SCA-3

December 7, 1973

This is in reply to your letter of September 21, 1973 with which you forwarded correspondence from the corporation protesting the award of contracts to *** under invitation for bids *** issued by the ***. You also attached a letter dated September 14, 1973 from the *** relative to this protest. As the issues raised in the protest relate to Service Contract Act wage determinations you request our comments on this matter.

In order to provide you with some background information, we issued Wage Determinations *** under the Service contract Act to apply to *** for film processing services, *** bid solicitation No. ... covered miscellaneous film processing services which were at the time being performed by the two contractors, ... Wage Determinations ... sets forth the wage rates and fringe benefits received by employees on the predecessor contract for certain of those services as contained in the collective bargaining agreements between ...

Likewise, Wage Determination ... reflects, for services like those performed under the other predecessor contract, the wage and fringe benefit provisions of the collective bargaining agreement between ... These wage determinations were issued in accordance with sections 2(a) and 4(c) of the Service contract Act of 1965, as amended.

It has been a long standing maxim of the courts that the exercise of the Secretary of Labor's authority concerning the issuance of wage determinations is not reviewable. Under the doctrine of Nello L. Teer Company v. United States, 384 F.2d 533 (Ct. C1., 1965). cert. den. 383 reviewable by the courts.

The Teer case concerned wage determination matters under the Davis-Bacon Act (40 U.S.C. 276a et seq.). The Davis-Bacon Act and the Service Contract Act are similar statutes with the same basic purpose. The Davis-Bacon Act places in the Secretary of Labor the authority to issue prevailing wage determinations applicable to laborers and mechanics employed on Federal and federally assisted construction projects; the Service Contract Act authorizes the Secretary to issue such wage determinations for employees on contracts entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services. Therefore, Court decisions relating to one of these acts have a direct bearing on the other.

As judicially construed, the wage determination function of the Secretary under the Davis-Bacon Act is that of an appraiser or valuer of the amounts to be paid to employees of a government contractor under the contract. In the exercise of this function, and subject to impeachment of his determination only for fraud, dishonesty, or bad faith, the Secretary fixes, as between the government and the contractor, and those who work on the job for him, the wages to be paid, in the same manner and with the same conclusive and binding force as private parties fix such matters by contract between themselves, and as officers of the government in other contracts fix and determine quantities, prices, and other vital issues referred to them by the contract, for fixing. The wage determination needs neither formal dispute nor formal hearing to support it, and

its correctness is not subject to question, where there is nothing in the record to impeach it on the grounds above cited. Gilling v. Webb, 99 V.2d 585 (C.A.). And see annotation, 163 ALR 1300.

As the Comptroller General held in 48 Comp. Gen. 22. July 18, 1968, "the Service Contract Act does not provide for review of wage rate determinations either by the General Accounting Office or the courts, and in the absence of a statute, damage resulting from a wage rate determination made pursuant to a law, such as the Service Contract Act, which does not invade any recognized legal right is irremediable. See Perkins v. Lukens Steel Co., 310 U.S. 113." As stated by the Court in Perkins, supra,

Thus, a wage determination by the Secretary of Labor contemplates no controversy between parties and no fixing of private rights; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept. Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law".

In addition, the Supreme Court has held that the correctness of the determination of wage rates under the Davis-Bacon Act is not open to attack on judicial review (United States v. Binghamton Construction Co., 347 U.S. 171 (177), 74 S. Ct. 438 (1954)). This view was followed in the recent case, Delta Electric Construction Co., Inc. v. Commander Naval Facilities Engineering Command, Department of the Navy, and James Hodgson, Secretary of Labor, 67 L.C. 32, 607, (W.D. Tex. 1971) and the Nello L. Year case, supra.

Furthermore, the Service Contract Act, in Section 4(a), provides:

"Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended. (Walsh-Healey Act) shall govern the Secretary's authority to enforce this Act, make rules, regulations, ... and take other appropriate action."

Section 4 of the Walsh-Healey Act provides, in pertinent part, as follows:

"The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal Officers and employees...as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto...

"The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act."

