In the Matter of:

DEPARTMENT OF THE ARMY **ARB Case No. 98-120**

***In re* request for review of wage determinations based on the November, 1996 Bureau of Labor Statistics Survey of the Seattle-Tacoma-Bremerton, WA Consolidated Metropolitan Statistical Area** **DATE: December 22, 1999**

and

DEPARTMENT OF THE AIR FORCE **ARB Case No. 98-121**

***In re* request for review and reconsideration of Wage Determination Nos. 95-2567 (Revision 10) and 94-2568 (Revision 8), with prospective application to U.S. Air Force contracts performed at McChord Air Force Base in Pierce County, WA**

and

DEPARTMENT OF THE NAVY **ARB Case No. 98-122**

***In re* request for review and reconsideration of Wage Determination Nos. 94-2559 (Revision 9) and 94-2560 (Revision 7) for Clallam, Gray's Harbor, Jefferson, Kitsap and Mason Counties, WA**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Petitioners:
Clarence D. Long, III, Esq., *Department of the Air Force, Washington, D.C.*;
James E. Evans, *Department of Air Force Vandenberg AFB, California*
Alfred E. Moreau, Esq., *Department of the Army, Washington, D.C.*
Lis B. Young, Esq., C. Diane Truman, *Department of the Navy, Alexandria, Virginia*

For the Respondent:
Carol Arnold, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,

U.S. Department of Labor, Washington, D.C.

For Intervenor Contract Services Association of America:
Gary Engebretson, Andrew Fortin, *Washington, D.C.*

For Intervenor Johnson Controls World Services, Inc.:
R. Donald Burns, Gilbert L. Patton, *Silverdale, Washington*

FINAL DECISION AND ORDER

The central issue addressed in these consolidated appeals is whether the Administrator of the Department of Labor's Wage and Hour Division (Administrator) misused his discretion when deciding that the Service Contract Act wage determinations for the Puget Sound region of Washington State should be based on wage data reflecting the entire Seattle Consolidated Metropolitan Statistical Area (CMSA), or whether the Administrator instead is obligated to continue an earlier practice of using wage data from three smaller subdivisions of the region – the Bremerton-Shelton, Tacoma and Seattle areas.

These cases are before the Administrative Review Board on petitions for review filed by the Departments of the Army (Army), the Air Force (Air Force), and the Navy (Navy) – collectively, the Armed Forces. The Armed Forces seek review of a series of rulings in which the Administrator denied the Armed Forces' requests for reconsideration of several wage determinations issued under this new policy of relying on CMSA data. We have jurisdiction over the appeals pursuant to 29 C.F.R. §§4.56(b) and 8.1(b) (1999).

For the reasons discussed below, we conclude that the Administrator's decision to rely on the metropolitan-wide CMSA data when issuing wage determinations in the Puget Sound area is within the range of discretion accorded the Administrator under the statute and regulations. We therefore deny the Armed Forces' petitions.

BACKGROUND

To assess the issues raised by the Armed Forces in this case, it is necessary to understand the interplay of several processes that ordinarily function independently. Therefore, before turning to the specific facts that underlie the Armed Forces' challenge to the Puget Sound wage determinations, we review (a) the Administrator's wage determination process and the concept of "locality" under the Service Contract Act, and (b) the Office of Management and Budget's rules for defining various categories of metropolitan statistical areas. We then review changes in the Bureau of Labor Statistics' wage survey methodology, and the impact of these changes on the Labor Department's wage determination process.

A. Regulatory framework - SCA wage determinations

The Service Contract Act, as amended (41 U.S.C. §351, *et seq.* (1994)) (SCA or Act), requires the Secretary of Labor to determine minimum wage and fringe benefit rates for service workers employed on Federal service contracts. Responsibility for implementing the Act is delegated to the Labor Department's Wage and Hour Administrator. 29 C.F.R. §4.3(a).

Under the Act and its implementing regulations, the Administrator issues wage determinations that are incorporated into the contract specifications for each Federal service contract. Two different types of wage determinations are issued. For service contracts at worksites where an existing collective bargaining agreement governs employee wage and fringe benefit rates, the Administrator issues wage determination rates based on the rates in the labor agreement. 41 U.S.C. §351(a)(1),(2); 29 C.F.R. §4.53. For sites where there is no collective bargaining agreement in effect, the Administrator issues a wage determination that reflects wages and fringe benefits "prevailing . . . for such [service] employees in the locality." 41 U.S.C. §351(a)(1)(2); 20 C.F.R. §4.52. The Administrator's "prevailing in the locality" wage determinations are based on wage data, most frequently surveys compiled by the Bureau of Labor Statistics (BLS). 29 C.F.R. §4.52(a).

The Service Contract Act requires that the "prevailing rate"-type wage determinations reflect wages paid in the "locality." In contrast to the SCA's companion prevailing wage law, the Davis-Bacon Act – which requires that the prevailing wage rates be based on wages paid "in the city, town, village, or other civil subdivision of the State in which the work is to be performed" (40 U.S.C. §276a(a)) – the term "locality" is not defined within the Service Contract Act. The regulations implementing the Act provide the following explanation of the factors considered by the Administrator when determining the correct "locality" for purposes of SCA wage determinations:

> Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine the minimum monetary wages and fringe benefits prevailing for various classes of service employees "in the locality". Although the term *locality* has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts

> and circumstances pertaining to that determination. Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area. For example, a survey by the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the same geographic area included within the scope of the survey. Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used. In addition, in *Southern Packaging & Storage Co. v. United States*, 618 F.2d 1088 (4th Cir. 1980), the court held that a nationwide wage determination normally is not permissible under the Act, but postulated that "there may be the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition".

29 C.F.R. §4.54(a).[1/] Thus, there is significant flexibility in determining an appropriate "locality" for wage determination purposes, and neither the statute nor the regulations prescribe any specific geographic area to be used. The regulations indicate that wage determinations in urbanized areas ordinarily are issued on a metropolitan area basis, and that the geographical area covered by the wage determination coincides with the area from which the wage data were compiled.

B. Regulatory framework – OMB classification of metropolitan areas

The Federal Office of Management and Budget (OMB) has responsibility for developing a variety of statistical programs. *See generally* 44 U.S.C. §3504 (1994). Pursuant to this statutory directive, OMB devises standards for categorizing urban areas throughout the United States. The OMB criteria for designating metropolitan areas are re-evaluated on a continuing basis and were revised in 1958, 1971, 1975, 1980, and 1990, and are being reviewed now in anticipation of the 2000 census. *See* Notices, OMB, 63 Fed. Reg. 70526, 70528 (1998). The criteria currently in effect, "Revised Standards for Defining Metropolitan Areas in the 1990's," were published in 1990. 55 Fed. Reg. 12154 (1990).

[1/] The text of this regulation was first promulgated in 1983. 48 Fed. Reg. 49762 (1983). By that time, the Office of Management and Budget had abandoned the Standard Metropolitan Statistical Area as the sole OMB-recognized metropolitan unit in favor of multiple metropolitan units. *See* Notices, OMB, 63 Fed. Reg. 70526, 70529 (1998).

