is more likely that the percentage of recyclable materials handled at the interim facility and coming from non-DPW sources was at least 5 percent of the facility's total recyclables. One 1995 monthly invoice concerning the National Park Services' National Mall recycling shows a monthly recyclables quantity of approximately 25 tons, which constitutes by itself over one percent of the monthly DPW-collected recyclables handled at Eagle's interim facility. (*Id.* at DC003670-003671, 003672-003673). There is nothing in the record to suggest that this quantity was not normal for the April 1993 through April 1995 period.

After the commingled materials were separated by type, Eagle would then market them. Tynes testified that for the materials other than metal, the market entities would arrange for transporting the material to the market's facility. (*See* Tr. 50-52). For metal, Alcoa had a local facility so Eagle would have the metal transported to Alcoa. Strangely, Tynes testified that he rarely transported metal from the interim facility but rather from CWI's facility. (*Id.*). In the recycling industry, recycling contractors sometimes use a broker who in turn arranges for the sale of recyclables to a market. Mr. Tynes at first testified that he used brokers on the District recycling job (Tr. 92) but later stated that he did not use a broker for the District job and could not remember ever using a broker in the past (Tr. 98), and then stated that he used brokers "very, very sparingly and I just don't remember using a broker off the top of my head" and that he would "use various sources, not necessarily a broker" (Tr. 100). Near the end of the hearing, he testified that "[I]n some instances we would deal with a broker." (Tr. 879). Depending on the arrangement, Eagle might receive revenue from the broker less any commissions charged by the broker. (Tr. 97-100). Tynes seemed sure that he marketed District recyclables to Alcoa, Union Carbide, Baltimore Recycling, and Southeast Recycling. (Tr. 100-106). Eagle may also have marketed District recyclables to Society Plastic, ERI, Georgetown Paper, Welman, Inc., but Tynes could not recall for sure although he indicated that Eagle maintained a file indicating entities to whom it sells reyclables and the revenue derived from its sales. (Tr. 104-105). Despite ordering the production of such files, it is not clear that Eagle provided complete documentation of its marketing. The OIG auditors discovered from the records produced to them that Eagle had underreported market revenue by $14,496. RSI independently investigated Eagle's market vendors and states that Eagle underreported $92,250 in market revenue. (RSI Reply Brief, Ex. A).

If collected materials were not recyclable, or recyclable material was too contaminated to market, then Eagle arranged with a hauler like CWI to dispose of this bypass material at a landfill. (Tr. 112-113).

Ms. Hallie Clemm, an employee with DPW, was responsible for monitoring Eagle's performance and authorizing progress payments. (Tr. 126). She prepared a spreadsheet listing on a monthly basis the amount of District recyclables delivered by DPW trucks to Eagle, the amount of newspaper, aluminum, plastic, steel, and glass marketed by Eagle, the amount of unmarketable material, and the amount of material unaccounted for by Eagle. (HEX 1). The data was taken from reports submitted by Eagle with its monthly invoices. Ms. Clemm made a summary of the spreadsheet which shows the following tonnages for the District recycling job:

Month	**Delivered from DPW**	**Marketed Paper**	**Marketed Aluminum**	**Marketed Plastic**	**Marketed Steel**	**Marketed Glass**	**Unmarketable**	**Unaccounted Tonnage**
Mar 1993	353.88	269.15	0.00	0.00	0.00	0.00	43.52	269.15
Apr	1184.78	560.97	2.02	7.93	11.75	86.09	115.29	400.73
May	2220.04	1260.79	6.16	13.68	12.68	136.22	559.83	400.73
Jun	2363.46	1459.88	8.13	24.35	4.14	151.81	444.63	230.68
Jul	2036.79	1129.06	9.04	30.97	4.55	154.48	490.57	270.52
Aug	1973.61	1211.18	7.69	10.16	5.13	128.48	475.93	218.12
Sep	1945.23	1083.01	3.62	10.91	0.00	51.07	358.10	135.04
Oct	1988.79	1224.26	0.00	0.00	0.00	0.00	491.15	438.52
Nov	1965.69	1183.41	0.00	21.90	0.00	154.88	441.93	273.38
Dec	2261.07	1248.89	0.00	13.91	7.20	188.79	391.29	163.57
Jan 1994	2035.86	768.25	0.00	31.55	0.00	221.37	368.80	410.99
Feb	2297.25	1130.41	4.06	72.82	17.13	571.95	361.33	645.89
Mar	2316.39	1305.15	2.13	44.03	0.00	562.95	345.98	139.55
Apr	2011.24	1529.65	2.09	35.48	0.00	450.39	372.88	56.15
May	2307.42	1348.19	5.54	32.10	0.00	508.25	353.50	- 379.25
Jun	2404.69	1743.23	9.07	41.71	0.00	372.02	449.11	59.84
Jul	2124.30	1237.02	5.93	60.75	0.00	260.53	402.72	- 210.45
Aug	2145.98	1605.23	11.01	86.29	0.00	315.57	407.36	157.35
Sep	2288.39	1398.08	5.22	107.97	0.00	519.47	407.36	- 276.48
Oct	2163.08	1407.36	10.34	126.39	0.00	527.63	297.34	- 149.71
Nov	2039.64	1542.52	5.89	118.30	0.00	407.61	407.97	- 268.98
Dec	2560.63	1518.88	2.16	137.50	0.00	399.90	407.97	- 442.65
Jan 1995	2054.36	1329.24	3.48	90.85	0.00	455.25	324.80	149.26
Feb	1722.00	1179.10	6.50	49.81	0.00	343.34	257.50	- 114.25
Mar	2262.43	1466.98	8.00	104.44	0.00	350.39	339.51	- 6.89
Apr	1496.48	784.16	1.68	160.95	0.00	331.82	280.10	- 62.23
May	135.57	135.57	5.20	90.52	0.00	355.88	0.00	- 451.60
TOTAL	52659.05	32122.62	124.96	1525.27	62.58	8006.14	9593.47	1451.95

(*See* HEX 1A, 1).

III. <u>Determination of Actual Costs Pursuant to D.C. Code § 1-1182.5(d)(2)</u>

D.C. Code § 1-1182.5(d)(2) provides:

> If a contract is void, a contractor who has entered into the contract in good faith, without directly contributing to a violation and without knowledge of any violation of the chapter or rules and regulations prior to the awarding of the contract, shall be compensated for costs actually incurred.

We have interpreted the language "costs actually incurred" as meaning that the contractor is entitled to be compensated for its costs that are properly allocable to the work, are reasonably incurred, and are allowable under the applicable cost principles. The actual costs must be reasonable costs. Otherwise, the District could end up paying more than even contemplated under the purported contract. The Council could not have intended any other meaning for actual costs because the purpose of the provision is to free the innocent contractor from the rigors of a forfeiture, not to provide a windfall to a contractor whose contract is determined to be invalid. In determining the reasonableness of costs, we also consider the contractor's proposed cost and pricing data submitted in response to the solicitation. In the competitive sealed proposals used in this procurement, Eagle submitted in its cost proposal and BAFOs various cost and pricing data schedules. For what was contemplated as a fixed unit price contract, if Eagle performed inefficiently or otherwise performed its work in such a manner that it would have incurred a loss on the job, Eagle should not be able to avoid its losses for which it is responsible simply because the contract was declared void *ab initio*. Stated differently, the actual cost recovery provided by D.C. Code § 1-1182.5(d)(2) is not a pure cost reimbursement remedy. Indeed, even under the convenience termination measure of costs, which is more generous than the actual cost measure of D.C. Code § 1-1182.5(d)(2), a contractor's recovery is reduced by applying a loss ratio in the situation where the contractor would have incurred a loss on the contract.

The actual costs must be allocable to the performance of the purported contract work, which is defined by the Statement of Work. Costs incurred in performing added work that would have constituted a valid change under the Changes article of the contract -- but for the fact that the contract was void *ab initio* -- may also be recoverable, depending on the circumstances. Besides the usual factors to be considered in the context of a valid contract, we must also consider whether the performance of added work is reasonable when measured against the contractor's knowledge of the validity of the contract. For example, it is relevant here to consider Eagle's performance (and cost documentation) in light of its knowledge by October 1993 that its contract might be terminated, and, by April 1994, that the Board had declared the contract void *ab initio*.

In analyzing costs, the OIG auditors looked to see whether Eagle was able to support items of cost with vendor invoices, Eagle vouchers which would indicate the proper cost account for charging the costs, and evidence of payment by Eagle. Generally, OIG would find the cost supported if at least two of the three records existed. The OIG auditors conducted an audit of incurred costs, but did not attempt to conduct a review of Eagle's performance under the invalid contract. (Tr. 729-730; HEX 65B, at 3). In describing the scope and methodology of its review of direct and indirect costs claimed by Eagle, the OIG stated in pertinent part:

> The direct cost audit scope was limited to test procedures for validating Eagle's

> claimed costs by tracing them to books of original entry and supporting records. We tested specific transactions, but did not evaluate Eagle's total internal control system or technical aspects of its performance. The direct productive manhours scope was limited to reviewing timesheets to determine total direct productive manhours. The indirect cost audit scope was limited to tests of indirect costs and costs comprising the allocation bases. In addition, we evaluated the appropriateness of the allocation methods used.
>
> Our audit included assessing the accounting principles used and significant estimates made by Eagle. Criteria used in evaluating the claimed costs also included cost principles set forth in the Federal Acquisition Regulation (FAR), District of Columbia Municipal Regulations (DCMR), and Cost Accounting Statndards (CAS).

(HEX 65A, at 3).

Although the OIG auditors did not have the benefit of the results of the evidentiary hearing and additional data collected during the proceedings which occurred after its final audit report, including the examination and cross-examination of the Eagle representatives, we have found the OIG audit reports and supporting workpapers to be very helpful in our assessment of Eagle's costs and the our ultimate determination of actual costs under D.C. Code § 1-1182.5(d)(2).

As we made clear during the evidentiary hearing, we went beyond the sample testing conducted by the OIG auditors, analyzing all items of cost claimed by Eagle under the District recycling job, and examining all supporting data (including original invoices, vouchers, payment records, cost and revenue reports, labor data) offered by Eagle. We also reviewed all of the performance data produced by the parties, including recycling reports, correspondence, and documentation relating to the invalid contract. Our specific findings concerning allowability and allocability are addressed in connection with each category of cost considered: labor, labor burden, other direct costs, subcontract costs, costs for Eagle's new recycling facility, and general and administrative costs.

