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THE WHITE HOUSE

WASHINGTON

January 3, 1977

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: JAMES T. LYNN

FROM: JAMES E. CONNOR JEC

SUBJECT: Implementation of the Service Contract Act

The President reviewed your recent undated memorandum on the above subject and approved the following recommendation:

> "Approve Option One, which provides that the Administrator for Federal Procurement Policy issue a procurement policy directive that would implement the proposed amendment agreed to by OMB and the procuring agencies and override the current Labor Department regulations."

In addition, the following notation was made:

> "However, if Secretary of Labor wishes to appeal to me I will take time."

Please follow-up with appropriate action.

cc: Dick Cheney

5:50

Denny brought over -said Lynn had called her on hot line and said has to go up to president tonight.

Congress is waiting for it.

President did not see x

E.

note: Usery has not signed off.

1/1 D

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM FOR THE PRESIDENT

FROM: SECRETARY USERY
DIRECTOR LYNN

SUBJECT: Implementation of Service Contract Act

We have a disagreement concerning the administration of the Service Contract Act which, in general, provides that contractors who are providing services to the government must pay their employees the wage prevailing for similar work in a locality, as determined by the Department of Labor. Briefly stated, the disagreement concerns specific interpretations of the Service Contract Act by the Department of Labor and proposed actions of the Office of Federal Procurement Policy (OFPP) to issue procurement policy overriding departmental regulations implementing those labor standards.

These issues were brought to you inadvertently in an undated and unsigned memorandum from the Director which was not coordinated with the Secretary of Labor. Therefore, these questions are raised again in this more balanced and jointly agreed upon memorandum.

I. BACKGROUND

In early summer 1974 following discussions with Under Secretary Schubert and Paul O'Neill of OMB, an Interagency Working Group began a review of certain problems in procurement which were directly related to the application of the Service Contract Act. The Working Group consisted of representatives from the Department of Labor, OMB, and several major procurement agencies.

Based on recommendations of the Working Group, the Department agreed to publish the proposed revisions to the Service Contract Act Regulations in the Federal Register for comment. Following their publication on April 9, 1975, the House Subcommittee on Labor-Management Relations promptly held Oversight Hearings on the five proposals on May 6 and 7, 1975. Committee members were unanimously opposed to the proposals. Because of the controversy surrounding these proposals, the Department held public hearings on June 23 and 24, 1975.

After considering the entire record, Secretary Dunlop issued final regulations adopting two of the proposals and rejecting the other three proposals which are now at issue between OMB and the Department of Labor. The final regulations, which were signed on January 30, 1976, and published in the Federal Register February 6, 1976, represent the Department's legal views of what it believes to be the only correct interpretation of what the statute and legislative history mandate. Subsequently, and at the request of OMB, Secretary Usery reviewed the entire matter and concurred in the decisions reached by former Secretary Dunlop.

The Office of Federal Procurement Policy now proposes to issue a procurement directive to implement the three proposals previously rejected by the Secretary of Labor and to override the Department's interpretations.

The Department of Labor strongly disagrees on the merits and legality of the proposed changes and on the question of whether OFPP has such authority, which the Department believes has been vested exclusively in the Secretary of Labor since the enactment of the Service Contract Act. The Department believes these actions to be inadvisable and without legal basis, that they would substantially reduce labor standards protection, and that they would represent an unwarranted extension of OFPP's authority beyond procurement policy to include all aspects of those social and economic policy programs which are implemented through the procurement process.

OMB, on the basis of informal advice of Department of Justice officials, believes that the proposed action of OFPP is clearly authorized by the OFPP Act and consistent with the provisions of the Service Contract Act, as amended. OMB further supports the proposed action as appropriate means for overcoming measures that in its view unnecessarily disrupt the government's procurement process and which artificially distort wage patterns in the nation in the effort to assure that existing labor standards for service employees are fully protected.

II. CURRENT REGULATION ISSUES. The three Department of Labor regulations that are at issue are:

A. <u>The applicable wage rates for a service contract when the place of performance is not known at the time of bid advertising</u>.

DOL regulations now require that when the place of performance of a service contract is unknown at the time that bids are sought for the work, the labor rates are to be those prevailing in the locality of the procuring activity. For examples, if bids are to be advertised for the overhaul of aircraft engines (the work on which can be performed anywhere in the country depending upon the location of the ultimately successful bidder) and the contracting officer is located in the Houston, Texas, area, since the place where the work will be performed is unknown, DOL's regulations would require Houston, Texas, rates to be applied. The interagency task force developed a two-stage system which would result in each bidder being able to bid on the basis of the wages prevailing in his locality.