OMB's standards for categorizing metropolitan areas are complex. The general concept of a "metropolitan area," as defined by OMB, is that it includes a core area containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with the core. Thus a metropolitan area typically includes central cities and their outlying – but integrated – counties. *Id.*

Under OMB's 1990 standards, the basic urban unit is the "metropolitan statistical area" (MSA), which typically includes a city or urbanized area of at least 50,000 in population joined by surrounding counties where a sizeable portion of the population commutes to the center. *Id.*, §§1-3. MSAs are classified by population size, from the smallest Level D MSA (generally having a population of 50,000 - 100,000) to the largest Level A MSA (a metropolitan statistical area with population over 1,000,000). *Id.*, §6. If there are two or more adjacent urban areas that independently would qualify as metropolitan statistical areas, they are combined into a single, larger MSA if a substantial percentage of workers commute between the adjacent urban areas. *Id.*, §5. With regard to the Puget Sound region, there are four areas that independently would qualify as MSAs based on their population size and urban core areas: Bremerton, WA (Level C); Olympia, WA (Level C); Tacoma, WA (Level B); and Seattle-Bellevue-Everett, WA (Level A). *See, e.g.,* OMB Bulletin 99-04, "Revised Statistical Definitions of Metropolitan Areas (MAs) and Guidance on Uses of MA Definitions," June 30, 1999, at List II p.23. Under the OMB standards, however, these four urbanized areas are merged into a single Level A metropolitan statistical area.

OMB's rules recognize that within the large, Level A metropolitan statistical area there may be several of these smaller, identifiable cities or urban areas. If these smaller urban areas have a population of at least 100,000 and meet several other criteria, they are denominated by OMB as Primary Metropolitan Statistical Areas (PMSAs). Some of the urban centers now classified as PMSAs formerly had been designated as "Standard Metropolitan Statistical Areas" (SMSAs) under OMB's pre-1990 guidelines. 55 Fed. Reg. at 12156, §8. Under this aspect of the OMB standard for defining metropolitan areas, the four urban centers in the Puget Sound region – Bremerton, Olympia, Tacoma, and Seattle-Bellevue-Everett – all are classified as PMSAs. *See* OMB Bulletin 90-44, *supra*. That is, each of the four urban centers independently qualifies as a metropolitan area based on its size and economic factors, but they are part of a

larger Level A MSA covering the entire Puget Sound region.[2/] (*Note*: A map of the state of Washington showing the state's counties is found as an Appendix to this decision.)

Many of the largest Level A metropolitan statistical areas include two or more PMSAs. Under the OMB classification structure, a metropolitan statistical area that includes two or more PMSAs (like the Puget Sound region) is designated a Consolidated Metropolitan Statistical Area (CMSA). However, the CMSA designation does not change the underlying classification of the urban region: it remains a Level A metropolitan statistical area, *i.e.*, an urban center with economically and socially integrated outlying counties; or, in some cases, a metropolitan area consisting of multiple urban centers and outlying counties with substantial economic and social integration. 55 Fed. Reg. at 12156, §10. Under the OMB standards, the entire Puget Sound region constitutes the single Seattle-Tacoma-Bremerton, WA Consolidated Metropolitan Statistical Area (Seattle CMSA). This large Seattle CMSA, covering six counties and more than 20,000 square miles, encompasses the four smaller PMSAs. *See* OMB Bulletin 90-44, *supra*.

C. Changes in the BLS wage survey program

As noted above, the primary data sources for the Wage and Hour Division's SCA wage determinations are wage surveys conducted by the Bureau of Labor Statistics. The design of these surveys is not static, however, but instead changes over time in methodology and geographical coverage.

When compiling the SCA wage determinations in the Puget Sound region prior to the challenged 1997 wage determinations, the Wage and Hour Administrator relied on a series of wage surveys conducted by BLS. The BLS surveys that were available at that time covered subcomponents of the Puget Sound region; specifically, there were separate wage surveys that

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[2/] The four Primary Metropolitan Statistical Areas in the Puget Sound region include the following counties, respectively:

Primary Metropolitan Statistical Area	Counties Included
Bremerton PMSA	Kitsap County
Olympia PMSA	Thurston County
Seattle-Bellevue-Everett PMSA	Island County King County Snohomish County
Tacoma PMSA	Pierce County

OMB Bulletin 99-04, List II at 23; *see also* Admin. Brief at 6.

covered (respectively) the Seattle, Tacoma and Bremerton-Shelton areas.[3/] Admin. Brief at 6.[4/] Beginning in 1996, BLS discontinued this practice of surveying separately each of the Puget Sound urban centers, and instead shifted to a survey covering the entire Seattle CMSA.

The BLS survey currently used by the Wage and Hour Division is called the Occupational Compensation Survey Program, or OCSP. BLS developed the OCSP survey in 1992 by combining two earlier wage surveys: the Area Wage Survey Program and the National White-Collar Pay Survey. Notices, Dept. of Labor, BLS, 57 Fed. Reg. 30982, 30983 (1992). The OCSP was intended to be multi-purpose, with the data being used for developing Service Contract Act wage determinations, and also for administering the Federal Employees Pay Comparability Act of 1990 (FEPCA), 5 U.S.C. §§5301-07 (1994). *Id.* Under FEPCA, the pay rates for Federal white-collar employees (*e.g.*, employees paid on the "GS" schedule) are adjusted upward in many metropolitan areas to reflect higher wage rates and living costs in urban locations. 5 U.S.C. §§5301-07; *see* AR, Tabs Y, Z. By 1996, BLS's OCSP survey of the six-county Seattle CMSA had replaced the earlier BLS surveys restricted to the smaller areas

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[3/] The three areas in which BLS had formerly conducted individual wage surveys are comprised of the following counties: the Seattle area, Snohomish and King Counties; the Bremerton-Shelton area, Kitsap and Mason Counties; and the Tacoma area, Pierce County. AR, Tabs A-C. Data for the CMSA survey were collected from Island, King, Kitsap, Pierce, Snohomish and Thurston Counties. AR, Tab W.

[4/] References to the parties' pleadings are abbreviated as follows:

Army May 6, 1998 letter requesting Board review of Apr. 20, 1998 ruling	Army 5/6/98 Pet. for Rev.
Air Force May 8, 1998 letter requesting Board review of Apr. 20, 1998 ruling	Air Force 5/8/98 Pet. for Rev.
Navy May 8, 1998 letter requesting Board review of Apr. 20, 1998 ruling	Navy 5/8/98 Pet. for Rev.
Jointly filed June 22, 1998 letter accompanying briefs and supplemental documentation filed by each petitioner	Joint Pet. for Rev.
Air Force June 22, 1998 letter brief in support of petition for review	Air Force Brief
Navy June 22, 1998 brief in support of petition for review	Navy Brief
Statement of the Acting Administrator in Response to Petition for Review	Admin. Brief
Petitioners[']' Response to Statement of the Acting Administrator in Response to Petitioners[']' Request for Review	Reply Brief
Johnson Controls Sept. 9, 1998 letter brief	Johnson Controls Ltr. Brief
CSA Sept. 8, 1998 brief	CSA Brief

in the Puget Sound region, including the separate wage surveys for the Seattle, Tacoma and Bremerton-Shelton areas. AR, Tabs A-C, W.

D. Impact of the changed BLS survey program on the Wage and Hour Division's Puget Sound wage determinations

Before 1996 (*i.e.*, when BLS still conducted separate wage surveys for Seattle, Tacoma and Bremerton-Shelton), the Administrator viewed each of these three areas as a "locality" under the Act, and routinely issued separate wage determinations for each location. Because the wage determination rates in each location were based on distinctly separate surveys, the Administrator's wage determination rates varied in each location among the various classes of occupations. AR, Tabs M, N, P, Q.