IV. <u>Eagle's Allowable Actual Costs</u>

A. Eagle Direct Labor Costs

In its 1996 cost submission, Eagle claimed direct labor costs of $978,659.72 for the period February 1993 through September 1994, consisting of $127,083.34 in "temporary labor" (casual laborers Eagle alleges it paid in cash) and $851,576 (derived from Eagle's monthly "Labor Distribution Summary Reports" ("LDSRs") (Eagle Exs. 1-20)). For the period beginning in mid-September 1994 through May 1995, Eagle claims another $363,232 in labor incurred by its affiliated company, Eagle Management. These labor costs from Eagle Management do not appear under Eagle's direct labor schedules because Eagle has sought to recover all of the various costs incurred by Eagle Management under the subcontractor costs category, *i.e.*, Eagle treats Eagle Management as a subcontractor on the District recycling job and its costs as subcontract costs. For purposes of the District recycling job, OIG determined that Eagle Maintenance and Eagle Management are from a functional and operational standpoint just one company, because the two entities are wholly owned by Mr. Tynes, and they share the same G&A staff, office space, warehouse, and processing facility. (HEX 65A, at 3-4, 9). Based on our review of the testimony and record, we agree with OIG's determination and find that Eagle Management and Eagle Maintenance operated as one company.

Temporary Labor Costs

OIG disallowed the entire amount of the temporary labor costs of $127,083.34 as unsupported. Eagle has agreed with OIG's disallowance. (HEX 65A, at 6, note A.1.).

Labor Distribution Costs (Feb. 1993 – mid-Sept. 1994)

A review of Eagle's LDSR reports shows that for most of the 1993, the claimed direct labor was coded to Eagle's project Account No. 3032-000-39, entitled "Waste Mgmt-Direct Labor." Eagle states that prior to the District recycling job, it had used the 3032 account to collect Eagle's labor costs for processing recyclables collected from PG County under a subcontract with Waste Management. We are told that this processing work ended late in 1992, but in any event, prior to the start of the District recycling job. It was not until December 1993 that Eagle created a new account, No. 3800-000-39, entitled "DC Recycling," to collect the District recycling labor costs. (Eagle Ex. 12). Eagle was unable to produce to the OIG auditors the personnel files for the persons charging labor to the District job, stating that they were lost in the July 1993 fire. We find this excuse unpersuasive because more than 85 percent of the labor was incurred after the fire on July 2,1993. Although OIG apparently did not review any personnel files and time cards, OIG's analysis of the LDSRs for the period February 1993 through mid-September 1994 did not alert them to any obvious mischarging of labor. Although the OIG may have relied on Mr. Tynes' affidavit (stating that Eagle had no other recycling jobs involving processing of recyclable materials) for its assumption that Eagle's labor was properly charged to the District recycling job, we find based on the hearing testimony and the documentation in the record that Eagle collected recyclable materials from its other janitorial and recycling jobs, and processed nearly all of those materials at the Capitol Heights facility by the laborers who were charging to the District recycling job. While Mr. Tynes testified that the amount was very small and no more than 1 percent of the total recyclables, we find it more likely than not that the figure was at least 5 percent of total recyclables.

Labor Costs Charged by Eagle Management (mid-Sept. 1994 – May 1995)

After mid-September 1994, Eagle began accumulating labor costs and other District (and PG County) recycling costs through its affiliated entity, Eagle Management. Eagle Management records of labor were also incomplete. Eagle produced "time sheet edit" reports for some months, payroll registers for some months, and "payroll hours/earnings" reports for other months. (*E.g.*, Eagle Exs. 29-45, 59). OIG did not have actual time sheets or personnel files for its auditing procedures and did not interview any of the laborers. Between mid-September and December 1994, OIG determined that Eagle had incurred $166,484 in direct labor. (HEX 66T, at 16). Between January 1995 and April 1995, OIG determined that Eagle had incurred $166,289 in direct labor. (*Id.*). OIG initially disallowed $29,234 in labor for May 1995, but later allowed that amount on Eagle's representation that DPW had delivered recyclables to its facility up to the end of April. Based on the volume of deliveries in the latter part of April, we allow half of the May 15 payroll amount, that is, $9,697 and disallow the remainder. As we found with regard to Eagle's labor for the period February 1993 through mid-September 1994, at least 5 percent of the recyclables processed at the interim facility during the mid-September 1994 through the beginning of May 1995 were generated from Eagle's other recycling and janitorial jobs and from commercial haulers.

Allocable and Allowable Direct Labor Costs

Based on our findings above, 95 percent of Eagle's direct labor costs of $1,194,046 ($851,576+$166,484+$166,289+$9,697) should be allocated to the District recycling job. Thus, we find that Eagle's allocable direct labor for the District recycling job equals $1,134,344. Considering that Eagle performed the equivalent of approximately 25 full months of work on the District recycling job (April 1993 through April 1995, since the quantity of recyclables for February through April 1993 equal almost one full month), Eagle had a direct labor average of $45,374 per month. We find this to be unreasonable. Eagle's BAFO proposed direct labor (including project management) of $408,444 (monthly average of $34,037) for the first year and $424,455 (monthly average of $35,371) for the second year. Eagle's actual direct labor exceeds its proposed amount by $301,445, almost 30 percent. We find three primary reasons for the actual labor to be significantly higher than the proposed labor costs: (1) the extra effort entailed in separating the newspaper from the other commingled materials; (2) Eagle's recycling operation entailed significantly less automated procedures and systems than Eagle had stated in its proposal and that were required by the statement of work; and (3) by processing at its Capitol Heights facility and CWI's Olive Street facility, Eagle labor was inefficiently committed to the recycling work and often involved Eagle transferring recyclable materials between the two facilities with the attendant additional handling costs. We find that Eagle and the District bear equal responsibility for the added labor costs. Accordingly, of the $301,445 of labor beyond Eagle's BAFO cost and pricing data which were a component directly supporting the invalid contract's unit prices, $150,722.50 should be the responsibility of the District and $150,722.50 should be the responsibility of Eagle. Based on this assignment, Eagle is entitled to recover $983,622 for allowable labor costs under D.C. Code § 1-1182.5(d)(2).

B. Eagle Labor Fringe Benefits Cost

Eagle's BAFO identifies a labor burden rate of 22 percent consisting of FICA (7.65%), FUTA (.80%), SUTA (2.50%), worker's compensation (5.50%), and liability insurance (5.55%). Total labor burden costs for the base year were estimated at $89,857.77, based on a direct labor base of $408,444.40. (PCX 21).

In its 1996 submission, Eagle claimed fringe benefits totaling $325,759, for the period February 1993 through mid-September 1994 using the temporary labor and labor distribution as the direct labor base. For the remaining period of September 1994 through April of 1995, Eagle's fringe benefit costs are subsumed in the $1,000,851 claimed by Eagle as subcontract costs charged by Eagle Management.

Of the $325,759 in claimed fringe benefits, OIG disallowed $137,646, consisting of the component of fringe benefits relating to the disallowed temporary labor and nearly all of the amounts that Eagle claimed for vacation, sick, and holiday leave for the reason that Eagle, with one exception (one supervisor earned $1,166 in leave during the performance period), never paid leave amounts to its workers on the District recycling job. (HEX 65A, at 5, 7, 8-9). Thus, OIG allowed a total of $188,113 in fringe benefit costs on the labor distribution ($851,576) base. Applying the ratio of allowable total direct labor ($983,622) to the total direct labor base used by OIG ($1,134,344), to OIG's fringe benefit figure of $188,113 (for the period 1993 through mid-September 1994), we find that allowable fringe benefit costs equal $163,118.

Based on our review of the income statements for Eagle Management for the periods September through December 1994 (HEX 66T) and January through May 1995 (HEX 66U), we find unadjusted total fringe benefits of $40,784 and $80,498 for the respective periods. These figures must first be adjusted to account for Eagle Management's two projects (the District recycling job and the PG County recycling job). By applying ratios of District recycling labor to PG County recycling labor for each of those periods, we find the District recycling job's share of fringe benefits to be $27,765 and $49,289, for a total of $77,054. This amount must be further adjusted to account for the unallowable portion of labor for which Eagle is responsible. By applying the ratio of allowable total direct labor ($983,622) to the total direct labor base used by OIG ($1,134,344), we find the allowable and allocable share of fringe benefits to be $66,816 for the period September 1994 through the beginning of May 1995. Based on the adjusted labor base for that period of $296,965 ($342,470 times the ratio for accounting for unallowable labor), the fringe benefit rate comes to approximately 22.5 percent, which is consistent with the 22 percent we found allowable for the labor distribution base covering the period February 1993 through mid-September 1994. Both rates are consistent with the 22 percent rate set forth in Eagle's BAFO.

In sum, we find that Eagle is entitled to allocable and allowable fringe benefits costs of $229,934 for the entire performance period pursuant to D.C. Code § 1-1182.5(d)(2).

C. Eagle's Other Direct Costs

Eagle has claimed other direct costs ("ODCs") totaling $654,856, consisting of $605,052, summarized on Schedules 2, 2A, 3, and 3A of Eagle's June 3, 1996 cost submission, and additional ODCs of $49,804 claimed by Eagle which are subsumed in the "subcontract" costs of Eagle Management, for the period of late 1994 through April 1995. Eagle's Schedule 2 and 3 claimed costs, OIG accepted costs, and OIG questioned costs are as follows:

Other Direct Costs	Eagle Claimed	OIG Accepted	OIG Questioned
Material & Supplies	45,527	38,750	6,777
Fuel, Maintenance, Trans.	303,520	303,520	0
Equipment Rental/Repair	140,512	113,202	27,310
Uniforms	3,532	3,532	0
Other Direct Costs	82,606	61,836	20,770
Depreciation	29,355	0	29,355
Totals	605,052	520,840	84,212

Within the Eagle Management costs, the following ODCs are claimed:

September through December 1994:

Transportation	7,102
Materials	3,057
Equipment rental	4,478
ODCs (subcategory)	10,172

January through May 1995:

Transportation	9,447
Materials	7,431
Equipment rental	4,503
ODCs (subcategory)	3,614

As discussed below, we find total allocable and allowable ODCs pursuant to D.C. Code § 1-1182.5(d)(2) of $353,635.