Department of Labor. DOL believes the proposed change is illegal. It would permit competition for this type of Federal service work based on labor costs which, contrary to the purposes of the Act would drive procurement from national markets to low wage areas. It could require a two-step process even on site-specific service work where contractors from nearby "localities" wish to bid, which would be an administrative burden.

Office of Management and Budget. OMB believes the current situation discourages bidders who are required to pay wages higher than prevailing in their locality. The two-stage approach provides a reasonable solution that fully protects wage rates of service contract employees in their locality.

B. Use of collectively bargained wage rates when bidding on new services.

Department of Labor regulations require the payment of prevailing wage rates and prevent a bidder, who has a current work force at his locality of performance, to base his bid on that CBA except where the rates contained in the CBA are equal to or higher than the prevailing rate.

Department of Labor. DOL believes the Act and legislative history are absolutely clear on this point, as detailed in the attachment. To

recognize rates below prevailing rates in these cases would be patently illegal. The proposal could encourage unscrupulous unions and contractors to enter into "sweetheart agreements" to obtain Federal work in some cases. To recognize rates less than those prevailing would contravene the national policy that the government should not be a party to the depressing of local wage rates.

Office of Management and Budget. The denial of the right to base wages on a valid collective bargaining agreement is at odds with national policy, and creates labor difficulties for a contractor. Use of the CBA, on the other hand, would avoid discrepancies between the compensation due employees under the covered contract and employees performing other work in the same facility. OMB does not believe that the "sweetheart agreement" issue will be a problem since the CBAs to be recognized are for existing facilities and existing work forces.

C. Use of the "successor provisions" of the Act where similar work is performed at a different location.

Department of Labor regulations extend the successor provision to all continuing requirements for services even though the work might be performed in different localities. As a result a contractor, performing a service contract in its facility in one part of the country, is required to pay wages not less than those which were negotiated in a different part of the country. If the successor rates are substantially different from those prevailing in his locality, the contractor may request a hearing and a variance from DOL.

Department of Labor. DOL believes this to be the only interpretation consistent with the statute. It has apparently presented little difficulty since of 1,500 relevant determinations issued annually since 1972 only 10 have required a variance hearing; none of which involving a situation of concern to OMB.

Office of Management and Budget. OMB believes that the amendments of 1972 were designed to prevent the practice of a contractor underbidding the one providing services and then paying the same workers lower wages. It is OMB's belief that the SCA does not require an interpretation of this issue that would require maintaining the same wage rates for all successor contractors regardless of location.

III. IMPLEMENTATION ISSUE

If you decide that one or more of the regulations at issue should be changed, this can be done either by issuing revised DOL regulations as previously contemplated, or by the OFPP issuing a procurement policy directive that overrides the regulation.

The Department of Labor believes, as set forth in the attached legal opinion, that the OFPP does not have authority to override the Secretary's interpretation of the Service Contract Act. It believes that the manner in which the Act has been administered is mandated by statute, and that the interpretation necessary to provide OFPP legal basis to override are not valid.

The Office of Management and Budget/OFPP believe that it has a legal basis to establish a procurement policy that is at odds with the Department of Labor regulations, and that in fact its statute requires that it do so in this case.

The Department of Justice is prepared to review the legal argument of both agencies and issue a formal opinion if it is desired.

IV. OPTIONS

Modify one or more of the Department of Labor regulations having to do with wage determination under the SCA in contracts that are not site-specific:

Pros

- The current regulations raise the cost of procurement to the Federal Government.
- They do not tend to send contracts to low wage areas.
- They prevent the use of a collective bargaining agreement to set wage rates in some cases.
- They are objected to by the major procurement agencies (DOD and GSA) and several service contractors.
- Non-site-specific service contracts generally utilize skilled or semi-skilled workers, such as aircraft mechanics and computer programmers.

Cons

- The current regulations are the only proper interpretation of the law in light of legislative history.
- Changing them would result in immediate legislation by the Labor Committees to tighten the statute.
- Service contracts are considered "flesh peddling" in the labor community, and reducing protection would be looked at as hitting the lowest paid segment of the labor force.
- The Service Contract Act was intended to protect workers' pay even when the price may be increased Federal procurement cost.
- Skilled and semi-skilled workers also need wage protection.