The shift to the regional CMSA data after 1996 created transitional problems for the Administrator, because of the large concentration of workers employed in the immediate Seattle area,[5/] and Seattle's history of higher wage rates than those in the Tacoma and Bremerton-Shelton areas. AR, Tabs E, F. The change to the merged CMSA wage data meant that new wage determinations for Federal service contracts in the Tacoma and Bremerton-Shelton areas would be based on survey data reflecting higher wage levels – often much higher.

In June and July, 1997, the Administrator issued the first SCA wage determinations based on the new Seattle CMSA data. If applied without modification, the 1996 Seattle CMSA survey data would have supported a substantial increase in the wage rates for many of the occupations in the Tacoma and Bremerton-Shelton areas, compared with earlier wage determination rates. Indeed, the SCA regulations concerning "locality" plainly suggest that the geographic area of a wage determination should coincide with the geographic area included in a wage survey, in which case the Administrator easily could have issued a single set of wage determinations covering the entire Seattle CMSA region. *See* 29 C.F.R. §4.55 ("For example, a survey by the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area

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[5/] Although both the Navy and the Air Force focus on the relatively large concentration of workers in Seattle, their specific contentions differ somewhat. The Navy stated that "79% of DOL's CMSA survey used as the basis for WD 94-2559 (Rev. 9) reflects data derived from sources located in King County . . ." AR, Tab E, 9/15/97 ltr. at 4. The Air Force stated that "79% of the wage data comprising the Seattle CMSA survey is derived from the Seattle PMSA" (*i.e.*, King, Island and Snohomish counties). AR, Tab F, 8/20/97 ltr. at unnumbered p.3. We do not need to resolve this inconsistency, because Census Bureau statistics covering King and Snohomish Counties provide support for the general contention that the greatest concentration of workers is in the area immediately surrounding Seattle, with the following figures recorded in 1990: of a total 1,471,846 workers living in King, Snohomish, Pierce, Kitsap, and Thurston Counties, 1,073,230 workers, or 72.9%, work in King and Snohomish Counties. U.S. Bureau of the Census, "Commuting Flows of American Workers Charted by New 1990 Census Computer File," Press release No. CB92-267, Dec. 22, 1992, Table 14, derived from computer file STF-S-5, Census of Population 1990: Number of Workers by County of Residence by County of Work; *see* Table reproduced *infra* at p. 23.

includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the *same geographic area included within the scope of the survey*."(emphasis added)). However, rather than shifting immediately to a single set of wage determinations for the entire Puget Sound region tied to the Seattle CMSA-based wage survey, the Administrator devised a methodology providing for a transition to the new data reflecting higher wage rates.

The Administrator decided to continue issuing wage determinations for each of the three areas in the Puget Sound region (Seattle, Tacoma, Bremerton-Shelton). Wage determinations WD 94-2567 (Rev. 10) and WD 94-2568 (Rev. 9) were issued for the Tacoma area ("the 1997 Tacoma CMSA-based wage determinations"), and wage determinations WD 94-2559 (Rev. 9) and WD 94-2560 (Rev. 7) were issued for the Bremerton-Shelton area ("the 1997 Bremerton-Shelton CMSA-based wage determinations").[6/] AR, Tabs A-C. In instances where the new CMSA wage survey data resulted in only a small increase over the wage rate in the predecessor Tacoma and Bremerton-Shelton wage determinations, the Administrator simply applied the CMSA data to the wage determination. *See id.* However, where the CMSA data would have resulted in a large increase in wage determination rates when compared to the predecessor wage determinations, the Administrator generally applied a 15% "cap" to the increase over the wage rate in the earlier wage determination. *See id.,* 4/20/98 rulings at unnumbered p.1.

A notable exception to this approach involved wage rates for employees in protective service occupations (police, fire protection, marshalls, etc.), which were not subjected to the 15% cap. The Administrator noted that the BLS wage surveys formerly conducted for the Tacoma and Bremerton-Shelton areas did not include wage data from state and local governments, the usual source for wage rate information for protective service occupations, and that, historically, the Wage and Hour Division's practice in instances where there was no local wage data on protective service occupations was to rely on BLS regional wage data for these job classifications. AR, Tabs A-C, 4/20/98 rulings at 2.[7/] Accordingly, the Administrator concluded that it was unnecessary to cap increases in wage rates for protective service occupations included in the 1997 Tacoma and Bremerton-Shelton wage determinations because the predecessor wage

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[6/] Although not an issue raised by the parties, we note that the geographic areas covered by the 1997 CMSA-based wage determinations include rural counties that are located beyond the Seattle CMSA. The Tacoma wage determination applies to contracts in Lewis, Pierce and Thurston counties. The Bremerton-Shelton wage determination applies to contracts in Kitsap, Mason, Grays Harbor, Jefferson and Clallam counties. AR, Tabs M, N, P, Q.

[7/] Although the Administrator's rulings are unclear whether BLS regional data were actually relied on previously in setting the protective service occupations wage rates for the predecessor Tacoma and Bremerton-Shelton wage determinations, it is evident that the protective service wage rates for the Tacoma and Bremerton-Shelton areas – whether derived from the old Seattle-Bellevue-Everett wage survey or from BLS regional statistics – were not generated from actual wage surveys of the Tacoma and Bremerton-Shelton areas. *See* AR, Tabs A-C, 4/20/98 rulings at 2, 4.

rates had not been based on wage survey data specific to the Tacoma and Bremerton-Shelton areas. *Id.* at 2, 4.

After developing the new, higher-wage 1997 CMSA-based wage determinations for the Tacoma and Bremerton-Shelton areas, the Administrator issued the wage determinations to the Army, Navy and Air Force, to be applied to Federal service contracts at military installations in the Puget Sound area. The wage determinations promptly were challenged by the Armed Forces, using the "review and reconsideration" procedures found at 29 C.F.R. §4.56.

PROCEDURAL HISTORY

On August 20, 1997, the Air Force Labor Advisor requested that the Administrator review and reconsider the 1997 CMSA-based Bremerton-Shelton wage determinations (WD 94-2567 (Rev. 10) and 94-2568 (Rev. 9)). AR, Tab F; 29 C.F.R. §4.56. On September 15, 1997, the Navy Labor Advisor requested that the Administrator review and reconsider the 1997 Tacoma wage determinations (WD 94-2559 (Rev. 9) and WD 94-2560 (Rev. 7)). AR, Tab E. On September 18, 1997, the Army Labor Advisor joined the Navy and the Air Force by challenging all four of the wage determinations. AR, Tab D.

The Administrator issued three letter rulings on April 20, 1998 (addressed to the Army, Navy and Air Force, respectively), denying each of the requests for review and reconsideration. AR, Tabs A-C. The substance of the three rulings is identical.[8/] (The substantive arguments advanced by the parties below, and the Administrator's response, are summarized in the next section of this decision.)

Each of the Armed Forces filed petitions for review, appealing the Administrator's ruling, in early May 1998. On June 8, 1998, the Board issued an order consolidating the cases.[9/]

[8/] Although the arguments advanced by each of the Armed Forces shared common themes, their briefs to the Administrator were distinctive and included differing exhibits. However, the Administrator's letters rulings to the respective agencies generally address only the arguments and materials submitted by the Navy, largely ignoring the materials submitted by the Army and Air Force. *See* AR, Tabs A-C.

