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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-178400(1) November 28, 1973

The Honorable
The Secretary of Labor

Dear Mr. Secretary:

We refer to letter of May 24, 1973, with enclosure, from the Assistant Administrator, Employment Standards Administration, concerning the protest of Descomp, Inc., against certain terms in request for proposals (RFP) No. 3FP-A5-N-3473-4-12-73, issued by the Federal Supply Service, General Services Administration (GSA).

The RFP was issued March 14, 1973, calling for an indefinite quantity of ADP keypunching and verification services. Prior to the issuance of the solicitation, the contracting officer sent to the Department of Labor a Notice of Intention to Make a Service Contract (Standard Form 98) which listed as the "place of performance" the locations of the Government installations for which the services were to be performed. In response, Labor provided Service Contract Act Wage Determinations for 23 classes of employees, including keypunch operators, file clerks, secretaries, stenographers, switchboard operators, typists, computer operators, and draftsmen, in three localities--the District of Columbia; an area of suburban Maryland (Montgomery and Prince Georges Counties); and a suburban Virginia area (Arlington, Fairfax, Loudon, and Prince William Counties, and the independent Cities of Alexandria, Fairfax, and Falls Church). The wage determinations for these localities were included in the RFP along with the following provision:

"NOTE: The Wage Determinations shown herein covers employees employed on contracts for services for installations located in the specified localities, cities, counties and/or states. The wage rate paid must correspond to the Wage Determination for the location of the agency and not for the location

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> of the contractor. For Example: If you are awarded Service Area A, which is located in the District of Columbia, you must pay the rate listed on the Wage Determination for the District of Columbia regardless of your plant location."

The solicitation further provided that the contractor would be paid on a card-output basis in accordance with 1,000-card allotments.

Among the objections made by Descomp against the terms of the RFP, two contentions, in particular, raise fundamental issues in regard to the interpretation and application of the Service Contract Act of 1965. Since we believe, for the reasons discussed, that certain procedures which your Department has adopted in implementing the Act may be questionable, we are calling these matters directly to your attention.

The specific contentions raised by Descomp are as follows. First, the protestant's counsel in a letter to our Office has questioned whether the Service Contract Act was intended to apply to services of the type being procured under the RFP. Counsel has expressed the view that the Act's coverage is limited to contracts for services such as janitorial work, guard services, window washing, trash removal and the like. Also, the protestant objects to the RFP "NOTE" requiring payment of wage rates based on the location of the agencies and not the location of the contractor. In this regard, Descomp has advised that its actual performance under contracts of this type takes place at its facility in Delaware. Descomp picks up cards at various Government agencies in the Washington area, processes them in Delaware, and returns them to Washington. Apparently, a similar procedure would be utilized by any contractor, since there is no indication in the RFP that the services being contracted for are to be performed on the premises of the Government installations involved. Descomp believes that it is unfair to force contractors who are not located in the Washington, D. C., area to pay minimum wage rates as determined from the wages prevailing in that area. The protestant therefore requests that your Department be required to make wage determinations for its locality and the localities of the other offerors, and that the RFP be amended accordingly.

The Service Contract Act of 1965, 41 U.S.C. 351, et seq., requires that every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in

excess of $2,500, with certain exceptions, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain a provision specifying the minimum monetary wages and fringe benefits to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder as determined by the Secretary of Labor, or his authorized representative, in accordance with the prevailing rates and fringe benefits for such employees in the locality.

Initially, we have serious doubts whether the RFP contemplates the award of a contract the principal purpose of which is to furnish services through the use of service employees. A contract awarded under the RFP will apparently be performed by clerical, "white-collar" employees who do not come within the Act's definition of "service employee" (41 U.S.C. 357(b)):

> "The term 'service employee' means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons."

The legislative history of the Act indicates that the scope of the "service employee" concept was intended to be limited to employees generally referred to as "blue collar" employees. In this regard, Senate Report No. 798, September 30, 1965, 89th Congress, 1st Session on H.R. 10238, the bill enacted as the Service Contract Act, states at pages 1 and 2 as follows:

> "The bill is applicable to advertised or negotiated contracts in excess of $2,500, the principal purpose of which is to furnish services through the use of service employees. Service employees are defined in the bill as guards, watchmen, and any person in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations. Typical services furnished would also include laundry and drycleaning, custodial, janitorial, cafeteria, food, and miscellaneous housekeeping."

Further, the statement of Mr. Charles Donahue, then Solicitor of Labor, at page 4 of the Hearing on H.R. 10238 before the Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, August 5, 1965, makes clear that the Act was intended to apply to those employees performing service contracts involving the type of work performed by Federal Wage Board employees:

> "The standards set forth in H.R. 10238 would apply to guards, watchmen, and employees in jobs of the type for which wage rates are set by individual agency wage boards when the workers are employed directly by the Government. These employees are, as you know, employees in trades, crafts, or manual labor occupations, including supervisors, often referred to as 'blue collar' workers. Included in coverage under the bill would be janitorial, custodial, maintenance, laundry, drycleaning, hauling, pest extermination, clothing and equipment repair, and cleaning service employees."