Before making any decisions, the Department of Labor believes that you should be aware of the following aspects:

The proposed issuance of the OFPP, if allowed to proceed, will bring forth immediate demands for congressional action from Federal contractors who would be adversely affected by these changes, from the AFL-CIO, and from Senate and House committees responsible for Service Contract Act legislation.

In explaining the need for the initial Service Contract Act of 1965, both the Senate (S. Rept. No. 798, pp. 3-4) and the House (H. Rept. No. 948, pp. 2-3) states:

> "Many of the employees performing work on Federal service contracts are poorly paid. *** They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.
>
> "The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying

> the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a government contract is awarded to a service contractor with low wage standards, the government is in effect subsidizing subminimum wages."

The labor standard protections enacted in 1965 and strengthened by Amendments in 1972 and 1976 obviously cut across one of the basic tenets of government procurement -- the procurement of goods and services from the lowest responsible bidder -- and assumes that additional costs may be required of Federal contractors.

The Congress in full recognition of the cost impact, has demonstrated its continued support of the Act's underlying purpose by strengthening its labor standard protections in the Amendments of 1972 and 1976. Likewise, repeated oversight hearings have examined the Department's administration of the Act to insure that the intended protections are afforded service workers. The Act, the subsequent amendments, and the concerns identified by congressional hearings in 1971, 1972, 1974, 1975, and 1976 have enjoyed broad bipartisan support in both Houses of Congress. Because of this support, immediate and severe criticism from the Senate Labor Committee and from the House Subcommittee on Labor Management Relations of the House Committee on Education and Labor can be expected if the proposed regulation changes are adopted. These Committees expressed themselves, specifically, and in detail to certain of these proposals in 1974 hearings and to the proposed regulations themselves in hearings conducted in May 1975. It is anticipated that there will be immediate steps to cancel by legislation the three changes at issue if finally adopted. Other changes to the Service Contract Act favored by the House Subcommittee on Labor Management Relations which would make these labor protections even more stringent might also be made a part of such legislation.

The AFL-CIO has been very active in the passage of the Service Contract Act and the development of implementing regulations. It will argue that the proposed changes will undermine labor standards protection essential to the well-being of all service employees, including those who are the least skilled and lowest paid, and also diminish job

stability in many instances, in clear contravention of a basic purpose of the 1972 Amendments. The specific changes proposed by OFPP, as well as Presidential approval for the issuance of overriding regulations by this Office, will incur an immediate and harsh negative reaction from organized labor and a call for legislative action, which might very well result in amendments to the Office of Federal Procurement Policy Act. In this regard, the House Subcommittee of Labor-Management Relations cautioned that it will

> "closely scrutinize the activities of the Office of Federal Procurement Policy as they relate to the Department of Labor's administration of the Service Contract Act. The Subcommittee has no intention of allowing that office, or any other ad hoc group created by the Administration, to let its zeal for cost-cutting subvert and distort the protections of the Service Contract Act." "Plight of the Service Worker Revisited," supra, p. 16.

On the other hand, OMB/OFPP believe strongly that these changes are necessary, are equitable, and are required by OFPP's enabling statute. OFPP has drafted notification of changes to be effective March 1, 1977, for submission to the Federal Register, procuring agencies, and the Government Operations Committees. They expect favorable support from private industry, the Armed Forces Committees, and at least the Senate Government Operations Committee. Positive legislation would be required to prevent their regulations from going into effect.

V. DECISION

The specific regulations at issue are:

A. Wage rate determination when site is unknown shall be based on location of contracting officer.

_____Retain (DOL) _____Modify (OMB/OFPP)

B. Collectively bargained wage rates do not apply if DOL determines a higher prevailing wage and no variance.

_____Retain (DOL) _____Modify (OMB/OFPP)

C. A successor service contract must use the wage rates of the previous contract as the prevailing wage even if performed in a different locality with lower local rates.

_____Retain (DOL) _____Modify (OMB/OFPP)

If, and only if, any modification is to be made, it should be made:

A. By OFPP through procurement regulation:

. Demonstrates that the reason for the change is to improve efficiency, effectiveness, and economy of Federal procurement.