Material & Supplies

In its BAFO, Eagle's estimated costs for materials and supplies are listed under the "Supplies" category within the Other Direct Costs schedule. (PCX 21, Cost and Pricing Data, Years 1-5, Schedule 3). Eagle estimated $5,618 per year for such costs. For the actual two-year performance period, Eagle claims a total of $56,015 for material and supplies, consisting of $31,660.67 in 1993, $13,866.58 for the period January through October1994, and, subsumed within Eagle Management's "subcontract" costs, $3,057 for the period September through December 1994, and $7,431 for the period January through April 1995.

In support of the claimed material and supplies costs in its 1996 cost submission, Eagle furnished the following: Schedule 2, which lists monthly totals for 1993; Schedule 2A, which lists the monthly amounts by supplier; Schedule 3, which lists monthly totals for 1994 (through October); and Schedule 3A, which lists the monthly amounts by supplier. (HEX 65B, Appendix 1). Eagle collected costs for these items under its internal cost account numbers 3800-000-44 and 3032-000-44. The costs claimed through Eagle Management are summarized in the September-December 1994 and January-May 1995 income statements and attached "Detail Trial Balance" sheets. (HEX 66T, 66U).

OIG relied on auditing of a random sampling conducted by KPMG, a subcontractor retained by OIG to perform auditing of Eagle's costs, of only 9 items of materials and supplies claimed by Eagle in 1993, 8 items relating to Account 3800 (the DC recycling job account) and 1 item relating to Account 3032. KPMG found 4 of the 9 randomly selected cost items to be unsupported. (HEX 66C; Tr. 699-717). Neither KPMG nor OIG did any further testing. Based on our review of the invoice records, KPMG's and OIG's analyses, and testimony relating to the material and supplies costs claimed for 1993 and 1994, we find that 2 of the remaining sample are also not properly recoverable or not adequately supported in the record. First, Eagle claims $1,717.80 paid to Count Recycling which was the portion of a $37,000 amount for a capital repair not reimbursed by Eagle's insurance carrier after a fire damaged Eagle's Capitol Heights facility (HEX 66E; Tr.201, 710-712). Eagle's CFO identified a threshold of $2,500 for capitalizing rather than expensing a cost item. (Tr. 201). Thus, if Eagle incurred a cost that was properly capitalized, then it cannot charge the full amount as a direct cost for the period in which it was incurred. The OIG auditors disallowed depreciation as an item of actual cost under D.C. Code § 1-1182.5(d)(2). In any event, Eagle did not establish the useful life for capital items and other information concerning allocation, so there is no basis for us to consider whether to allow a share of such costs. Second, we find $1,638.33 paid to American Express for various purchases by Noel Perez (HEX 66C; Tr. 204-207) because the record shows Perez did not make purchases exclusively for the District recycling job and Eagle did not demonstrate that the claimed purchases related to the District job. (*E.g.*, HEX 66T, at 6; June 30, 1997 Eagle Filing, Doc. No. 1 (PG job invoices)). Although we might disallow all material and supplies based on the results of the 9 randomly selected cost items, from our further review of original records – to the extent that they exist – including the original invoice records, voucher forms, and related documentation, in conjunction with Eagle's Schedules 2A and 3A, we are able to find adequate documentary support for the following costs: Carter Fuel Oil ($1,451), Suburban Propane ($735), Direct Safety ($1,861), Maurice Electric ($631), Galanes Boxes ($4,365), Erin Supply ($2,434), Colliflower, Inc. ($1,222), Hydra Lift ($1,340) (original invoice and voucher documentation supports $1,340 rather than Eagle's Schedule 2A claim amount of $1,242), Yadgi & Co. ($255), Hoffman Equipment ($3,804), Metro Rental ($214), National Capitol Industry ($352), Recycling, Inc. ($450), Grainger ($276), Steel & Wire Products ($586), Beltway Ford ($104), Structural Inst. ($78), and ACME ($110). Other claimed costs are not properly supported. The unadjusted total of supported costs for materials and supplies equals $20,268, which after deducting 5 percent for the allocable share of such costs on other recycling work performed at the Capitol Heights facility, yields allowable and allocable materials and supplies of $19,255.

For the materials and supplies costs incurred by Eagle Management, we find adequate documentary support for the following costs: Steel Wire Products ($603), Colliflower, Inc. ($200), Erin Supply Co. ($469) (2 items totaling $405.48 were disallowed because the purchase orders show that they were for both the"PG [County] [and] DC" recycling jobs and were not allocated), Galanes Boxes ($3,110), and Direct Safety ($152). The unadjusted total of supported costs for materials and supplies equals $4,534, which after deducting 5 percent for the allocable share of such costs on other recycling work performed at the Capitol Heights facility, yields allowable and allocable materials and supplies of $4,307.

Apparently, neither KPMG nor OIG in its review of KPMG's work, analyzed the undifferentiated claim amounts under the category of "Other" or "Other Reimbursements" found on Eagle's Schedules 2A and 3A. Pursuant to Board request, Eagle submitted separate documentation to support certain miscellaneous claimed amounts for materials and supplies listed as "Other" or "Other Reimbursements" on Eagle's Schedules 2A and 3A. For the material and supplies cost account 3800-000-44, Eagle identifies costs of $1,361.19. We find that the contemporaneous portions of the documentation for these cash transactions do not adequately show that the costs were incurred solely for the District recycling job or paid by Eagle. We find the amounts neither allocable nor allowable.

The costs involved in this materials and supplies category do not appear to be the type that would be affected by Eagle's inadequate facilities and the inefficiencies in conducting the processing operation at multiple locations and in hauling materials between locations. Accordingly, we make no deductions and find the total allowable and allocable costs for materials and supplies is $23,562.

Fuel, Maintenance, Transportation

In its BAFO, Eagle's proposed costs related to fuel, maintenance, and transportation under the "Repair and Maintenance" category within the Other Direct Costs schedule. (PCX 21, Cost and Pricing Data, Years 1-5, Schedule 3). Eagle proposed $18,000 per year for such costs. For the actual two-year performance period, Eagle claims a total of $319,983 for fuel, maintenance, and transportation, consisting of $26,399.24 in 1993, $277,035 for the approximate period of January through October1994, and, subsumed within Eagle Management's "subcontract" costs, $7,102 for the period September through December 1994, and $9,447 for the period January through April 1995.

In support of its claimed fuel, maintenance, and transportation costs, Eagle furnished with its 1996 claim letter the following: Schedule 2, which lists monthly totals for 1993, Schedule 2A, which lists the monthly amounts by supplier, Schedule 3, which lists monthly totals for 1994 (the bulk of the costs through August), and Schedule 3A, which lists the monthly amounts by supplier. (HEX 65B, Appendix 1). Eagle collected costs for these items under its internal cost account numbers 3800-000-43 and 3032-000-43. The costs claimed through Eagle Management are summarized in the September-December 1994 and January-May 1995 income statements and attached "Detail Trial Balance" sheets. (HEX 66T, 66U).

OIG relied on auditing of a random sampling conducted by KPMG of 20 items of fuel, maintenance, and transportation costs claimed by Eagle in 1993 and 1994. KPMG found all 20 randomly selected cost items to be supported. (HEX 66C, 66K; Tr. 694). The OIG auditor stated that to verify that the fuel charges related to the District recycling job rather than another Eagle job, she relied, for example, on Eagle's representation that Noel Perez signed for the fuel and that "he only drove a truck for the D.C. recycling job . . . ." (Tr. 695-696). As we have discussed earlier, at the hearing, Eagle's representative conceded that Mr. Perez made acquisitions for other Eagle jobs besides the District recycling job. (Tr. 204-207). The documentary evidence bears that out. (*E.g.*, HEX 66T, at 6). Based on our review of the invoice records, KPMG's and OIG's analyses, and testimony relating to the fuel, maintenance, and transportation costs claimed on Schedule 2A for 1993, we find the 1993 costs, prior to the allocation adjustment, are supported in the amount of $25,452. The items of cost for the category of "Other" are unsupported. Based on our review of the invoice records, KPMG's and OIG's analyses, and testimony relating to the fuel, maintenance, and transportation costs claimed on Schedule 3A for 1994, we find that those 1994 costs totaling $196,869 are supported as follows: D&D Tires ($111), Friend's Tire ($8,340), Suburban Propane ($2,471), Macks, Inc. ($861), Brent Trucking ($48,300 consisting of 3/10/94 invoice no. 6133 ($38,400), 4/25/94 invoice no. 6339 ($8,700), and 6/25/94 invoice no. 6797 ($1,200)), Fannon Petroleum ($1,412), CWI ($131,524), and MGM Transportation ($3,850). The CWI invoices charged to cost account 3800-000-43 were supportable for the following amounts which total $146,138: invoice no. 5114 ($2221.76), invoice no. 5115 ($4,320), invoice no. 5116 ($1,050), invoice no. 5112 ($2,250), invoice no. 5251 ($10,710), invoice no. 5254 ($1,414), invoice no. 5253 ($0), invoice no. 5377 ($1,270.50), invoice no. 5376 ($7,191), invoice no. 5375 ($22,860), invoice no. 5500 ($1,113), invoice no. 5115 ($4,320), invoice no. 5499 ($23,495), invoice no. 5498

($16,730), invoice no. 5636 ($1,193), invoice no. 5635 ($23,469.40), and invoice no. 5634 ($22,530). We disallow 10 percent of these CWI costs, resulting in allowable CWI costs of $131,524, due to the inefficiencies of Eagle's operation which resulted in additional hauling of recyclables between Eagle's Capitol Heights facility and the CWI facility it was using at Olive Street. The items of cost for "AMEX – Fuel", Nations Bank, Waste Management (not shown to be dedicated to the District job, *see* HEX 66U, Detail Trial Balance, at 33), and the category of "Other" are unsupported. The costs for fuel, maintenance, and transportation in 1993 and 1994 equals $222,321, which after deducting 5 percent for the allocable share of such costs on other recycling, yields allowable and allocable fuel, maintenance, and transportation costs of $211,205.

For the fuel, maintenance, and transportation costs incurred by Eagle Management in 1994, we find adequate documentary support for the following costs: MGM Brokerage Service ($3,100) and Count Recycling Systems ($3,371). The unadjusted total of supported costs for fuel, maintenance, and transportation equals $6,471, which after deducting 5 percent for the allocable share of such costs on other recycling work, yields allowable and allocable fuel, maintenance, and transportation of $6,147. For the fuel, maintenance, and transportation costs incurred by Eagle Management in 1995, we find adequate documentary support for the costs totaling $9,447, which after deducting 5 percent for the allocable share of such costs on other recycling work, yields allowable and allocable fuel, maintenance, and transportation of $8,975. Total allowable and allocable fuel, maintenance, and transportation costs listed under Eagle Management equals $15,446.