The Administrator ordinarily should consider all major arguments raised by each of the parties in a request for review and reconsideration, and address specifically the evidence presented. This is particularly true when it is evident (as in this case) that each of the Petitioners had invested significant time and effort to develop and articulate its own position.

[9/] A fourth case, *Department of the Air Force,* ARB Case No. 98-125 (dealing with wage determinations in North Carolina and South Carolina), also was consolidated with these three cases. On July 15, 1999, the Board issued an order severing Case No. 98-125 from these three Puget Sound cases.

The Armed Forces filed a joint supplemental petition on June 22, 1998, accompanied by individual briefs and supporting documentation. In response, the Administrator moved for an opportunity to review the Armed Forces' additional documents and issue a supplemental ruling. The Board granted the Administrator's motion by order of July 16, 1998.

The Administrator issued his supplemental ruling on July 20, 1998. That ruling, *in toto*, stated that the supplemental documentation that had been submitted by the Armed Forces to the Board had been reviewed and that the information provided did not alter the Administrator's conclusion that the survey data and methodology that had been used to develop the challenged wage determinations were appropriate.

By order issued on July 9, 1998, the Board granted the request of Johnson Controls World Services, Inc. (Johnson Controls) to intervene in this proceeding. On September 2, 1998, the Board granted the similar request of Contract Services Association of America (CSA). *See* 29 C.F.R. §8.12.

Oral argument before the Board was held in Washington, D.C., on November 5, 1998, with all parties and Intervenors participating.[10/]

THE ADMINISTRATOR'S APRIL 20, 1998 RULINGS

As discussed above, the Administrator's 1997 Tacoma and Bremerton-Shelton wage determinations that are at issue here represented a new approach to determining prevailing wage rates in the Puget Sound region, differing from earlier wage determinations in significant ways:

- Whereas earlier wage determinations for these two areas had been based on BLS wage surveys specifically limited to these two respective areas (*i.e.*, Tacoma and Bremerton-Shelton), the 1997 wage determinations were based on the new BLS Occupational Compensation Survey encompassing the entire Seattle CMSA (*i.e.*, the entire Puget Sound region).

- Instead of shifting to a single set of wage determinations that would apply to the entire Seattle CMSA, the Administrator continued to issue separate wage

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[10/] By letter dated May 13, 1999, Johnson Controls requested that the Board accept a newspaper article concerning economic data from the Seattle metropolitan area and Kitsap County. We decline to do so. Our review of the Administrator's ruling is in the nature of an appellate proceeding and we generally focus our attention on the formal administrative record in the case, *i.e.,* the materials that were before the Administrator. *See* 29 C.F.R. §8.1(d); *Harbert International, Inc.,* Case No. 91-SCA-OM-5, Sec. Dec., May 5, 1992, slip op. at 6. No argument has been advanced in support of a remand to the Administrator for review of the proferred evidence, and the record does not indicate a basis for such action. *See COBRO Corp.,* ARB Case No. 97-104, July 30, 1999, slip op. at 12 n.10 and cases cited therein. We therefore deny Johnson Controls' request to admit the new evidence.

determinations for the smaller Seattle, Tacoma and Bremerton-Shelton areas as a transitional measure. Where the CMSA data would have resulted in a large increase above the rates in the predecessor wage determinations, the Administrator capped the increase in the wage determinations at 15% above the earlier wage determination rates.

- For protective service occupations, new wage determination rates were issued based directly on the CMSA data, without applying the 15% cap. Historically, the Administrator would have relied on BLS regional data for calculating such wage rates for Tacoma and Bremerton-Shelton, because the wage surveys formerly conducted in these two areas did not cover local and state government, the usual source of wage data on protective service professions. In setting wage rates for those professions in the 1997 Tacoma and Bremerton-Shelton CMSA-based wage determinations, however, the Administrator relied directly on the Seattle CMSA wage survey because it included data for those professions and because the wage rates for those professions in the prior Tacoma and Bremerton-Shelton wage determinations had been based on data from outside the Tacoma and Bremerton-Shelton areas. *See* n.7, *supra.* Because the predecessor wage determination rates had not been based on local data, the Administrator concluded that it was not necessary to ease the transition to reliance on the Seattle CMSA wage data.

In seeking review and reconsideration by the Administrator, the Armed Forces argued that the Seattle CMSA survey data did not provide an adequate basis for determining the wages prevailing in the Tacoma and Bremerton-Shelton localities, for two basic reasons: 1) the Tacoma and Kitsap localities constitute entities that are economically distinct from the Seattle/King County area; and 2) wage data from King County (in which Seattle is located) dominated the CMSA survey, resulting in inflated wage rates on the Tacoma and Bremerton-Shelton wage determinations. AR, Tabs D-F.[11/]

The Navy and the Air Force submitted documentation in support of their claim that the wage determinations were improper, including:

- comprehensive tables comparing the Seattle CMSA wage data, current and previous wage rates for the Bremerton-Shelton and Tacoma localities, Federal wage rate equivalents for various job classifications, and wage rates taken from a Washington State wage survey; and

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[11/] The Navy's arguments and documentation relevant to the Bremerton-Shelton wage determinations focus on Kitsap County. AR, Tab E; Navy 5/8/98 Pet. for Rev.; Navy Brief. Kitsap and Mason Counties comprised the Bremerton-Shelton wage survey area under the former SCA wage survey scheme. AR, Tabs A-C, 4/20/98 ruling letters at unnumbered p.1.

- wage data from a survey of employers in Kitsap County conducted by the Navy, along with a survey of the counties in which the employees who worked at Navy installations in the Bremerton-Shelton and Tacoma localities resided.

AR, Tabs E, F, BB, DD. As relief, the Petitioners requested that the Administrator revise the challenged wage determinations and that the Wage and Hour Division return to the individual locality survey method formerly used for developing SCA wage determinations. AR, Tabs D-F.

On April 20, 1998, the Administrator issued three final ruling letters, responding to the review requests. AR, Tabs A-C.

The Administrator defended the decision to shift to the CMSA-based "locality" by arguing that using the CMSA data was consistent with applicable guidelines under the SCA regulations. *Id.*, 4/20/98 rulings at 2. The Administrator explained that the Wage and Hour Division had begun relying on the BLS survey of the Seattle CMSA because the CMSA survey had replaced the three separate wage surveys previously conducted for the Seattle, Bremerton-Shelton and Tacoma areas. The Administrator also noted that even though the Seattle CMSA survey data was the primary basis for the challenged 1997 Tacoma and Bremerton-Shelton wage determinations, the wage determination rates for these areas had been tailored "to recognize historical differences between the three prior survey areas and to minimize the impact of the changed survey area." *Id.,* at unnumbered p.1. The Administrator also explained the application of the "15% cap" methodology to the job classifications in the 1997 wage determinations (other than the protective service occupations) as a means of limiting the immediate impact of the higher Seattle CMSA wage data on wage rates in the Tacoma and Bremerton-Shelton areas.[12/] *Id.* at 1-2.