. Could only be withdrawn by replacing the administration of OFPP within thirty days, and is therefore the only way a change would be effected.

. Will have more than the Labor committees of the Congress aware of and interested in the issue.

B. By DOL through amended regulations:

. Maintains the balance between cost considerations and labor protections.

. Less likely to generate broad congressional negative reaction.

. Is the only legal course to accomplish the end, in the opinion of the Department of Labor.

VI. DECISION

Have OFPP issue overriding regulations_____(OMB/OFPP)

Have Labor revise their regulations_____(DOL)

If the decision is to have OFPP act, a formal opinion by the Department of Justice is requested by the Department of Labor to establish the legality.

MEMORANDUM ON OMB PROPOSAL CONCERNING IMPLEMENTATION OF THE SERVICE CONTRACT ACT

I. INTRODUCTION

This addresses the undated memorandum to the President from the Administrator of the Office of Management and Budget concerning a disagreement with the Secretary of Labor over interpretations of the Service Contract Act, which is administered by the Secretary of Labor.

As Mr. Lynn explained, an interagency task force proposed implementation of five regulations. After public hearings and careful analysis of the issues, Secretary Dunlop issued two of the proposals as final regulations. On the advice of the Office of the Solicitor, it was determined that the remaining three proposals were inconsistent with the terms of the Act, and would not protect existing labor standards for service employees. Secretary Usery has concurred in the action by Secretary Dunlop.

In his memorandum, Mr. Lynn has suggested that the Office of Federal Procurement Policy should issue a procurement directive to implement the proposed regulations and override the Department of Labor regulations. In so doing, he assumed, without discussion, that OFPP has the authority to issue such a directive. The Department of Labor strongly disagrees that OFPP has such authority, which has been vested exclusively in the Secretary of Labor since the enactment of the Service Contract Act. Furthermore, this action would extend OFPP's authority beyond procurement policy to include all aspects of those social and economic policy programs which are implemented through the procurement process. As discussed more fully below, OMB's proposal to subordinate the statutory authority of the Secretary of Labor to the Administrator of OFPP is without legal basis and is inadvisable as a practical matter. Furthermore, the specific proposals are inconsistent with the Service Contract Act.

II. THE AUTHORITY OF OFPP

OFPP was established by Public Law 93-400 (August 30, 1974), 41 U.S.C. 401 et seq., in order to promote economy, efficiency and effectiveness in Government procurement, including the coordinating of procurement policies and programs of the executive agencies. Thus, under Section 6 of the Act, OFPP has the authority to provide overall direction of, and to prescribe, policies, regulations, procedures, and forms, which shall be followed by executive agencies in procurement of property (other than real property), services, and construction. However, such actions are limited by the requirement that these policies, etc., must be in accordance with applicable laws and with due regard to the program activities of the executive agencies. Pursuant to Section 9 of the Act, to the extent that an executive agency itself has authority under any other law to prescribe policies, regulations, procedures and forms for procurement, that authority is subject to the authority of OFPP. However, Section 6(g) provides that OFPP shall have no duties, functions or responsibilities other than those conferred by this Act.

The question, therefore, is whether, or to what extent, "procurement policy" includes the administration and interpretation of the Service Contract Act and other social and economic policy programs such as the Davis-Bacon Act, the Walsh-Healey Act, Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans Readajustment Assistance Act, which are administered by the Department of Labor.

In contrast to the primary procurement objective of purchasing goods and services from a responsible bidder at the lowest price, and the statutory objective of OFPP to promote economy, efficiency and effectiveness of Government procurement, the programs administered by the Department of Labor have as their primary purpose the maintenance of wage standards and the furtherance of equal employment opportunity through affirmative action. Where compliance with these Government contract labor standards results in added costs to contractors, which Congress (and the President through Executive Orders) has deemed necessary to protect the rights of workers, these labor standards must prevail. Thus, as the President recognized in his message to Congress accompanying Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix (providing for coordination by the Secretary of Labor of the administration of the Davis-Bacon and Related Acts):

> Since the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.

Congress has specifically given the Secretary of Labor the exclusive authority to issue rules and regulations under the various contract labor standards statutes--through Section 4 of the Service Contract Act, 41 U.S.C. 351 et seq.; Sections 4 and 5 of the Walsh-Healey Public Contracts Act, 41 U.S.C. 35 et seq.; Section 105 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 et seq.; the Copeland Act, 40 U.S.C. 276c; and pursuant to Reorganization Plan No.14 of 1950, the Davis-Bacon Act, 40 U.S.C. 276a et seq, and those related statutes incorporating Davis-Bacon prevailing wage standards.