In sum, total allowable and allocable fuel, maintenance, and transportation costs for Eagle equals $226,651.

Equipment Rental/Repair

In its BAFO, Eagle's proposed yearly costs of $108,000 related to equipment within the Other Direct Costs schedule. (PCX 21, Cost and Pricing Data, Years 1-5, Schedule 3). In the BAFO, equipment repair probably was included in the "Repair and Maintenance" category. Thus, there is not a precise match between BAFO cost categories of "Repair and Maintenance" and "Equipment" with the costs accounts, "Fuel, Maintenance, and Transportation" and "Equipment Rental/Repair," actually used by Eagle during performance. For the actual two-year performance period, Eagle claims a total of $149,493 for equipment rental/repair, consisting of $72,475 in 1993, $68,037 for the period of January through November 1994, and, subsumed within Eagle Management's "subcontract" costs, $4,478 for the period September through December 1994, and $4,503 for the period January through April 1995.

In support of its claimed equipment rental/repair costs, Eagle furnished with its 1996 claim letter the following: Schedule 2, which lists monthly totals for 1993, Schedule 2A, which lists the monthly amounts by supplier, Schedule 3, which lists monthly totals for 1994), and Schedule 3A, which lists the monthly amounts by supplier. (HEX 65B, Appendix 1). Eagle collected costs for these items under its internal cost account numbers 3800-000-45 and 3032-000-45. The costs claimed through Eagle Management are summarized in the September-December 1994 and January-May 1995 income statements and attached "Detail Trial Balance" sheets. (HEX 66T, 66U).

OIG relied on auditing of a random sampling conducted by KPMG of 19 items of equipment rental/repair costs claimed by Eagle in 1993 and 1994. KPMG found 17 of the 19 cost items to be supported. (HEX 66C, 66K). The two disallowed items were charges to American Express Green totaling $7,310. (HEX 66K; 65A, at 5). The OIG auditors in their review disallowed one more of the 19 items selected, a $20,000 cost paid to Gershman, Grickman & Bratton, Inc. ("GBB") (*see* Eagle Schedule 2A; HEX 66G), which was not for equipment rental but rather for consulting on the new intermediate processing facility. (Tr. 735-736; 213-214). OIG separately determined that all costs relating to the design and construction of Eagle's new District-based processing facility were unallowable. OIG thus agreed with KPMG that 16 of the 19 randomly selected items were allowable.

Based on our review of the random sample, we find the following additional items unallowable: (i) the amount of $10,842.10 paid to Mid-Atlantic Waste Systems for "glass crusher(s) machinery" is unallowable because the cost is not a rental cost but a capital acquisition that benefited Eagle beyond the District recycling job and for which Eagle has provided no basis for allocation (HEX 66G; Tr. 212-213); (ii) the amount of $3,975.74 paid to NationsBank of Delaware based on a statement listing an annual fee, a "Transfer Misapplied Pymt", four unspecified charges from Beltsville Rental, a prior balance credit of $390.01, and a payment of $2,692.83. Thus, we find 5 of the 19 randomly selected items, totaling $42,128, to be unallowable.

Based on our review of the invoice records, KPMG's and OIG's analyses, and testimony relating to the equipment rental/repair costs claimed on Schedule 2A and 3A for 1993 and 1994, we find costs, prior to the allocation adjustment, are supported as follows: Count Recycling ($64,040); Orix Credit ($2,012); Suburban Propane ($43); Hydra Lift ($935); Colonial Pacific ($4,637); Oxon Hill Rental ($3,451); and Metro Rental ($7,707). The 3 invoice charges for Idealease ($915) were disallowed because although the vouchers charge the 3 invoices to the District recycling job, the 2 invoices that have the rental agreement attached list the drivers as Vaundervilt C. Simmons and Lawrence Maynard. These two individuals were drivers for the PG County recycling job during that time period. (Eagle Ex. 11, at 43, 56; Eagle Ex. 12, at 45, 58). The costs claimed for Toyota Motor, Waste Management AMEX, Nations Bank, and the category of "Other" are unsupported and thus unallowable. The unadjusted costs for equipment rental/repair in 1993 and 1994 equal $82,825, which after deducting 5 percent for the allocable share of such costs on other recycling jobs, yields allowable and allocable equipment rental/repair costs of $78,684.

For the equipment rental/repair costs incurred by Eagle Management in 1994 and 1995, we find adequate documentary support for the claimed costs of $8,981 which after deducting 5 percent for the allocable share of such costs on other recycling jobs, yields allowable and allocable equipment rental/repair costs listed under Eagle Management of $8,532. The equipment rental/repair costs do not appear to be the type that would be affected by Eagle's inadequate facilities and the inefficiencies in conducting the processing operation at multiple locations and in hauling materials between locations.

In sum, total allowable and allocable equipment rental/repair costs for Eagle equals $87,216.

Other Direct Costs (Subcategory)

Eagle did not include in its BAFO cost schedules a subcategory of "Other Direct Costs" within the general category of "Other Direct Costs." For the actual two-year performance period, Eagle claims a total of $96,392 for the ODCs subcategory, consisting of $33,389 in 1993, $49,217 for the period of January through November1994, and, subsumed within Eagle Management's "subcontract" costs, $10,172 for the period September through December 1994, and $3,614 for the period January through April 1995.

In support of its claimed ODC costs, Eagle furnished with its 1996 claim letter the following: Schedule 2, which lists monthly totals for 1993, Schedule 2A, which lists the monthly amounts by supplier, Schedule 3, which lists monthly totals for 1994, and Schedule 3A, which lists the monthly amounts by supplier. (HEX 65B, Appendix 1). Eagle collected costs for these items under its internal cost account numbers 3800-000-49 and 3032-000-49. The costs claimed through Eagle Management are summarized in the September-December 1994 and January-May 1995 income statements and attached "Detail Trial Balance" sheets. (HEX 66T, 66U).

OIG relied on auditing of a random sampling conducted by KPMG of 18 items of ODC costs claimed by Eagle in 1993 and 1994. KPMG found 10 of the 18 cost items to be supported. (HEX 66C, 66K). The auditors disallowed items from Wamo Welding, American Express Green, Overhead Door, and Robert McCall, in the total amount of $20,770.

Based on our review of the random sample, we find the amounts of $8,000 and $4,609 paid to Design-Build Contracting for roof repairs, $4,700 paid to Wamo Welding for welding at the Capitol Heights facility, and $5,500 paid to Nathan Dorsey, to be unallowable because those costs are capital improvements that benefited Eagle beyond the District recycling job. (HEX 66C; Tr. 215-217).

Based on our review of the invoice records, KPMG's and OIG's analyses, and testimony relating to the ODCs claimed on Schedule 2A and 3A for 1993 and 1994, we find costs charged to the ODC accounts 3800-000-49 and 3032-000-49, prior to the allocation adjustment, are supported as follows: First Page ($166.50); District International ($226.66); McLean Rental ($241.43); Hirrlinger Electric ($1,823.43) ($173.25 deducted because amount erroneously charged to the District recycling job); D&D Tire ($236.98), Paradise Unlimited ($433.58); Hydra Lift ($11,997.22); Bay Scale ($9,399); Strickland Fire ($2,040); and Simplex ($90.05). (HEX 66C, 66D, 66K, 66I, 66J, 66P). The costs claimed for Design-Build Contracting, Wamo, AMEX, Nations Bank, Pepco, Bernie Ind., WSSC, Mid-Atlantic Waste Systems, Robert McCall, Overhead Door, and the categories of "Other" are unsupported and unallowable. We have reduced the credit amount of $29,085.39 appearing in the 1993 account 3800-000-49 "Other" category by $15,875.21, the sum of the claim amounts for that category, since we have found the claim amounts unsupported and unallowable. In sum, the unadjusted costs for ODCs in 1993 and 1994 equal $13,445, which after deducting 5 percent for the allocable share of such costs on other Eagle jobs, yields allowable and allocable ODCs of $12,773.

For the claimed ODCs incurred by Eagle Management in 1994 and 1995, we find adequate support in the record for the costs of ABC Burglar Alarm ($81.90), which after deducting 5 percent for the allocable share of such costs on other recycling jobs, yields allowable and allocable ODCs listed under Eagle Management of $78. We find the remaining claimed costs, including those for invoices from Bell Atlantic, WSSC, Ernest Roland, Aundra Williams/DC Drop Off, and Adolphus McLean, to be unsupported and unallowable. (HEX 66T, 66U, 66Z). The costs allowed in this subcategory of ODCs do not appear to be the type that would be affected by Eagle's inadequate facilities and the inefficiencies in conducting the processing operation at multiple locations and in hauling materials between locations. Therefore, we make no further deductions.

In sum, total supported costs under the ODCs subcategory for Eagle equals $12,851.

Uniforms

Eagle claims costs of $3,532 relating to uniforms. Based on our review of the record, we find the costs for uniforms to be supported, and after allocating 5 percent for other Eagle jobs, we find allowable and allocable uniform costs in the amount of $3,355.

Depreciation

Eagle claimed depreciation costs of $29,355 on Schedule 3 for 1994. The OIG auditors determined that depreciation was not an allowable cost and Eagle agreed with that determination. (HEX 65A, at 7 (Note 3); Tr. 697-698, 726-728).

D. Eagle Subcontractor Costs

Excluding the "subcontract" costs of $423,458 and $577,307 arising from Eagle Management for September through December 1994 and January through May 1995, Eagle has claimed subcontract costs of $675,215 summarized on Schedules 2 and 2A for 1993, and $176,193 summarized on Schedules 3 and 3A mainly for January through August 1994. When Eagle transferred the District recycling job to Eagle Management, what before was Eagle Maintenance's labor, ODCs, and subcontract costs, became Eagle Management's labor, ODCs, and subcontracts costs. However, Eagle Management billed Eagle for all of these costs on a monthly basis and Eagle Maintenance treated Eagle Management's monthly billings as "subcontract" costs since it viewed Eagle Management as a subcontractor. Thus, the $423,458 of "subcontract" costs claimed through Eagle Management for September through December 1994 (HEX 66T), and $577,307 of "subcontract" costs claimed through Eagle Management for January through May 1995 (HEX 66U), contain not only the subcontract vendors but also Eagle Management's labor, ODCs, "Overhead Expenses", and G&A expenses. In our earlier treatment of labor costs and ODCs, we have disregarded the Eagle Management structure as a separate entity in accord with OIG's similar findings and instead, we extracted the labor and ODC components from Eagle Management records and added them to the labor and ODCs generated by Eagle Maintenance so that each cost category contains all labor and all ODCs regardless of whether it was incurred under Eagle Maintenance or Eagle Management. To be consistent, we do the same with regard to subcontract costs.