The scope of the Secretary's authority under the Service Contract Act is accordingly not less than under the Walsh-Healey Act. As stated by the Supreme Court in Endicott-Johnson Corp. v. Perkins (317 U.S. 501, 507) - "The Act directs the Secretary to administer its provisions...Congress submitted the administration of the Act to the judgement of the Secretary of Labor, not to the judgement of the courts." That the authority of the Secretary extends to rulings determinative of coverage was recognized by the Supreme Court in the same case in the following language: "Pursuant to her authority under the Act, the Secretary in 1937 defined by

rulings the coverage of the Act." Id. at 503 (emphasis added). See also U. S. v. Davison Fuel & Lock Co., 371 F3d 705 (C.A. 4).

In the exercise of authority identical with that under the Walsh-Healey Act the Secretary in 29 CFR 4.1(c) has defined the scope of payment of minimum compensation required under the Service Contract Act as amended, based on collectively bargained wage rates and fringe benefits applicable to employment under a predecessor contract for like services, as follows:

Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished for the same location. Section 4(c) provides that no such contractor or subcontractor shall pay any employee employed on the contract to work for less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement. If, however, the Secretary finds after a hearing in accordance with the regulations set forth in Section 4.10 of this subpart that in any of the foregoing circumstances such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality, the payment obligations of such contractor or subcontractor with respect thereto shall not apply in such circumstances. (Emphasis added.)

In the most recent case considering the authority of the Secretary of Labor under the Service Contract Act (opinion filed September 15, 1973), Judge Coolahan of the United States District Court for the District of New Jersey stated:

"Whether or not a particular Government contract is subject to the Service Contract Act is a determination ultimately to be made by the Secretary of Labor on the basis of his regulations and statutory expertise. Once made, his determination is not judicially reviewable. In Endicott-Johnson Corp. v. Perkins, 317 U. S. 501 (1943), the Supreme Court held that it was the Secretary of Labor and not the procuring agency nor even the courts who is responsible for determining coverage under the Walsh-Healey Act, 41 U.S.C. 35 et seq. Since the authority of the Secretary to act under the Service Contract Act is co-extensive with his enforcement powers under the Walsh-Healey Act, it follows naturally that here, too, his determination is final and binding. See Endicott-Johnson Corp. v. Perkins, supra at 509 ...." Curtiss-Wright Corporation v. McLucas, Civil Action No. 807-73, D.C. M.J. September 15, 1973.

As noted above, in order to implement the 1972 Amendments to the Service Contract Act, the Secretary, pursuant to his authority under section 4(a) of the Act issued 29 CFR 4.1c which deals with section 4(c) of the Act. It states that its provisions apply to every contractor and subcontractor under a contract where such a contract is subject to the Act and under which substantially the same services as under the predecessor contract are furnished "for the same location."

We have taken this position, based on our reading and interpretation of the language of the Act in the light of its entire legislative history, that section 4(c) was intended to apply to all successor contracts for furnishing the same services, entered into pursuant to procurement action by the same Federal facility, and not only in those cases where the government contract work is performed at the same government installation.

In our interpretation and application of section 4(c) this Department has been guided by the legislative intent as expressed in the Report of the Senate Committee (S. Rept. 92-1131). According to this Report, section 4(c) and the related amendments to paragraphs (1) and (2) of section 2(a) are intended to apply in situations where a contract to furnish services to meet the Government's needs at a particular location succeeds a prior contract under which substantially the same services were furnished to the Government (although not necessarily performed) at the same location through the use of service employees where wage and fringe benefits were governed by a collective bargaining agreement. The obligations of the successor contractor in such a situation, as stated in section 4(c), are to pay the service employees he employs under his contract not less than "the wage and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits..., to which such service employees would have been entitled if they were employed under the predecessor contract," unless "the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." (Emphasis added.)

Wage determinations made under section 2(a) of the Act must give effect to section 4(c). The Report stresses that "Sections 2(a)(1). 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme" and that it is intended that these sections "be so construed that the proviso in section 4(c) applies equally to all the above provisions." A purpose of these amendments is stated to be "to explicate the degree of recognition to be accorded collective bargaining agreements covering service employees in the predetermination of prevailing wages and fringe benefits for future such contracts for services at the same location." (Emphasis in the original.) Significantly, neither the statutory language nor the committee reports purport to limit the applicability of section 4(c) to successor contracts for services to be performed at the same location as under the predecessor contract, in cases where the place of performance cannot be ascertained when bid specifications are supplied to potential contractors. The services, wherever performed, are of course furnished to meet the service needs of the procuring facility inviting the bids and charged with administration of the contract, and such services must be considered to be furnished at the location of such facility.