Because of the potentially conflicting goals and policies of procurement statutes, on the one hand, and labor standards statutes, on the other, and in light of the clear expression by Congress that labor standards statutes are to be administered by the Secretary of Labor, a determination that the authority of the Secretary is subject to that of the Office of Federal Procurement Policy cannot be made without a clear showing that such was the intent of Congress in the enactment of the Office of Federal Procurement Policy Act.

The authority of the Administrator of OFPP, as set forth in Section 6 of the Act, is primarily to "provide overall direction of procurement policy." The only suggestion that "procurement policy" may extend to the various social and economic statutes and executive orders implemented through the procurement process is in the requirement in Section 6(e) that the OFPP Administrator consult with the executive agencies which promulgate policies, regulations, procedures and forms "affecting procurement." However, pursuant to Section 6(e), the policies, regulations, procedures, and forms prescribed by the Administrator must be "with due regard to the program activities of the executive agencies" and "in accordance with applicable laws." The Conference Report explains with regard to the identical language in Section 3: "The use of this language here and elsewhere in the conference substitute (subsection 6(a)) makes clear that OFPP policies must be subject to and consistent with congressional enactments." Conf. Rep. No. 93-1268, 93rd Cong., 2d Sess. 8(1974).

The authority of OFPP with regard to the social and economic policy programs implemented through the procurement process is amplified in the Senate Report:

> The OFPP's cognizance of procurement policy would extend to the procurement aspects of regulations issued by the social and economic agencies such as the Small Business Administration, the Environmental Protection Agency, and the Department of Labor (Davis-Bacon, Walsh-Healey, contract safety standards, equal employment opportunity). The Commission on Government Procurement found that existing procedures for coordinating the procurement aspects of such socio-economic regulations "range from virtually nonexistent to barely satisfactory." (Emphasis added. S. Rep. No. 93-692, 93d Cong., 2d Sess. 18 (1974).)

Under even the broadest possible interpretation of the statute, it is immediately evident that OFPP has been delegated no authority to interpret the statutes administered by the Secretary of Labor or any executive agency. Furthermore, nowhere in the statute or the legislative history is there any indication that Congress intended that OFPP would have authority over all policies, regulations, and procedures of the Secretary of Labor issued pursuant to the various labor standards protection statutes and executive orders. Rather, it is necessary to distinguish between the social and economic policies and regulations issued in furtherance of those policies, and the procurement aspects of those policies and regulations. Once the Secretary of Labor has issued regulations or interpretations in furtherance of underlying social or economic policies, the authority of OFPP extends only to the implementation of those regulations and interpretations -- for example, ensuring that they are reflected in the Armed Services Procurement Regulations and Federal Procurement Regulations, and in Government contracts and grant agreements.

In the instant case, if OFPP issues a directive to the Secretary of Labor to implement the three regulations here in question, OFPP will have considerably exceeded any possible interpretation of its authority under the Office of Federal Procurement Policy Act. The Secretary of Labor, in interpreting the SCA, determined that the three proposals are inconsistent with the express terms and policies of the Act -- a determination which only the Secretary of Labor has the authority to make. The various memoranda submitted to the President do

not attempt to explain how the proposals are justified under the language of the Act. Rather, OMB's primary concern is cost of procurement.

As Congressman Jack Brooks, Chairman of the House Committee on Government Operations, which oversees OFPP, cautioned in his September 17, 1976 letter to the Administrator of OFPP:

> The Department of Labor has devoted decades to developing expertise in administering the corpus of laws affecting labor standards. Attempts by others, lacking such expertise, to preempt the authority of the Secretary of Labor could have the result, even unintentionally, of harming the interests of the working man and contravening the clear intent of Congress.

In addition, Congressman Carl D. Perkins, Chairman of the House Committee on Education and Labor, and Congressman Frank Thompson, Jr., Chairman of the Subcommittee on Labor - Management Relations, in their September 16, 1976 letter to the Administrator of OFPP, emphasized that by providing that OFPP actions shall be "in accordance with applicable laws,"

> Congress did not intend to repeal or amend those parts of our various labor statutes which mandate the Secretary of Labor to issue the rules and regulations necessary to effectuate their remedial purposes. Indeed, we believe it has always been the Congressional intent that such authority remain in the Department of Labor because of its expertise in matters pertaining to labor standards.