In order to isolate the true subcontract costs, we extract the subcontract costs from Eagle Management's income statements. The actual claimed subcontract costs (arising from the outside vendors) are contained in Eagle Management cost account 42502 (entitled "Subcontractors DC Recy") for the District recycling job. Claimed subcontract costs for the period September through

December 1994 appearing on Eagle Management's income statement total $164,151.62. (HEX 66T). Claimed subcontract costs for the period January through May 1995 appearing on Eagle Management's income statement total $203,477.83. (HEX 66U). Accordingly, actual claimed subcontract costs for the entire performance period from vendors outside of Eagle Maintenance and Eagle Management total $1,219,038 (*i.e.*, $675,215+$176,193+$164,152+$203,478).

OIG, in its final audit report, questioned $35,000 of $851,408 subcontract costs for the period 1993 through approximately August 1994. OIG questioned none of $379,671 in subcontract costs for the Eagle Management period of September 1994 through May 1995. OIG also disallowed a net profit of $18,833 appearing on Eagle Management's income statements for the period September 1994 through May 1995 because profit is unallowable under D.C. Code § 1-1182.5(d)(2). (HEX 65A, at 7 (note 5)). As discussed below, we find total allocable and allowable subcontract costs of $563,854 pursuant to D.C. Code § 1-1182.5(d)(2).

Initially, the OIG auditors employed KPMG to audit subcontract costs. After reviewing the initial OIG audit report, the Board was not satisfied with the level of documentation obtained from Eagle and the level of auditing performed with regard to subcontracts. For example, neither KPMG nor OIG was aware of the existence of Eagle's recycling division and affiliated company, Eagle Management, and that Eagle had transferred the District recycling job to this division in roughly September 1994. (Tr. 801-802). We directed Eagle to produce copies of the subcontracts, invoices and vouchers, and, for the two largest subcontractors, Eagle Management and CWI, we ordered the production of additional documentation such as correspondence and additional cost records. We directed the OIG to supplement its auditing to include analyzing whether Eagle's claimed subcontract costs were properly allocable to the District recycling job. OIG produced an interim audit report and ultimately its final audit report. (HEX 65A). Some background is useful for understanding how and why Eagle incurred subcontract costs and how Eagle accounted for such incurred costs.

For the period from late March 1993 through approximately September 1994, Eagle Maintenance, the parent company, was the cost center for all costs incurred on the District recycling job, its other recycling jobs (including the PG County hauling contract), and its janitorial jobs. According to Eagle, in September 1994, Eagle Maintenance transferred its recycling jobs to its affiliated company, Eagle Management. Thus, Eagle recycling workers were transferred for cost purposes to Eagle Management. All labor, acquisitions, repairs, maintenance, and subcontracting for recycling were recorded on the books of Eagle Management, although some residual ODCs were recorded in the parent company's cost accounts during the period September through December 1994. There were two principal recycling jobs showing accumulation of costs under Eagle Management cost accounts, the District job and the PG County job. A third job, Waste Management, also appears in the cost records. In line with what Eagle did during the period of April 1993 through September 1994, the District recycling job cost accounts continued to incur costs under the ODC and subcontractor costs categories in support of Eagle's other smaller recycling jobs. The cost allocations between the District job and the PG County job are more clearly seen in the Eagle Management cost records during the period September 1994 through May 1995 than can be discerned in Eagle Maintenance's costs records for the period of approximately April 1993 through September 1994.

1. *Subcontracted Hauling Services*

For the entire two-year performance period, Eagle Maintenance and Eagle Management cost records show collectively that subcontracted hauling services were the single largest category of costs claimed on the District recycling job. The claimed costs for hauling, totaling $1,301,288, are mainly captured under the subcontracts category, which accounted for $1,049,570 in claimed hauling costs. In addition, as seen in the ODCs category discussed earlier, a significant amount of subcontracted hauling costs were also charged under the ODC subcategory of fuel, maintenance, and transportation. Total charges of $251,718, consisting of CWI ($175,360), Brent Trucking ($72,508), and MGM Brokerage/Transport ($3,850), were made to this account. Of the $1,049,570 in hauling costs charged to subcontracting costs accounts, $707,206 is charged under the subcontracting accounts of the parent company, Eagle Maintenance, and the remaining $342,364 is charged to subcontracting cost accounts of Eagle Management. The hauling amounts claimed under Eagle Maintenance subcontracts cost accounts 3800-000-46 and 3032-000-46, totaling $707,206, are as follows: CWI ($442,473), Brent Trucking ($95,100), Rogers Brothers ($80,775), Georgetown Express ($67,375), MGM Brokerage/Transport ($10,243), Laidlaw ($9,468), and Waste Management ($1,772). The hauling amounts claimed under Eagle Management subcontracts cost account 42502 for September to December 1994 are limited to one subcontractor, CWI ($154,098). The hauling amounts claimed under Eagle Management subcontracts cost account 42502 for January to April 1995 are also limited to the same subcontractor, CWI ($188,266). Thus, the hauling costs by vendor are as follows: CWI ($860,197, consisting of $784,837 charged as subcontract costs and $175,360 charged as ODCs), Brent Trucking ($167,608, consisting of $95,100 charged as subcontract costs and $72,508 charged as ODCs), Rogers Brothers ($80,775), Georgetown Express ($67,375), MGM Brokerage/Transport ($14,093, consisting of $10,243 charged as subcontract costs and $3,850 charged as ODCs), Laidlaw ($9,468), and Waste Management ($1,772).

Eagle's BAFO cost and pricing data does not show any category for subcontract costs and does not appear to have any hauling costs incorporated in its ODC category. (PCX 21, Schedule 3 for Years 1-5). Under the solicitation and contract, Eagle would have expected the need to haul and dispose of approximately 15 percent of all recyclables collected because this was an estimated percentage of recyclables that would be unmarketable and thus treated as trash, also known as "bypass" in the industry's parlance. Eagle also would have incorporated into its labor estimates the manpower needed to sort the newspaper from the other collected recyclables and load the newspaper onto District-provided trucks. For hauling non-paper recyclables to market, Eagle may have assumed that it would have either the marketing source or a broker pick up the recyclables who would in turn deduct the transportation cost from the market revenue provided to Eagle.

To determine the reasonableness of the hauling costs claimed by Eagle, we must determine the types of hauling for which Eagle contracted, the approximate amounts hauled, and reasonable costs per ton for such hauling. The record reveals four main types of hauling which Eagle subcontracted to various hauling contractors. First, was the hauling of newspaper from Eagle's Capitol Heights facility and CWI's Olive Street facility to the District's newspaper market, Capitol Fiber. Second, Eagle contracted for the hauling of unmarketable materials to landfills. Third, Eagle contracted a limited amount of hauling of non-paper recyclables to various markets. Fourth, Eagle contracted with CWI to haul materials from the Olive Street facility to its Capitol Heights facility and from its Capitol Heights facility to CWI's Olive Street facility. Based on the data collected by

Ms. Hallie Clemm of DPW, we can determine the approximate tons of hauling that Eagle was required to perform under the invalid contract and then compare that with the hauling it claims it performed solely for the District job.

First, we consider the hauling of newspaper to Capitol Fiber. Under the statement of work, the District was responsible for hauling the newspaper from Eagle's Capitol Heights facility to Capitol Fiber, but, because of problems with the DPW truck fleet, the District was hauling only just over one half of the newspaper to Capitol Fiber. During the first year of performance, Eagle voluntarily transported the newspapers not being hauled by the District. During the second year of performance, Eagle expected the District to pay Eagle for this extra service. We believe that Eagle did not demand payment during the first year for such newspaper hauling because the District was paying Eagle not only the $15 per ton newspaper transfer fee but also the full $60 per ton processing fee on both newspaper and all other recyclables on the basis that since the District collected all recyclables together without having separate compartments for newspapers and the other recyclables, all the material was "commingled recyclables." This separating was more than the sorting and loading operation contemplated by the statement of work. Since contract payments have no meaning in a determination under D.C. Code § 1-1182.5(d)(2), it would be unfair to find that Eagle volunteered to provide the newspaper hauling in the first year without compensation. As we previously found, Eagle had to haul to Capitol Fiber approximately 45 percent of the newspapers for 1993 and approximately 55 percent of the newspaper for the remaining performance period. Based on the quantity of marketed newspapers, we previously found that Eagle thus had to transport to Capitol Fiber 4,681 tons of newspaper during 1993 and 11,821 tons of newspaper during the remainder of the performance period. Thus, Eagle subcontracted for the hauling of approximately 16,502 tons of newspaper to the paper market, mainly Capitol Fiber, during the entire performance period. It also appears from the record that Eagle subcontracted with CWI to perform a substantial majority of this newspaper hauling. (HEX 65B, Appendix 1, Attachment 1 (June 28, 1996 letter from Paul D. Furby to Mahamad K. Yusuff); Tr. 52).

Second, we consider the amount of unmarketable materials/bypass that Eagle had to have hauled away for disposal, either at a landfill or elsewhere. The record shows that for the entire performance period, Eagle had to have haulers dispose of a total of 9,593 tons of unmarketable recyclables. (HEX 1A). Third, there was a total of 9,779 tons of marketable materials other than paper, consisting of 125 tons of marketed aluminum, 1,525 tons of marketed plastic, 63 tons of marketed steel, and 8,066 tons of marketed glass. (HEX 1A). Eagle's records do not show how much of this material was transported to markets by Eagle subcontractors and how much was transported to markets by the market entities themselves or by market brokers. Fourth, there was an unknown quantity of materials hauled back and forth between Eagle's Capitol Heights facility and CWI's Olive Street facility. Eagle's records do not show how much material was hauled between the facilities. The evidence shows that because of Eagle's own facility problems it subcontracted with CWI to perform hauling that in certain respects was very inefficient. A significant quantity of DPW delivered materials were taken directly to CWI's facility. It appears that Eagle personnel separated the newspapers from the other commingled material. CWI would then transport the newspaper to Capitol Fiber and the remaining material was hauled back to Eagle's Capitol Heights facility for processing because only Eagle's facility had the mechanical sort lines. After processing, Eagle might have CWI haul the unmarketable material back to CWI's facility where it would be loaded onto tractor trailers and then transported by CWI to a landfill or other disposal site. (Tr. 355-

356, 371-372). Because Eagle's facility as represented in its proposal should have been sufficient to handle all of the DPW-delivered materials, but was not due to various facility and storage problems and inefficiencies in the processing operations, we find that the portion of Eagle's costs associated with hauling between Eagle's facility and CWI's facility are unreasonable and unallowable costs under D.C. Code § 1-1182.5(d)(2).