The Administrator also tied the shift to the CMSA wage survey to the statutory mandate of the Service Contract Act that "due consideration" be given to the pay rates of Federal employees in the development of SCA wage rates, noting that Federal employee locality pay adjustments under the Federal Employees Pay Comparability Act are awarded on a CMSA basis, and the pay adjustments are calculated by referring to BLS's CMSA wage survey data. *Id.* at 3; *see also* 41 U.S.C. §351(a)(5); 29 C.F.R. §§4.54(a), 4.51(d). The Administrator observed that BLS's reliance on the CMSA unit for conducting wage surveys was likely to continue, and to be expanded into other geographic areas. AR, Tabs A-C, 4/20/98 ruling letters at 3.

The Administrator's ruling also addressed specifically the documentation that had been submitted by the Navy.[13/] With regard to the data generated by the Navy's survey of seven major

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[12/] The Administrator thus used the "locality" concept in two ways, *viz.,* both to refer to the Seattle CMSA wage survey area and to refer to the areas for which the Tacoma and Bremerton-Shelton wage determinations were issued.

[13/] As noted above at n.8, the Administrator's ruling letters did not address the Army and Air Force (continued...)

employers in Kitsap County, the Administrator concluded that the data did not provide an adequate statistical basis for revising the Bremerton-Shelton wage determination because certain types of employment information were not included. The Administrator also noted that according to the Navy's survey, the wage rates reported by the Kitsap employers were *higher* than the rates in the 1997 CMSA-based Bremerton-Shelton wage determination for "nearly thirty percent of the surveyed classifications," thereby undercutting the Navy's claim that the rates in the Administrator's challenged wage determination were excessive. *Id.*

With regard to the challenge to the wage rates for protective service occupations (fire, police), the Administrator considered and rejected the wage data generated by the Navy's survey of Kitsap County fire and police departments. The Administrator concluded that the Navy's survey data could not form the basis for a challenge to the rates in the wage determination because the Navy's documentation did not indicate whether the survey results represented average rates, or wages paid to entry level or experienced employees. *Id.* The Administrator acknowledged that the 1997 CMSA-based Bremerton-Shelton wage determinations represented a "significant increase in the wage rates for the protective service occupations," and therefore reviewed additional BLS data to confirm that the 1997 CMSA-based wage determination figures were reasonable. Specifically, the Administrator looked to regional BLS wage surveys of protective service workers. In this case, the Administrator found that the BLS average weekly pay rates for Level I Firefighters and Police Officers in metropolitan areas in the western United States region ($882 and $854, respectively) were "remarkably consistent" with the corresponding Seattle CMSA pay rates of $918 and $854. Thus, BLS occupational wage data for protective service employees in the western portion of the United States also confirmed generally the appropriateness of the Seattle CMSA wage data for these occupations. *Id.* at 4.

The Administrator discounted the data from the Washington State surveys of Kitsap, Clallam and Jefferson Counties because no information about the surveys' methodology had been provided and because it was unknown exactly what the data represented (*e.g.*, mean versus median rates, whether rates were entry level, scope of the universe of employers surveyed, etc.). The Administrator nonetheless noted that even if the State survey were used, a comparison of the State survey wage rates with the Seattle CMSA wage rates did not support completely the Navy's challenge to the Bremerton-Shelton area wage determination, because the State survey wage rates were higher for some occupations than the CMSA data. *Id.*

The Administrator ultimately concluded in the April 20, 1998 rulings that the arguments and documentation submitted by the Armed Forces did not provide a basis upon which to revise the 1997 CMSA-based wage determinations. The Administrator also emphasized that the capping methodology was properly utilized to limit the increases in wage rates for most occupations to no more than 15% as a means of easing the transition "to full integration of the CMSA data." *Id.* These appeals followed.

[13/](...continued)
materials.

DISCUSSION

A. Introduction

The Armed Forces offer a series of arguments challenging the Administrator's ruling upholding the 1997 CMSA-based Tacoma and Bremerton-Shelton wage determinations. In their petitions, the Armed Forces allege that the Administrator erred with regard to issues of law, fact, and policy when issuing the new wage determinations based on the Seattle CMSA data.

Errors of Law – The Petitioners assert that the wage determinations are incorrect legally on several grounds. First, the Armed Forces assert that the wage determinations are incorrect because they are based on a "locality" that is inconsistent with the statute, regulations, case law and the Wage and Hour Division's internal procedures. Second, the Armed Forces argue that the 1997 wage determinations are defective because the 15% "capping" mechanism used by the Administrator is not explicitly authorized by statute or regulation. Third, the Petitioners contend that the Administrator's linking of the "due consideration" clause of the Service Contract Act with the locality pay adjustment provisions of the Federal Employees Pay Comparability Act when justifying his reliance on the Seattle CMSA wage survey data is not supported by law.

Errors of Fact – The Armed Forces also assert, based on various evidentiary submissions, that the wage rates in the 1997 CMSA-based Tacoma and Bremerton-Shelton wage determinations do not reflect accurately the lower level of wages actually paid in these communities when compared with the higher wage rates paid in Seattle itself (*i.e.*, King County). Stated differently, the Armed Forces contend that the Administrator's published wage determination rates for the Tacoma and Bremerton-Shelton areas simply are out of line with wage rates actually being paid in the vicinity of the Armed Forces' installations.

Errors of Policy – In addition to raising challenges based on the law and facts, the Armed Forces cite the practical effects of the Administrator's decision to rely on CMSA wage survey data, arguing that Federal contracting agencies with service contracts in the Tacoma and Bremerton-Shelton areas (and beyond) will be adversely affected by the Administrator's change in policy. In this connection, the Petitioners argue that the Wage and Hour Division's decision to use the BLS's CMSA data, rather than to commission separate wage surveys for the smaller Tacoma and Bremerton-Shelton areas, is driven primarily by budgetary considerations at the Department of Labor, and that the Seattle CMSA wage survey does not truly reflect "local" wage rates.

We consider each of the Armed Forces' arguments in our discussion below using this framework. In each instance, we review first the arguments raised by the Petitioners and Intervenors in challenging the April 20, 1998 rulings, then review the Administrator's defense of the rulings, and finally offer our analysis on each point. We review the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator. *See generally ITT Federal Services Corp. (II)*, ARB Case No. 95-042A (July 25, 1996), slip op. at 4-5 (according

Administrator's reasonable interpretation of Section 4(c) of the SCA "great weight"); *Service Employees Int'l Union (I)*, BSCA Case No. 92-01 (Aug. 28, 1992), slip op. at 7-14 (upholding Administrator's methodology for calculating nationally-prevailing fringe benefit rates as reasonable and within his discretion, while remanding on other grounds).

Based on the record before us, we conclude that the Administrator acted within the limitations set by the SCA and its regulations when issuing the 1997 CMSA-based wage determinations for the Tacoma and Bremerton-Shelton areas and denying the Armed Forces' requests for review and reconsideration.

B. Whether the challenged wage determinations for the Tacoma and Bremerton-Shelton areas are incorrect as a matter of law because 1) the Administrator relied on wage survey data encompassing the entire Seattle CMSA; 2) the Administrator adopted a 15% "capping" methodology; and 3) the Administrator relied on the "due consideration" clause of the Act to justify using CMSA-based wage survey data.