The following remarks were made during a colloquy at the hearing on H.R. 11884 before the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 92nd Cong., 2nd Sess., June 1, 1972, pp. 30-31:

Mr. O'Hara ... We have run into a number of instances in the administration of this Act where a contractor is holding a service contract and has arrived at an agreement to pay his employees a certain amount. Then he finds the invitation to bid for next year's contract providing for lower wage rates, say, providing that the prevailing rate is lower than the rate he is already paying his employees, and he finds all of a sudden he is in competition with other bidders for that contract

who are proposing to do it the same way he does it, except to pay their employees less wages. Don't you feel that that contractor is somewhat at a disadvantage when he is bidding on the renewal of that contract? ... The contractor now has the contract and is paying his employees, let us say, an average of $2 an hour. Then when the contract is going to be re-let he gets a prevailing wage determination that says $1.50 or that says $1.60, the Federal minimum, and he has to bid on that basis. Don't you think that places the one contractor at a competitive disadvantage in the bid?

Mr. Nystrom: I think that is true of any competitive bidding situation where one contractor has an agreement with his employees which provides for higher rates than another contractor may pay to his employees and you are bidding competitively. If you have a laundry contract, for instance, and one laundry has a union agreement and other laundries don't, the one with the union agreement might be undercut, unless, of course, the statute and the wage determination intervenes so we have a determination that the higher rate is the prevailing rate. But if it turns out that the contractor with the agreement you are referring to is paying more than the rate that is found to be prevailing in the locality, the statute doesn't protect him to that extent. The statute only protects him up to the level of the prevailing rate if you have a wage determination.

Mr. O'Hara: Or if you don't have a wage determination.

Mr. Nystrom: Of course, if you don't have a wage determination the only provision of the statute that applies is to be one which provides for the FLSA rate.

Mr. O'Hara: We would agree, wouldn't we that contractor is somewhat at a disadvantage?

Mr. Nystrom: That is a common thing in the competitive bidding provision on all kinds of contracts, I suppose.

Mr. Grunewald: The purpose of bidding is competition.

Mr. Nystrom: Unless he is able to handle it more efficiently, because he had higher paid employees and doesn't use so many of them. I don't know how it will affect his total labor price.

Mr. O'Hara: That is his tough luck? That is the old free enterprise system?

Mr. Nystrom: That is right.

Mr. O'Hara: Now, what about the employees?

Mr. Nystrom: It would be difficult for anybody who gets a wage cut for any reason. I don't know that is traceable to the effects of the statute, however.

Mr. O'Hara: No, it is not.

Mr. Nystrom: Or the administration of the statute.

Mr. O'Hara: It is that sort of problem which prompted us to include in the bill that in no event shall the new contractor be permitted to pay less that what the existing rate was under the old contract.

(Emphasis added.)

The foregoing colloquy provides a further indication that the subcommittee which drafted the 1972 amendments to the Service Contract Act was especially concerned with establishing a wage floor for all bidders on contracts for services which would eliminate the competitive advantage which new bidders could otherwise gain by prevailing wage determinations lower than the collectively bargained wages paid by an incumbent contractor, and which wage floor would prevent wage losses that might otherwise be suffered as a result of selection of a new contractor paying lower wages than the incumbent had agreed to. While the hardship cases to which the subcommittee's attention had been drawn involved primarily wage losses suffered by employees as a result of a change of contractors performing services within the confines of a Federal installation, this colloquy, like the language of section 4(c) added by the amendments, evidences the broader objective of the legislative draftsmen to equalize, with respect to wages, the competition between incumbent contractors and new bidders for the work and to assure employees working for such contractors at collectively bargained rates that wage determinations made under the Act will not enable new bidders, through undercutting of wages presently paid, to take over the contract work with the result that such employees are faced with loss of earnings or jobs.

It is concluded, for the foregoing reasons, that our position best effectuates the legislative intent in adding the new section 4(c) of the Act. However, we respectfully request that you deny the protest on the grounds that the General Accounting Office does not have jurisdiction to review wage rate determinations.

Sincerely,

Warren D. Landis
Acting Administrator