CWI

Eagle claims $784,837 in subcontract costs paid to CWI for services relating to the District recycling job. In its June 28, 1996 response to an inquiry from the OIG auditors, Eagle described CWI's subcontract effort as involving "processing and transfer of newsprint, hauling newsprint, hauling materials to market, and hauling by-pass for disposal." In his hearing testimony, Eagle's Mr. Tynes denied that CWI personnel performed any processing at the CWI Olive Street facility. Rather, Eagle used its own personnel to sort the paper from the other commingled recyclables and CWI merely hauled the newspaper to Capitol Fiber.

Mr. Tynes could not recall the specific subcontract arrangement or arrangements he had with CWI. The written record indicates that there were several different arrangements during the 2-year performance period. The first arrangement was evidenced by a written memorandum of understanding ("MOU") in May 1993 between Tynes of Eagle and Wilton Lash of CWI. Although Tynes initially was not aware of any written agreement between Eagle and CWI, the agreement surfaced during the proceedings. There were also other arrangements for pricing of various types of hauling and weighing of trucks for the period from 1994 to 1995, but no documentation has been produced clearly evidencing these arrangements. Some information concerning the arrangements can be gathered from CWI's invoices, Eagle's markups of those invoices, and, with respect to tractor trailer loads, a letter submitted by CWI with some of its invoices explaining the derivation of tractor trailer pricing.

1993 MOU Payments

Eagle seeks $333,892 for payments to CWI pursuant to the May 1993 MOU under which CWI received 5,137 tons of recyclables delivered by DPW during the period May through September 1993. Based on the record documentation, approximately 67 percent of the 5,137 total tons of recyclables delivered to CWI by DPW trucks during this period consisted of newspaper. (HEX 12, 14). Thus, newspaper totaled 3,442 tons while non-paper recyclables totaled 1,695 tons. As provided in the MOU, Eagle agreed to pay CWI $65 per ton for all recyclables received at the Olive Street facility while Eagle would receive from CWI a "tipping fee" amount of $30 per ton for the non-paper recyclables. Deducting the $30 tipping fee from the $65 per ton fee, for the non-paper recyclables, results in a price of $35 per non-paper ton which Eagle paid to CWI. However, Eagle's Mr. Tynes stated that all labor associated with District recyclables was provided by Eagle employees, not CWI employees. Eagle employees separated the newspaper from the non-paper recyclables and the non-paper recyclables were hauled by CWI back to Eagle's Capitol Heights facility where Eagle employees processed the material. We find that the $35 price per ton for non-paper recyclables represented a facility cost of $17 per ton charged by CWI for Eagle's use of its facility and a hauling cost of $18 per ton based on evidence showing that Eagle obtained transportation of newspaper from CWI at $18 per ton for 30 yard pulls (*e.g.*, $90 per 30 yard pull holding about 5 tons). Eagle incurred the facility expense because of the various facility, equipment, and personnel start-up difficulties described earlier that it encountered from March through September 1993. Under the actual cost standard of D.C. Code § 1-1182.5(d)(2), the District is not responsible for Eagle's cost of using CWI's facility under the circumstances presented here and such costs are thus disallowed. Moreover, Eagle's payment documentation shows the $65 per ton payment from Eagle to CWI, but Eagle has not disclosed or made a credit for the $30 tipping fee provided by CWI to Eagle under the MOU. The OIG auditors were not aware of the existence of the MOU when they conducted their cost audit and did not investigate Eagle's revenues for applying the MOU credit. Thus, for the 1,695 tons of non-paper recyclables brought to Olive Street, we find that Eagle is not entitled to hauling costs of $30,510 because Eagle should have been able to accept all such materials at its own facility and the hauling from CWI to Eagle's Capitol Heights facility is not a reasonable cost for which the District should be responsible. Moreover, since processing was performed by Eagle employees (separation at CWI's facility and processing at Eagle's facility) and that labor has been accounted for under the direct labor costs discussed earlier, no additional labor costs are recoverable by Eagle for these non-paper recyclables.

For newspapers, Eagle also claims the full $65 per ton. Eagle was paying $65 per ton to CWI for receiving the newspaper and transporting it to Capitol Fiber. According to Mr. Tynes' testimony, CWI did not separate the newspaper from the non-paper recyclables since this was performed by Eagle employees only. (Tr. 114-115). With regard to the $65 per ton fee for the newspaper services, we similarly disallow an imputed amount of $17 per ton for CWI's facility costs. The remaining $48 per ton must be for the transportation of the newspaper to the paper market because Mr. Tynes testified that only Eagle personnel performed the labor of separating the newspaper from the non-paper. We find that $48 per ton for hauling newspaper is unreasonable. The record shows that Eagle obtained transportation of newspaper from CWI and other venders for between $8 per ton (*e.g.*, $150 per tractor trailer load holding 110 cubic yards or about 18-20 tons) and $18 per ton (*e.g.*, $90 per 30 or 40 yard pull holding about 5 tons). We find a rate of $15 per ton as a reasonable cost because CWI's facility supported both tractor trailers and smaller containers. CWI hauled approximately 3,442 tons of newspaper from the Olive Street facility to the paper market, which at $15 per ton, equals a total hauling cost of $51,630.

In sum, we find Eagle's actual costs pursuant to D.C. Code § 1-1182.5(d)(2) for subcontract services by CWI under the May 1993 MOU during the period May through September 1993 equals $51,630.

Other CWI Invoice Payments by Eagle Maintenance for the period 1993-1994

There is adequate record evidence to support the 30 yard, 40 yard, and 20 yard container pulls by CWI found on the invoices. The record also supports costs for tractor trailer pulls and truck weighing costs. (*E.g.,* HEX 48). On the other hand, the invoices also contain various "service fees" -- including "attempted pull" (apparently CWI came for a load but none was available), "wait time" (CWI waiting extra time for load to be ready), and "tickets/violations" (presumably, traffic tickets and the like) -- which we find to be unsupported and unallowable. (E.g., HEX 15-25, 26, 27-38). We find the following CWI invoice amounts, totaling $68,065 to be supported by the record: invoice no. 4637 ($8,623.61), invoice no. 4862 ($630), invoice no. 4984 ($90), invoice no. 4745 ($1,350), invoice no. 4986 ($1769.60), invoice no. 4988 ($196), invoice no. 4987 ($4,230), invoice no. 4049 ($8,760), invoice no. 4171 ($17,885), invoice no. 4285 ($8,760), invoice (adjusted) no. 4389 ($18,370), and invoice no. 4515 ($7,400.65). (HEX 3-9, 15-38). We disallow 10 percent of these costs, resulting in allowable costs of $61,259, due to the inefficiencies of Eagle's operation which resulted in additional hauling of recyclables between Eagle's Capitol Heights facility and the CWI facility it was using at Olive Street.

CWI Invoice Payments made by Eagle Management for 1994-1995

During the 1994-1995 period when Eagle Management was subcontracting with haulers and other vendors for the District recycling job, we find the following CWI invoice amounts, totaling $205,479, to be supported by the record: invoice no. 6059 ($20,237.80), invoice no. 6024 ($1,228.50), invoice no. 6453 ($16,963.90), invoice no. 6452 ($9,810), invoice no. 6574 ($6,240), invoice no. 6454 ($1,456), invoice no. 6607 ($19,291.20), invoice no. 6575 ($1,074.50), invoice no. 6346 ($1,228.50), invoice no. 6344 ($8,100), invoice no. 6373 ($16,216.20), invoice no. 5906 ($1,312.50), invoice no. 5904 ($13,020), invoice no. 5943 ($23,670.70), invoice no. 6023 ($12,041.40), invoice no. 5763 ($33,849.80), invoice no. 5809 ($16,001.50), invoice no. 5806 ($1,323), invoice no. 6690 ($2,280) (through 05-08-95), and invoice no. 6691 ($133) (through 05-08-95). (HEX 39, 53). We disallow 10 percent of these costs, resulting in allowable costs of $184,931, due to the inefficiencies of Eagle's operation which resulted in additional hauling of recyclables between Eagle's Capitol Heights facility and the CWI facility it was using at Olive Street.

Summary of CWI subcontract costs

Based on our review of the record, we find adequate support for costs paid to CWI under the subcontracts category of costs in the total amount of $297,820, consisting of $51,630 under the May 1993 MOU, $61,259 charged to Eagle Maintenance's subcontracts category for the period 1993-1994, and $184,931 charged to Eagle Management's subcontracts category for the period from approximately September 1994 through the first week of May 1995.

Rodgers Brothers

Eagle claims costs for subcontracting with Rodgers Brothers of $80,775. In its June 28, 1996 letter to the OIG auditors, Eagle states that Rodgers Brothers was "[h]auling materials to market and by-pass for disposal." The invoices indicate that Rodgers Brothers was performing "dump and return" services using 30-yard containers at the rate of $400 or $425 each. (*E.g.*, HEX 57, 58). The trucking slips do not indicate a destination location. We find that Rodgers Brothers was hauling all or nearly all of the material to a landfill for disposal.

The record (including Eagle vouchers and Rodgers Brothers invoices) supports the following hauling costs totaling $67,200 which Eagle charged to the subcontracts cost account 3800-000-46: invoice nos. 000837 ($3,000), 000838 ($8,075), 000853 ($12,325), 000891 ($11,900), 001201 ($4,000), 001200 ($6,000), 001207 ($10,000), and 000908 ($11,900). Some or all of the charges on invoice nos. 000943 and 000963 relate to unallowable amounts for fire damage removal arising from the July 1993 fire at Eagle's Capitol Heights facility. Because we are unable to discern whether there are allowable amounts within those invoices, we find the invoice amounts are not adequately supported in the record.