1. The Seattle Consolidated Metropolitan Statistical Area as a "locality" under the Service Contract Act.

Armed Forces/Intervenors – The Armed Forces contend that the Administrator's reliance on the Seattle CMSA data to develop the Tacoma and Bremerton-Shelton wage determinations that are at issue here is inconsistent with the statutory and regulatory provisions relating to "locality." Under the Service Contract Act, the Labor Department is responsible for issuing wage determinations that reflect the prevailing wage and fringe benefit rates paid to various classifications of service employees "in the locality." 41 U.S.C. §351(a)(1),(2). The regulatory guidelines for identifying a "locality" under the SCA are found at 29 C.F.R. §4.54(a).

In the Armed Forces' view, the Administrator is responsible for determining wage rates under the Service Contract Act that "reflect, and not interfere with, local labor market conditions." Joint Pet. for Rev. at 2. Considering the large geographical area of the Seattle CMSA, the Armed Forces criticize the Administrator's use of the BLS survey because "[a]s a result, large areas of disparate communities, lumped together in CMSA surveys for purposes unrelated to SCA, now provide a database for average wages to be applied locally. The effect of this consolidation is contrary to the intent of SCA." *Id.* The Navy characterizes reliance on CMSA wage survey data as the improper use of "large portions of the United States as survey areas for specific localities." Navy Brief at 7-8. The Armed Forces cite *Southern Packaging and Storage v. United States,* 618 F.2d 1088 (4th Cir. 1980), and *Descomp v. Sampson*, 377 F. Supp. 254 (D. Del. 1974) as support for their contention that SCA wage determinations must provide wage rates that are tied to comparative economic conditions. Reply Brief at 8-9.

The Armed Forces contend that the Tacoma and Bremerton-Shelton areas are economically distinct from the Seattle urban center, with generally lower wage rates.[14/] As part of their claim that the Seattle CMSA consists of economically distinct districts, the Armed Forces assert that Puget Sound is a significant geographic barrier that continues to isolate the Tacoma and Bremerton-Shelton areas from the Seattle urban core. In challenging the Administrator's rulings, the Navy specifically questions why the Administrator did not address the guidelines for defining a locality in the Division's SCA Wage Determinations Manual of Operations, which include "home-to-work commuting patterns" as a pertinent factor. Navy Brief at 8, Encl. 5. The Armed Forces assert that commuting patterns in and around the Kitsap

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[14/] The factual evidence offered by the Armed Forces in support of this contention is discussed below at pp. 29 - 33.

peninsula (including Bremerton) support their claim that the Seattle CMSA is not an appropriate "locality" for purposes of assembling wage data under the SCA, because Puget Sound separates Kitsap and King Counties, adding additional time and expense to the commute between the two counties. Reply Brief at 17-18.

Intervenors Johnson Controls and CSA advance similar arguments in support of the Armed Forces' challenge to the 1997 CMSA-based wage determinations. For example, Johnson Controls states that 97% of its workforce employed at the Navy's Bangor facility reside on the Kitsap Peninsula in Kitsap, Mason, Jefferson and Pierce Counties, with only 1% residing in the Seattle area (King and Snohomish Counties). Johnson Controls Ltr. Brief at 1. CSA contends that, unlike Federal employees, SCA contract employees are concentrated near the site of performance of current contracts and are not spread out over the Seattle CMSA. CSA Brief at unnumbered pp. 7, 9-10.

Administrator – The Administrator contests the arguments advanced by the Armed Forces and the Intervenors. With regard to the *Southern Packaging* and *Descomp* decisions cited by the Armed Forces, the Administrator observes that those cases are factually distinguishable from the three cases at issue here, and urges particularly that – contrary to the Petitioners' position – the opinion of the Court of Appeals in *Southern Packaging* actually supports the Administrator's position that the Seattle CMSA is an appropriate locality under the Service Contract Act. Admin. Brief at 19-22. Specifically, the Administrator relies on the appellate court's discussion of "locality" in its *Southern Packaging* opinion, 618 F.2d at 1092, as support for the proposition that "locality" must not be interpreted in a restrictive manner. Admin. Brief at 19-20, 21-22.

As further support for his contention that "locality" must not be narrowly construed, the Administrator cites statements from the SCA legislative history on this issue. The Administrator notes that the undefined term "locality" in the SCA, which had been interpreted flexibly under the Walsh-Healey Act, 41 U.S.C. §35 *et seq.*, was chosen by Congress in lieu of the more rigid definition of the Davis-Bacon Act (40 U.S.C. §276a) requiring that prevailing wage rates be determined based on wages paid in the "city, town, village or any other civil subdivision of the State in which the contract work is to be performed." Admin. Brief at 21 (citing Hearings, Subcommittee on Labor, Committee on Labor and Public Welfare, 89th Cong., 1st Sess., on H.R. 10238, Sept. 23, 1965, pp.12-14). The Administrator also cites the regulatory guidelines for identifying a locality under the SCA, which are found at 29 C.F.R. §4.54. The Administrator asserts that the 1997 CMSA-based wage determinations "define locality the same as the geographic area included within the scope of the BLS survey" and are thus in compliance with Section 4.54. Admin. Brief at 22.

In response to the Armed Forces' contention that use of the Seattle CMSA wage survey data disregards the commuting distances of employees who work on SCA contracts, the

Administrator notes that "the criteria for qualification as a PMSA[15/] specifically include commuting distances." Admin. Brief at 23. The Administrator also argues that if employee commuting distances from government facilities were determinative of what geographic area constitutes an SCA locality, it would be necessary to develop wage determinations for each site where an SCA-covered contract would be performed. Admin. Brief at 23.

In addition, the Administrator argues that the Armed Forces effectively are requesting that the Wage and Hour Division abandon its established practice of relying on wage data compiled under the BLS Occupational Compensation Survey Program (OCSP) for localities not otherwise surveyed by BLS. Admin. Brief at 16-17. If the Wage and Hour Division is not permitted to use CMSA data, argues the Administrator, the Division will encounter tremendous difficulty in finding reliable sources of wage data for use in developing SCA wage determinations. *Id.* at 18. In addition, the Administrator argues that the Wage and Hour Division is in "the best position" to determine which survey most effectively serves the Division's needs. *Id.* In support of the conclusion that the OCSP provides a reliable source of wage data, the Administrator cites the cross-industry nature of the survey. *Id.* at 17-18.

Analysis – We begin by reviewing the authority under which the Administrator issues SCA wage determinations. As noted previously, Part 4 of Title 29 of the Code of Federal Regulations implements the Section 2(a)(1) requirement that the Secretary determine the minimum wage to be paid to employees working on Federal service contracts "in accordance with prevailing rates for such employees in the locality . . . ." 41 U.S.C. §351(a)(1). The wage determinations issued by the Administrator under the procedures at Subpart B of Part 4, Sections 4.50 *et seq.,* are central to this process. The regulations describe a process in which the Administrator and the Wage and Hour Division staff examine several factors, according to job classification and geographic area, and then determine a prevailing wage rate for each job classification based on one of the available methodologies for calculating the prevailing rate.