In view of the Service Contract Act's clear delegation of authority exclusively to the Secretary of Labor, the expertise which the Secretary has developed over the years, the dramatic impact which OFPP action could have on the administration of the Act, the conflicting goals of procurement and labor standards, and the demonstrated Congressional interest in this matter, the issuance of the proposed procurement policy directive by OFPP certainly should not be undertaken on the basis of an "informal" unwritten opinion from Justice Department officials

that OFPP has the requisite authority, without any input from the Department of Labor. Furthermore, such action would clearly constitute a "major policy or regulation" requiring 30 days notice to the House and Senate Committees on Government Operations, pursuant to Section 8 of the Office of Federal Procurement Policy Act.

III. THE DISAGREEMENT BETWEEN OMB/OFPP AND THE DEPARTMENT OF LABOR OVER THE ADMINISTRATION OF THE SERVICE CONTRACT ACT.

A. Background

In early summer 1974 following discussions with Under Secretary Schubert and Paul O'Neill of OMB an Interagency Working Group began its review of certain problems in procurement which were directly related to the application of the Service Contract Act. The Working Group consisted of representatives from the Department of Labor, OMB, and several major procurement agencies.

Based on recommendations of the Working Group, the Department agreed to publish the prosed revisions to the Service Contract Act Regulations in the Federal Register for comment. Following their publication on April 9, 1975, the Thompson Subcommittee promptly held Over-Sight Hearings on the five proposals on May 6 and 7, 1975. Committee members were unanimously opposed to the proposals. Because of the controversy surrounding these proposals, the Department held public hearings on June 23 and 24, 1975.

After considering the entire record, Secretary Dunlop issued final regulations adopting two of the proposals and rejecting the other three proposals which are at issue between OMB and the Department of Labor now. The final regulations, which were signed on January 30, 1976, and published in the Federal Register February 6, 1976, represent the Department's legal views of what the statute and legislative history mandate. Subsequently, and at the request of OMB, Secretary Usery reviewed the entire matter and concurred in the decisions reached by former Secretary Dunlop.

B. Discussion of the Specific Issues

1. The applicable wage rates for a service contract when the place of performance is not known at the time of bid advertising

Under sections 2a(1) and (2) of the Act, a determination of wage rates and benefits prevailing in the locality must be included in the bid specification and contract awarded pursuant thereto.

Most contracts covered by the Act are performed at known sites and identification of the appropriate locality for wage determination purposed presents no problem. However, in other situations, the contract services the government is buying will be performed at the location of the successful bidder, which cannot be determined in

advance of any bid solicitation. Contracts of this type which constitute only a small proportion of the total number of covered service contracts, pose special problems regarding the choice of an appropriate locality. The Department's regulations do not define "locaility" (See 29 CFR § 4.163). However, the Department has historically held that where the place of performance is unknown at the time of bid solicitation, the location of the procuring agency will be the "locality" appropriate for the issuance of a wage determination. The Department has continued to examine practical alternatives, consistent with the statutory requirements. One such approach which is used where appropriate is a "composite" or "competitive" locality determination. This is a single determination which contains a singe set of wage rates and fringe benefits derived from data collected from all the places at which the contract work would potentially be performed. This approach is supported by a number of relevant appellate court decisions rendered under the Walsh-Healey Act, a related remedial labor standards statute. Mitchell v. Covington Mills, 229 F. 2d 906 (C.A. D.C.), cert. denied, 350 U.S. 1002; Consolidated Electric Lamp Co. v. Mitchell, 259 F. 2d 189 (C.A. D.C.), cert. denied, 359 U. S. 908; Ruth Elkhorn Coals, Inc. v. Mitchell, 248 F.2d 635 (C.A. D.C.), cert. denied, 355 U.S. 953.

The two-stage procurement system advocated by OMB would require the Department of Labor to issue a separate wage determination for the location of each prospective bidder where the services might be performed. The Department rejected this approach because the statute plainly contemplates that the locality used for wage determination purposes shall be a single locality of appropriate scope--not a congeries of separate localities with wages separately determined for each--to provide uniform minimum wages for all bidders so as to eliminate wage-cutting as a basis for competition on Government service contracts.