Brent Trucking

In its claim submission, Eagle claims costs of $95,100 charged to the subcontracts cost account for Brent Trucking. In our review, we found that some of the amounts that Eagle placed in the ODC category of its claim submission were not actually charged to the ODC cost account but rather were charged to the subcontracts cost account. That explains why we find supported subcontract costs which exceed the $95,100 amount in the claim submission. In its June 28, 1996 letter to the OIG auditors, Eagle states that Brent Trucking was "[h]auling . . . recyclable material to market and by-pass for disposal." The invoices indicate that Brent Trucking was performing "dump and return" services using 30-yard containers at the rate of $300 each. The trucking slips do not indicate a destination location. Most likely, Brent was hauling material to a landfill.

Beyond the pre-adjusted $48,300 of transportation costs for Brent Trucking charged to the ODC category of fuel, maintenance and transportation cost account 3800-000-43 discussed earlier, the record (including Eagle vouchers and Brent Trucking invoices) supports the following additional hauling costs, totaling $116,475,which Eagle charged to the subcontracts cost account 3800-000-46: 11/18/93 invoice no. 5470 ($375), 1/10/94 invoice no. 5719 ($14,700), 1/25/94 invoice no. 5821 ($15,600), 2/10/94 invoice no. 5936 ($1,500), 2/10/94 invoice no. 5937 ($31,500), 2/25/94 invoice no. 6041 ($39,600), and 3/25/94 invoice no. 6228 ($13,200). The record does not adequately support the 5/10/94 invoice no. 6499 ($2,400) (check voided) and the 4/25/94 invoice no. 6440 ($13,800).

Georgetown Express

Eagle claims costs of $67,375 for subcontracting with Georgetown Express for hauling services. In its June 28, 1996 letter to the OIG auditors, Eagle states that Georgetown Express was "[h]auling materials to market and hauling by-pass for disposal." Georgetown Express invoices do not contain the truck tickets showing what material was being transported nor the pick-up location or destination for the shipment. The invoices simply describe the services as "Open Top Haul" and the unit charge is either $125 (through September 1993) or $375 (after September 1993). We find that the record (including vouchers and invoices) support $51,625 in charges to subcontract cost account 3800-000-46.

MGM Brokerage/Transport

Eagle claims costs of $10,243 for subcontracting with MGM Brokerage/Transport, which mainly consisted of transporting marketable glass to Owens Brockway Glass Recycling Center in Winston-Salem, North Carolina. Generally, MGM charged $300 for each approximately 20 ton tractor trailer haul, thus at a rate of about $15 per ton. One invoice indicates that MGM hauled a load of newspaper to Capitol Fiber for that same rate. Invoices support the $10,243 charged under subcontract cost account 3800-000-46.

Laidlaw

Eagle claims costs for subcontracting with Laidlaw of $9,468. In its June 28, 1996 letter to the OIG auditors, Eagle does not identify any hauling services by Laidlaw. A review of the invoices show that Eagle had some type of arrangement whereby it would have materials delivered to Laidlaw for processing by Laidlaw. For example, Laidlaw was provided "blue bag" recyclables which it would process at $50 per ton and thereafter the material became Laidlaw's, not Eagle's, and the District would receive no market revenue. (Tr. 231-232; HEX 60). Although Eagle's Mr. Tynes said that it was the District that dictated the use of Laidlaw for overflow of recyclables (Tr. 920), documentation shows that it was Eagle that designated Laidlaw as a facility for receiving recyclables. (Tynes letter to Francis, dated January 10, 1994). It is not clear which materials were DPW-collected materials and which materials came from other Eagle jobs. Nor does the record indicate the details of the arrangement between Eagle and Laidlaw. Finally, the recyclables became Laidlaw's and the District saw no benefit from marketing. For lack of adequate support, we find the costs associated with Laidlaw to be unsupported and unallowable.

Waste Management

Eagle claims costs for subcontracting with Waste Management of $1,772. In its June 28, 1996 letter to the OIG auditors, Eagle states that Waste Management was "[h]auling . . . by-pass for disposal." The invoices indicate charges to a Department of State job, Sovran Tennis job, a "Mosque Cleanup job", and charges for truck rentals under various District recycling codes. We find the $1,772 claims costs unsupported by the record.

Summary of Supported Hauling Costs

Based on our review of the record, we find supported hauling costs of $543,363.

2. Other Subcontract Costs

Although hauling costs constituted the vast majority of subcontract costs claimed by Eagle, there are other subcontract costs which we analyze below.

Frank Johnson

Frank Johnson was the Capitol Heights facility's plant manager who was hired by Eagle as an independent contractor. (June 28, 1996 letter to OIG Auditors). Eagle has claimed subcontract costs totaling $42,050, consisting of $3,300 summarized on Schedules 2 and 2A for 1993, $22,400 summarized on Schedules 3 and 3A for 1994, and costs of $16,350 claimed through Eagle Management for the period of late 1994 through April 1995. An invoice covering February 1995 indicates that Johnson was paid a lump sum of $150 per day for his consulting work at Eagle's Capitol Heights facility. (HEX 66Y). We find that the record adequately supports the claimed amount of $42,050.

Clarence Miller

Mr. Furby stated that he believed that Clarence Mill was a small hauler who might have hauled one item away from the Capitol Heights facility. (Tr. 241-242). Eagle has claimed subcontract costs of $675, represented by a single charge for May 1993. (HEX 66R). An invoice covering February 1995 indicates that Johnson was paid a lump sum of $150 per day for his consulting work at Eagle's Capitol Heights facility. (HEX 66Y). We find that the record adequately supports the claimed amount of $675.

Mid-Atlantic Waste

Eagle claims $3,082 for costs it paid to Mid-Atlantic Waste for acquiring various hoppers used in the recycling operation. We find that the record adequately supports the claimed amount of $3,082.

GB&B

Eagle claims $20,000 for costs it paid to the consulting firm Gershman, Brickner & Bratton, Inc. ("GB&B"). (HEX 66R). Although KPMG initially allowed the amount, Eagle has since agreed with OIG auditors who disallowed these as subcontract costs because they relate to consulting work on the proposed new Eagle recycling facility. As discussed below, we find that under the circumstances presented here the costs incurred by Eagle for the proposed new Eagle recycling facility are not recoverable under the actual cost standard of D.C. Code § 1-1182.5(d)(2).

John Gray P.C.

Eagle claims $4,500 charged in August 1993 for architectural services by John Gray relating to the new District-based facility. (HEX 66R; Tr. 243-244, 522). Those costs are not allowable for the same reasons discussed above with regard to GB&B.

Hirrlinger Electric

Eagle claims $2,075 charged on a January 10, 1994 invoice of Hirrlinger Electric for electrical work at the Capitol Heights facility. (HEX 66S). We find the amount to be allowable.

ABC Burglar Alarm

Eagle claims $380 for various invoices charged to the subcontracts cost account between January and June 1994 for burglar alarm services provided by ABC Burglar Alarm Systems. (HEX 66S). We find the amount to be allowable.

Strickland Fire Protection

Eagle claims $505 for one or more invoices charged to the subcontracts cost account in January 1994. (HEX 66S). We have found one invoice in the amount of $305 charged to the subcontracts cost account 3800-000-46 for mechanical services. We find that amount to be allowable.

Bradby Electrical

Eagle claims $4,410 for work charged to the subcontracts cost account in January 1994. (HEX 66S). We find the amount to be unsupported in the record.

AMEX

Eagle claims $1,000 charged to the subcontracts cost account in March 1994. (HEX 66S). We find the amount to be unsupported in the record.

Wamo Welding

Eagle claims $3,377 charged to the subcontracts cost account between March and August 1994. (HEX 66S). We find the amount to be part of a $5,877 capital improvement to the Capital Heights facility which benefited more than simply the District recycling job. Accordingly, the amount claimed is unallowable.

Robert McCall

Eagle claims $9,468.20 charged to the subcontracts cost account between March and June 1994. (HEX 66S). The record does not disclose any vouchers and invoices charged to the subcontracts cost account. We did find find an agreement for McCall to perform various unallowable capital improvements for a price of $6,400. The amount claimed is unsupported and unallowable.

Meyers Consulting Engineers

Eagle claims $2,037 charged to the subcontracts cost account in August 1994. (HEX 66S). The record discloses that the amount was part of the capital improvements undertaken by Wamo Welding. (HEX 62). Although Meyer Consulting Engineers was a subcontractor of Wamo Welding, due to an apparent failure of Eagle to complete its payment to Wamo, it was arranged that Eagle pay Meyer directly. Because the capital improvement benefited more than simply the District recycling job, the claim amount is unallowable.

Federal Pest Control

Eagle claims $800 charged to the subcontracts cost account between January and August 1994, at $100 per month, for pest control services. (HEX 66S). We find adequate support in the record for the amount claimed. Eagle also claims $400 for the period September through December 1994 and $600 for the period January through May 1995. The record discloses invoices for these periods and we allow a total of $800 for the period September 1994 through April 1995. Thus, we find $1,600 in supported costs.

"Other"

Eagle claims a net of $73,600.46 under the subcontracts cost account between June and December 1993. (HEX 66R). Eagle has failed to provide adequate support in the record for these costs. Accordingly, they are disallowed.

Overhead Door

Under Eagle Management's subcontractors cost account for the period January through May 1995, Eagle claims an amount of $325.66 . From the documentation in the record, it appears that this amount is part of a larger capital improvement that Eagle made to its facility which benefited Eagle beyond the District recycling job. Accordingly, we disallow the amount.

"Temporary Call-In"

Under Eagle Management's subcontractors cost account for the period September through December 1994, Eagle claims various amounts totaling $2,453.38 labeled as "Temporary Call-In L." Under the same cost account for the period January through May 1995, Eagle claims various amounts totaling $5,136 labeled as "Temporary Call-In L." Although these amounts were not explained by Eagle, it appears that these amounts represent temporary labor. Eagle agreed with the OIG auditors that the temporary labor was not allowable. (Tr. 162). If some copies of checks paid to the order of Adolphus McLean are meant to be the support, we do not find them to be adequate.

Summary of Allowable and Allocable Subcontracts Costs

In addition to supported hauling costs of $543,363, we find supported costs of $50,167 for the other costs charged to the subcontracts cost accounts of Eagle (including Eagle Management). As with the charging of ODCs, we saw instances where Eagle improperly allocated costs arising from other Eagle jobs to the District recycling job. For example, CWI performed hauling services for Eagle's other jobs, but in at least some cases, Eagle did not allocate such costs to the other jobs but rather charged them under the District recycling cost accounts. (*E.g.*, HEX 21 (ticket relating to NASA job); HEX 46, 50 (NASA Goddard Space Center)). Because of Eagle's record keeping, we are unable to determine the extent of such erroneous charges. When it came to responsibility for approving the allocation of costs to Eagle jobs, we find that Mr. Furby in his testimony was not always forthcoming. (*See, e.g.*, Tr. 188-192). Nevertheless, as with the labor and ODC categories of costs, we find that the 5 percent deduction for Eagle's other recycling jobs performed at the Capitol Heights facility should be applied to subcontract costs because at least 5 percent of the material handled at the Capitol Heights facility was generated from other Eagle recycling and janitorial jobs. Therefore, after applying the 5 percent deduction to the unadjusted total subcontract costs of $593,530, we find allocable and allowable subcontract costs for Eagle of $563,854.