For example, Section 4.51 provides that prevailing wage rate determinations are to be "based on all available pertinent information," and cites area surveys generated by BLS or "other Labor Department personnel" as the most frequently used sources of wage rate information. 29 C.F.R. §4.51(a). In addition, the regulation provides that information may be obtained from contracting officers "and from other available sources, including employees and their representatives and employers and their associations," as well as from collective bargaining agreements where such agreements set the wage that prevails for particular employee classifications in the locality. *Id.*

15/ The Administrator's observation that commuting distances are a factor in OMB's determining the existence of a *PMSA* does not advance the Administrator's position. After all, the primary issue in this case is whether the *Seattle-Tacoma-Bremerton CMSA* is a "locality." On this question, it is far more significant that, by definition, a CMSA is a Level A Metropolitan Statistical Area (*i.e.*, an MSA with a population over 1,000,000) that includes two or more PMSAs. 55 Fed. Reg. 12154, 12156, §10 (1990). MSAs that include both urban areas and outlying counties are determined only after examining commuting patterns. *Id.* at 12155, §§2, 3.

Section 4.54 provides guidelines for designating "localities" for which wage determinations are to be issued by the Administrator. Similar to the flexible regulatory guidelines for calculating wage rates, Section 4.54(a) describes the term "locality" as having "an elastic and variable meaning," to accommodate different wage structures under the various types of service contracts that are subject to SCA coverage. 29 C.F.R. §4.54(a), quoted *supra*. We share the Administrator's view that the guidelines provided by Section 4.54(a) are consistent with the SCA's legislative history, which indicates that the undefined term "locality" intentionally was chosen instead of the more rigid "city, town, village" language contained in the Davis-Bacon Act. *See* Hearings, Subcommittee on Labor, Committee on Labor and Public Welfare, 89th Cong., 1st Sess., on H.R. 10238, Sept. 23, 1965, p.11 (Statement of Charles Donahue, Solicitor of Labor); *see also Descomp,* 377 F. Supp. at 265. On the following basis, we also agree with the Administrator that the *Descomp* and *Southern Packaging* decisions do not support the Petitioners' claim that designating the Seattle CMSA as a "locality" is inconsistent with the statute.

The *Descomp* and *Southern Packaging* courts, respectively, rejected the application of wage determination rates issued for the Washington, D.C., area to prospective contractors who intended to perform their service contracts in other locations. In *Descomp*, the place of contract performance was Wilmington, Delaware; the contract under consideration in *Southern Packaging* designated the place of performance as the entire continental United States (*i.e.*, the services could be performed in any one of various locations around the country). The common thread running through those decisions is that the wage determination applicable to a contract must represent wages prevailing in the locality *where the contract is to be performed*, and could not simply be based on Washington, D.C., wage rates if the place of performance was outside the Washington area. *Southern Packaging,* 618 F.2d at 1091-92, 458 F. Supp. at 732-35; *Descomp*, 377 F. Supp. at 266.

However, both the *Descomp* and *Southern Packaging* decisions clearly provide support for the proposition that "locality" must be given a flexible construction under the SCA. *See Southern Packaging,* 618 F.2d at 1091-92, 458 F. Supp. at 732-35; *Descomp*, 377 F. Supp. at 264-66. For example, the District Court in *Southern Packaging* stated that "the term 'locality' is indefinite and lends itself to varied interpretations . . . ." 458 F. Supp. at 733. That court also noted that the Senate Report that accompanied the 1965 bill that was enacted into law stated that "[t]he Secretary in determining the locality . . . would take a realistic view of the type of service contract intended to be covered by the determination." 458 F. Supp. at 735 (quoting from S. Rep. No. 798, 89th Cong., 1st Sess. 2 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3737, 3738).

It is noteworthy that the district court in *Southern Packaging* endorsed the Administrator's use of the Standard Metropolitan Statistical Area (SMSA) as the preferred "locality" unit for issuing wage determinations under the SCA, based on the testimony of the Director of the Department's SCA wage determination office regarding the practice of that office at that time. 458 F. Supp. at 730, 733-34. When *Southern Packaging* was before the district court in 1978, the SMSA was, like the CMSA is in the instant case, a multi-jurisdictional unit consisting of an urban core surrounded by adjacent, economically integrated areas, established

by OMB for collecting and evaluating data by various Federal agencies. *See* Notices, OMB, 55 Fed. Reg. 12154 (1990).

In 1978, OMB standards for defining statistical areas already were being revised to reflect the increasing size of metropolitan areas and changing commuting patterns. By the time new OMB standards were promulgated in connection with the 1980 decennial census, OMB had abandoned the SMSA in favor of the general formulation that is in effect today, *i.e.*, recognition of different classes of Metropolitan Statistical Areas (Levels A - D), with Level A MSAs (over 1 million population) eligible to be designated as Consolidated MSAs if they include two or more subareas that independently would qualify for MSA status (PMSAs). *See* discussion *supra* at pp. 4-6. *See generally* 45 Fed. Reg. 956 (1980) (1980's MSA standards); 55 Fed. Reg. 12154 (1990) (1990's MSA standards). And the notion of "metropolitan area" continues to evolve. In a recent notice announcing further modifications to the definitions of metropolitan and non-metropolitan areas issued in anticipation of the 2000 decennial census, OMB noted that commuting patterns continue to be "the most reliable and broadly available measure of functional integration" of communities, but observed that

> [t]he spatial patterns of commuting are more complex today than in previous decades, but no less important. The spatial structure of the urban environment is less consistently monocentric than was the case in the early part of the twentieth century . . . . commuting patterns are less likely to resemble a hub-and-spoke model than a polycentric structure of multiple employment nodes serving a region's needs.

Notices, OMB, 63 Fed. Reg. 70526, 70534 (1998).

In asserting that the Administrator is prohibited from relying on the BLS CMSA survey data, the Petitioners and Intervenors would have this Board direct the Administrator to develop wage survey data based only on subareas of the Puget Sound region.[16/] But there is nothing in the Act or the regulations that compels such a result. The term "locality" intentionally was left undefined by Congress when enacting the SCA, thereby giving the Secretary (and the Administrator) broad discretion to define "locality" on a case-by-case basis. As work practices continue to change in light of new developments in transportation, technology and telecommunications, it is likely that the concept of "locality" also will continue to evolve.

[16/] The Petitioners jointly request that wage determinations based on "appropriate survey data" be issued, Joint Pet. for Rev. at unnumbered p.3, with the Petitioners respectively identifying the following wage survey areas: the Air Force requests that the Board order the Administrator to issue a wage determination based on a survey of the Tacoma PMSA, Air Force 5/8/98 Pet. for Rev. at 2; Air Force Brief at 4; the Army requests issuance of a wage determination based on wage data derived from the "localities where the contracts are to be performed," Army 5/6/98 Pet. for Rev. at 2; and the Navy requests issuance of a wage determination based on wage data derived from "Kitsap and surrounding counties" Navy 5/8/98 Pet. for Rev. at 4; Navy Brief at 4.

The Administrator has noted that commuting patterns play a role in the CMSA definition developed by OMB. Admin. Brief at 5, 23; AR, Tabs CC, HH. In its recent review of the current standards for defining metropolitan areas, OMB observed that "[s]ubstantial agreement exists that population density (or possibly housing unit density) and daily commuting continue to be the best means of defining areas consistently nationwide," and that "[b]y establishing place-to-place links between workers' homes and places of employment, commuting has provided a measure of the economic interactions within an area." 63 Fed. Reg. at 70532, 70533. Review of the OMB criteria under which the Seattle CMSA was designated shows clearly that commuting patterns play a major role in the designation, and refutes the Armed Forces' view that reliance on the CMSA unit is at odds with the SCA locality concept.