Moreover, as the House Subcommittee on Labor-Management Relations stated in concurring with the Department's statutory construction "if contractors have no single determination upon which to base their bidding, it is inevitable that the rate will sink to the lowest level and we will again return to the pre-1965 era of an unregulated labor-broker system with service contracts being channeled into low-wage areas of the country." "Congressional Oversight Hearings: the Plight of the Service Worker Revisted," 94th Cong., 1st Sess., p. 10 (1975).

2. The use of collectively bargained wage rates when bidding on new services.

It is OMB's position, based on its construction of the 1972 Amendments to sections 2(a)(1) and 2(a)(2) of the Act, that the Secretary of Labor may satisfy his statutory obligation by issuing a wage determination which recognizes the prevailing rates, but which also includes a proviso allowing a prospective bidder who has a collective bargaining agreement to bid accordingly and, if successful, to be governed by the provisions of the collective bargaining agreement.

The legislative history of the 1972 Amendments makes it absolutely clear that the changes in section 2(a)(1) and (2) cannot be read as standing alone. As stated in Senate Report No. 92-1131, at page 4, these changes must be "read in harmony" with new section 4(c) "to reflect the statutory scheme." The Senate Committee's report also states "the intention * * * that section 2(a)(1) and 2(a)(2) and 4(c) be so construed that the proviso in section 4(c) applies equally to all /three/ provisions." According to the report, the purpose of the three changes, taken together, was "to explicate the degree of recognition to be accorded collective-bargaining agreements covering service employees, in the predetermination of prevailing wage and fringe benefits for future such contracts for services at the same location. (Emphasis added.)

In summary, the scheme discussed above requires the Secretary of Labor to issue a wage determination setting forth collectively bargained wage rates and benefits where the employees in the predecessor contract were covered by a collective bargaining agreement. Concurrently, the successorship principle in section 4(c) obligates any contractor succeeding to the predecessor's contract to pay no less than those wage rates and fringe benefits. In other words, there is an unseverable relationship between sections 2(a)(1), 2(a)(2), and 4(c) which limits recognition of the collective bargaining agreement to situations where the predecessor contractor has a collective bargaining agreement. The position advanced by OMB simply ignores the statutorily mandated relationship.

The extent to which the above position may or may not discourage bidders who have their own collectively bargained agreements is unknown. The Department has no evidence that this position has had any greater chilling effect than would ordinarily occur under wage determinations based on rates prevailing in the locality.

OMB's position would, in fact, encourage and promote the very wage undercutting that the Act was designed to eliminate. Under such a standard, unscrupulous contractors and unions might be encouraged to enter into "sweetheart agreements" which establish wage and fringe benefit levels below those otherwise established as prevailing in order to gain a competitive advantage over other prospective bidders who must pay higher rates.

3. The use of the "successor provisions" of the Act where similiar work is performed at a different location.

The sections of the Act at issue in item 2, supra, are also at issue here but they specifically relate to situations where successor contracts are performed at the location of the successful bidder's facility rather than at the particular government installation. In these cases, the problem arises from the fact that a predecessor contractor with a collective bargaining agreement is situated in one location and prospective successor contractors in others. The Department has historically held that the only inter-

pretation consist with the statutory language is that section 4(c) is operative in any situation where one contract succeeds another in which substantially the same services are furnished. There is no qualification on the face of the statute which supports the narrow interpretation urged by OMB that the 4(c) successorship principle has application only where the follow-on contract is performed at the same location.

Department of Labor records do not indicate that this is a problem of any significance. When the situation arises, it typically involves contracts for repair of equipment or other services which are performed at the contractor's place of business. The statute in section 4(c) establishes a procedure whereby interested parties may request a formal hearing to resolve differences between the predecessor contractors collectively bargained wage rates and fringe benefits and those prevailing in the locality where the work will be performed. Of the some 1500 wage determinations issued since passage of the 1972 Amendments to reflect the wage rates and fringe benefits contained in a predecessor contractor's collective bargaining agreement, only 10 have required a formal hearing, none of which has involved the situation which concerns OMB. Finally, the House Subcommittee on Labor-Management Relations has strongly concurred in the Department's interpretation of section 4(c). (See page 10 of the "Plight of the Service Worker Revisited", supra.)