To the same effect is a statement in a memorandum furnished by Mr. Donahue which appears at pages 15 and 16, Hearing on H.R. 10238 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, September 23, 1965:

> "The Service Contract Act proposal covers contracts, the principal purpose of which is to furnish services through the use of service employees, as defined in the proposal (i.e., manual, skilled, blue-collar type employees), under contracts with the United States and the District of Columbia in excess of $2,500. Examples of contracts covered are those for janitorial, custodial, laundry and drycleaning services. * * *"

It is our understanding that your Department's policy concerning coverage of clerical employees has been inconsistent, and that during 1970 and 1971 you regarded such employees as being outside the Act's coverage. In any event, your rules relating to the administration of the Act, published in Title 29, Code of Federal Regulations, Part 4, seem to indicate that the "service employee" concept covers blue-collar workers and that clerical employees are not covered. 29 CFR 4.113(b) states that "service employee" does not include employees employed in a bona fide executive, administrative, or professional capacity, and further notes that the definition of "service employee" is for the most part identical with that in the Classification Act Amendments

of 1954 (5 U.S.C. 1082(7)) which defines "blue collar workers" or "wage board employees" in the Federal service. Also, 29 CFR 4.153 includes as an example of an employee not covered by the Act a laundry service contractor's billing clerk performing billing work with respect to the items laundered.

Descomp's objection to the RFP "NOTE" requiring the contractor to pay wage rates based upon the localities of the Government installation being served, in accordance with the wage determinations included in the RFP, rather than upon the localities of the various offerors, raises an even more serious issue--the proper interpretation of the "locality" basis of wage determinations. In a typical service contract procurement--for example, a solicitation calling for janitorial or trash removal services--the locality of the Government installation and the locality where the services are performed are one and the same. Where, as here, there is a procurement of services which can be rendered at the location of the successful bidder, wherever that may be, your Department's position, as we understand it, has been that the Act requires the issuance of wage determinations based upon the locality of the Government facility for which the services are to be performed.

In a letter to Descomp dated May 1, 1973, the Assistant Administrator, Employment Standards Administration, stated that in a procurement of services where there is uncertainty as to where the work is to be performed because the services can be rendered at the location of the successful bidder, wherever that may be, the Department issues wage determinations based on the location of the Government facility for which the services are to be performed. The letter further states:

> "It was, and is, our opinion that such an approach to wage determinations for procurements where the place (or places) of performance is unknown at the time of the filing of the SF-98 not only furthers the remedial purposes of the Act but also provides the fairest opportunity to any interested bidder to compete for a Government contract.
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> "Given the present procurement procedures for such contracts, we feel the position outlined above is the only practical and equitable course to follow. The only alternatives are (1) not to issue any wage determination for inclusion in the invitation for bids and subsequent contract, which would be

contrary to the clear intent of the Act or (2) to issue a wage determination for a contractor's facility after contract award when the contractor's location is known. Such a policy is, of course, inconsistent with the competitive bidding process itself."

With regard to the question of the "locality" basis for wage determinations, the relevant language of the Act indicates quite clearly that "locality" has reference to the place where services are performed:

"Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 * * * the principal purpose of which is to furnish services in the United States through the use of service employees * * * shall contain * * *:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract * * * as determined by the Secretary * * * in accordance with the prevailing rates for such employees in the locality * * *;"

This view is confirmed by examination of the legislative history of the act. See, in this regard, the statement of Mr. Charles Donahue, the then Solicitor of Labor, reported at page 11 of Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Congress, 1st session, on H.R. 10238. Mr. Donahue stated in part:

"At the threshold I have been told that there is some curiosity as to why we did not simply take the Davis-Bacon Act and extend it so that it would cover service contracts as well as construction contracts.

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"Another answer to that question is, that in principle, without mentioning it, we have followed the Davis-Bacon Act. I address myself to the provisions on page 2 of the bill as it was reported in the House of Representatives, paragraph No. 2, which provides for the determination of prevailing wage rates by the Secretary of Labor on the basis of those prevailing for service employees in the locality.

"Now the word 'locality' is comparable to the words in the Davis-Bacon Act; city, town, village, or any other political division of the State in which the contract work is to be performed."

Mr. Donahue's further statements in the Senate hearings indicate that "locality" was substituted for the Davis-Bacon formulation because of the need for a more flexible geographic standard. However, there is no indication here or elsewhere in the legislative history that "locality" was meant to have reference only to the location of Government installations for which the services are being provided to the exclusion of the locations of performance.

In short, the "locality" contemplated by the Congress appears to have been an area encompassing the location where service employees are actually performing a service contract. This is in accord with the purpose of the Act--"* * * to provide much needed labor standards protection for employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies." H. Rept. No. 948 on H.R. 10238, 89th Congress, 1st Session, September 1, 1965.

The locality interpretation which you have adopted in the present case and in similar cases is subject to question. It results in employees being paid minimum wages as determined from the prevailing wages in a locality other than the one wherein they are actually engaged in performing the contract. Also, it establishes, in effect, a nationwide rate, since all bidders whatever their location are bound to pay the wage rates in the locality of the Government installation. This nationwide rate is not determined with reference to the prevailing wages throughout the country, but is based on the prevailing rates in the locality of the Government facility.

We believe that these practices have an adverse impact upon the Government's procurement of services. It is apparent that the departmental interpretation of "locality" and the practice of classifying clerical workers as service employees increase the cost of procuring services as contemplated by the RFP.

While as indicated we think your current practices are subject to serious question we cannot conclude that they are prohibited by the language of the Service Contract Act. Accordingly, we are advising

the Administrator of General Services and the protestor by letters of today that the protest is denied. However, in view of the significant impact of the protested procedures on the Government's procurement of services generally, we strongly recommend that your Department, as the agency charged with the implementation of the Service Contract Act, present these matters to the Congress with a view towards obtaining clarifying legislation.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510. Your attention is directed to section 236 of the act which requires that you submit written statements of the action to be taken with respect to the recommendations. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

We would appreciate being advised of whatever action is taken on our recommendation.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States