E. Eagle's General and Administrative Cost

G&A costs are indirect costs that are not attributable to any single cost objective but which are pooled and then allocated among all company cost objectives. We asked the parties to address whether G&A costs should be allowable under the actual cost standard of D.C. Code § 1-1182.5(d)(2). We agree with the OIG that some G&A costs, such as administrative and clerical salaries, which can be shown to have reasonably benefited the performance of the work under the invalid contract, may be recognized, even though due to the nature of the costs it is proper to collect them in indirect cost pools and then allocate them among projects rather then attempt to allocate portions and charge them as direct costs of the various projects. (Tr. 817).

Eagle claims G&A costs of $570,063 using G&A pools for 1993 ($1,302,292), 1994 ($1,615,232), and 1995 ($403,608), and claimed total cost base for 1993 ($8,731,322), 1994 ($10,654,668), and 1995 ($2,562,546), for Eagle's calculated G&A rates of 14.92 percent for 1993, 15.16 percent for 1994, and 15.75 percent for 1995. (HEX 65B, Appendix 1, Eagle Schedule 7). Eagle then applied these rates to claimed direct costs and fringe benefits for 1993 ($1,503,731), 1994 ($1,680,519), and 1995 ($577,393) (HEX 65B, Appendix 1, Eagle Schedules 2-4), to arrive at its total G&A costs of $570,063.

In its initial audit, the OIG auditors questioned $48,262 of Eagle's claimed G&A costs due to an overstatement of Eagle's G&A rate arising from unallowable costs (interest, entertainment, and contributions) included in the G&A cost pool that Eagle used in calculating the rate, and from reduced direct cost bases for 1993 and 1994. (HEX 65B, at 12 (Finding No. 5)). In the initial audit, however, the OIG auditors had not examined whether individual items of the claimed costs in the G&A cost pools were adequately supported. During its supplemental auditing procedures, the OIG auditors discovered that of a sample of $208,302 of listed G&A costs, $108,981 of those costs were unsupported. (HEX 69A; Tr. 820). The OIG auditors also found additional unallowable costs. (HEX 69A; Tr. 820-821). Based on this supplemental audit, the OIG auditors calculated new G&A rates for each of the three years. In addition to finding significant unallowable and unsupported costs, the OIG auditors also determined that it was improper for Eagle to charge Eagle Maintenance's G&A rate on Eagle Management "subcontract" costs which included Eagle Management G&A. (HEX 69A; Tr. 821-826). The OIG auditors also felt that it was unreasonable for Eagle to charge the G&A rate on its substantial subcontract costs. According to the OIG auditors, a rate of 3-5 percent is more typical in the industry for subcontract costs, although the auditors declined to make an analysis to calculate such a rate for Eagle. (Tr. 822-827). Nevertheless, the OIG auditors used their re-calculated G&A rates for 1993, 1994, and 1995, and applied those rates to the entire cost base, including subcontract costs. To determine the questioned G&A amounts, the OIG auditors multiplied the G&A rates by the amount of OIG's questioned base costs of the District recycling job and then also deducted the Eagle Maintenance G&A on Eagle Management costs to arrive at a total G&A disallowance of $240,798. (HEX 65A, at 9-10; HEX 69A; Tr. 826-827).

We find that Eagle's G&A cost pool is not adequately supported in the record. Of the approximate $200,000 of G&A costs randomly tested by the OIG auditor, one half of the costs were unsupported. In addition, the OIG auditor determined that another $78,000 of claimed G&A costs were unallowable. We also find that the OIG rates and Eagle rates are unreasonably high for applying to subcontract costs on this particular recycling job.

We could deny all Eagle G&A costs for lack of adequate support, but such a blanket denial may be unfair since clearly there are some allowable G&A costs. We adopt another approach.

Eagle proposed in its BAFO a G&A rate of 11 percent on total costs. (PCX 21). We find this rate to be reasonable even considering the problems with Eagle's G&A cost support. Applying a G&A rate of 11 percent to Eagle's allowable and allocable costs for labor ($983,622), labor burden ($229,934), ODCs ($353,635), and subcontract costs ($563,854), a total of $2,131,045, we find Eagle entitled to G&A costs of $234,415.

F. Eagle's District-based Processing Facility Costs

Eagle claims construction related costs of $5,548,367 for its new District-based intermediate processing facility, consisting of property costs ($1,371,781), site preparation and construction ($2,056,160), processing equipment ($1,813,840), consulting fees ($120,000), architect fees ($125,000), attorney fees and other fees ($39,046), permits ($12,666), and environmental and other surveys ($9,874). (HEX 65B, Appendix 1, Eagle Schedule 13). Eagle argues that these costs are allowable costs because they were costs incurred in and for the performance of the invalid contract and that "construction and completion of the facility were essential to Eagle's ability to perform under the contract . . . ." (Eagle Brief, at 9).

The statement of work permitted Eagle to have its interim processing facility (i.e., the Capitol Heights, Maryland facility) within a 10 mile radius of the District's border but further provided that "beginning on the first day of the second year of the contract, the contractor must have a fully operational processing facility within the District from which all activities, except buy back operations, associated with performance of this contract shall be conducted." (PCX 12, at 3 (Article 1)). The bilateral modification of the purported contract, entered into by the District and Eagle on the same date as the contract, provides, *inter alia*, that "[t]he contractor is responsible for obtaining all permits necessary to establish the recycling processing and buy back facilities in the District. . . . The processing and buy back facilities are private facilities which are the sole responsibility of the contractor." (PCX 12, at 1).

The OIG disallowed all of the claimed facility costs principally on the basis that the bilateral modification made clear that the facility was Eagle's private facility and its sole responsibility. (HEX 65A, at 10). The OIG also pointed out that Eagle was using the facility after the end of the District recycling job for commercial purposes and that the facility had a commercial value. Also, Eagle used the facility for a follow-on recycling contract awarded by the District to Eagle. Moreover, although Eagle was to have the facility available for processing at the beginning of the second year of the District recycling job, Eagle did not have the facility completed until after the District recycling job was ended. Thus, during the performance period, Eagle never used the new District-based facility. (Tr. 17-21, 57).

We agree with the OIG's analysis. Eagle had no legitimate expectation of recovering costs of the District-based facility pursuant to the purported contract and bilateral modification, those costs never benefited the District recycling job, and the costs represent capital improvements that have a commercial value to Eagle. Accordingly, Eagle's claimed costs for construction of the District-based intermediate processing facility are not recoverable under D.C. Code § 1-1182.5(d)(2).

V. Eagle Revenue from Marketing Recyclables

Determining Eagle's revenue from marketing the recyclable materials is necessary because to arrive at the proper actual costs incurred by Eagle under D.C. Code § 1-1182.5(d)(2), such market revenue must be deducted from total actual costs determined in part IV, *supra*, in order to obtain net actual costs. (Tr. 815-816).

Eagle claimed that it had received revenue totaling $178,558.31 from the marketing of its District recyclables, consisting of $51,417.50 in 1993, $72,166.61 in 1994, and $54,974.20 in 1995. The OIG auditors found that Eagle's ledgers showed additional amounts of $14,496 in marketing revenue for 1993 and 1994 which Eagle did not report. (HEX 65B, at 13-14). Eagle replied to the OIG auditors by stating that some of the 1993 and 1994 revenue was not attributable to the District recycling job. However, Eagle failed to produce any documentation to support allocating those revenues to Eagle's other recycling activities. Indeed, Eagle was unable to locate its files of the vendors to whom it marketed its recyclables. (Tr. 104-105). We find that the OIG properly determined that the unreported amounts were revenue on the District recycling job. Thus, OIG determined that Eagle had received market revenue of $193,054. RSI states that it independently obtained and examined cancelled checks and invoices from Eagle's marketing vendors and determined that Eagle underreported market revenue totaling another $92,249.84. RSI suggests that some of the checks from the vendors were never recorded on Eagle's general ledger. (Eagle Reply, filed Aug. 7, 1997, Ex. A). Although RSI lists check numbers, dates, and amounts, RSI did not submit the cancelled checks and invoices into the record. The OIG did not make an independent investigation of market revenue by contacting market vendors. On the record presented, we are unable to find that Eagle received market revenue beyond the $193,054 determined by the OIG. Because we have found for cost purposes that 5 percent of Eagle's recycling activities were allocable to non-District recycling, we recognize a similar 5 percent credit in the amount of $9,653 for revenue from the sale of non-District recyclables, for a net marketing revenue of $183,401.

VI. Eagle's Net Actual Costs Incurred Under D.C. Code § 1-1182.5(d)(2)

In Part IV, we determined that for the District recycling job Eagle has established actual costs incurred of $2,365,460. In Part V, we determined that Eagle earned net market revenue of $183,401. Thus, Eagle's net actual costs incurred on the District recycling job equals $2,182,059.

VII. District Payments to Eagle for the District Recycling Job

The record is clear that the District paid Eagle a total of $3,142,022 relating to the District recycling job. During the approximate 2-year performance period, Eagle submitted invoices to the District totaling $3,095,325, DPW approved $2,876,706 of the amount billed, and Eagle received payments from DPW totaling $2,070,056. (HEX 65B, at 6, OIG Schedule K). Purporting to settle disputed amounts while Eagle's claim was pending before the Board, DPW paid Eagle an additional amount of $1,071,966 in January 1996, bringing total payments to $3,142,022.

CONCLUSION

Pursuant to D.C. Code § 1-1182.5(d)(2), Eagle is entitled to net actual costs incurred on the District recycling job of $2,182,059. The District has made total payment to Eagle of $3,142,022. Accordingly, the District has overpaid Eagle by $959,963 and is liable to the District for the amount of overpayment.

SO ORDERED.

DATE: December 29, 2000

/s/
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/
LORILYN E. SIMKINS
Chief Administrative Judge

/s/
MATTHEW S. WATSON
Administrative Judge