The Armed Forces have submitted two types of non-wage data in support of their position that the Tacoma and Bremerton-Shelton areas are economic environments distinct from the Seattle/King County core of the Seattle CMSA. First, the Navy asserts that of the more than 13,000 Federal civilian and contractor employees working at Navy installations in Kitsap County, very few – only 2% – commute from King County (Seattle). AR, Tab E, Exh. D. However, the number of workers commuting from King County to the Kitsap peninsula is only a partial measure of the economic integration of the Puget Sound region, failing to consider the number of Kitsap County residents who commute in the other direction – *i.e.,* out of the county – to find employment. A more complete picture of the region is provided by data compiled by the Census Bureau from the 1990 census, and we take notice of this data. *See United States v. United Bhd. of Carpenters & Joiners of America, Local 169,* 457 F.2d 210, 214 n.7 (7th Cir. 1972). Whatever the geographic barriers of the Puget Sound region, the Census Bureau's home-to-work commuting data demonstrate that there is a high level of economic interaction among the counties, with large numbers of workers moving across county lines as part of their daily commute:

Seattle-Tacoma, WA CMSA Bremerton MSA Olympia MSA	Total living in county of residence	**COUNTY OF WORK**					Worked elsewhere
		King County	Snohomish County	Pierce County	Kitsap County	Thurston County	
Total Working in county of work	....	912,610	179,864	233,197	83,826	68,923	....
COUNTY OF RESIDENCE King County	805,782	750,970	28,328	14,452	1,673	1,304	9,055
Snohomish County	231,967	84,722	141,802	368	339	108	4,628
Pierce County	270,589	53,657	2,526	203,626	3,626	3,750	3,404
Kitsap County	88,144	8,459	530	2,960	74,323	109	1,763
Thurston County	75,364	2,064	172	8,526	180	59,069	5,353
Living elsewhere	....	12,738	6,506	3,265	3,685	4,583	....

Source: U.S. Bureau of the Census, "Commuting Flows of American Workers Charted by New 1990 Census Computer File." Press Release No. CB92-267, December 22, 1992, Table 14, derived from computer file STF-S-5, Census of Population 1990: Number of Workers by County of Residence by County of Work.

Although the Census Bureau data confirm generally the Navy's claim that only 2% of the workers employed in Kitsap County commute across (or around) Puget Sound from King County, fully 9,053 of Kitsap's 83,826 workers (11.3% of the total) commute into Kitsap County from the other counties in the region. Perhaps more important as a measure of the economic integration of the region is the commute in the opposite direction, with 9.2% of the King County (Seattle) workforce traveling into the urban core from Kitsap County – 8,459 workers.

The second type of non-wage data submitted by the Armed Forces are statistics comparing the sales prices of residential real estate in King County (Seattle) with prices in surrounding counties, including Pierce County (Tacoma) and Kitsap County (Bremerton-Shelton). Air Force Brief, Encl. 4; Navy Brief at 12, Encl. 8; AR, Tab FF. The Armed Forces cite the lower real estate selling prices in the Tacoma and Bremerton-Shelton areas in support of their argument that these outlying areas are economically distinct from the Seattle/King County core of the CMSA. Navy Brief at 12; Reply Brief at 5.

Similar to the commuting data submitted by the Navy, we do not find these real estate statistics persuasive in view of the degree of economic integration that is demonstrated by OMB's designation of the Seattle-Tacoma-Bremerton CMSA. As already discussed, the criteria for determining whether a Metropolitan Statistical Area qualifies as a CMSA cover a range of factors relevant to population density and housing and work patterns. 55 Fed. Reg. at 12154-56. The CMSA designation provides a comprehensive gauge of the economic integration of the Seattle-Tacoma-Bremerton area that is not overcome by the real estate statistics submitted by the Armed Forces.

We therefore find the Administrator's reliance on BLS wage survey data from the Seattle CMSA when developing the challenged Tacoma and Bremerton-Shelton wage determinations to be a reasonable exercise of his discretion under the Act and its implementing regulations. It is supported by government data documenting the work-home relationships within the Puget Sound labor market, and also by OMB's criteria for designating CMSA units. The wage data provided by the Armed Forces, which the Administrator dismissed as anecdotal or flawed (and which we discuss below), does not persuade us to the contrary.

2. The Administrator's 15% "capping" methodology.

Armed Forces/Intervenors – The Armed Forces challenge the Wage and Hour Division's use of the capping methodology on various grounds.

As discussed previously (at pp. 8-10), when shifting from the earlier BLS survey data based on the separate smaller communities (*i.e.*, Seattle, Tacoma, Bremerton) to the BLS's Seattle CMSA wage data, the Administrator did not simply issue a single new set of wage determinations that would apply to the entire region. Recognizing that immediate adoption of the CMSA data would produce dramatic increases in the wage determination rates for some service occupations in certain areas, the Administrator instead adopted a transitional strategy, continuing to issue separate wage determinations for the Seattle, Tacoma and Bremerton-Shelton

subregions. For occupations where the new CMSA data resulted in only a modest wage increase in wage rates when compared with the predecessor wage determinations, the CMSA data was incorporated directly into the new wage determinations. However, for occupations (other than protective service classifications) where the CMSA data would have resulted in a substantial increase in wage rates, the increase was capped at 15% over the wage rates in the predecessor wage schedules.

The Armed Forces note that there is no provision for the 15% capping mechanism in the Service Contract Act or its implementing regulations, and that the capping methodology allows for increases above the 15% cap to be phased in through additional 15% increments in future wage determination revisions. Reply Brief at 16-17. In view of the anticipated phase-in of higher wage rates in future wage determination revisions, the Navy and the Air Force object to the Administrator's reliance on capped wage rates when comparing the wage rates of the challenged Bremerton-Shelton and Tacoma wage determinations with other data. Navy Brief at 6-7; Air Force Brief at 3-6. In support of their objections, the Navy and the Air Force, respectively, analyzed the number and extent of increased wage rates that would have resulted on the Bremerton-Shelton and Tacoma wage determinations had the 15% cap not been applied. Navy Brief, Encl. 4; Air Force Brief, Encl. 2; AR, Tabs F, BB. The Armed Forces also urge that use of the capping methodology by the Wage and Hour Division is a tacit admission by the Division that the CMSA wage data did not provide a sound foundation for the challenged wage determinations. Reply Brief at 17.

Administrator – The Administrator denies that the capping mechanism constitutes any acknowledgment that using the Seattle CMSA survey data was inappropriate. The Administrator counters instead that using the new CMSA wage data, while simultaneously applying the 15% cap to any increases over the predecessor Tacoma and Bremerton-Shelton wage determinations, was an appropriate transitional mechanism that recognized the validity of *both* the new CMSA data and the older subregional data that formerly was used for issuing wage determinations. Admin. Brief at 25-26; *see* AR, Tab E.

Analysis – The Wage and Hour Division's capping methodology is not explicitly authorized by the SCA or its implementing regulations, and neither the Administrator's determination letters to the Armed Forces nor the Administrator's Statement to the Board offers an extended discussion of the origin of the 15% cap and its basis. *Cf.* Admin. Brief at 25-26; AR, Tabs A-C. Nonetheless, we find that the Administrator's general application of a 15% cap on wage rate increases in the 1997 CMSA-based wage determinations was a reasonable exercise of the Administrator's broad discretion to issue wage determinations under the Act, and we uphold this practice on the facts before us in this case.

The Administrator's discretion under the Service Contract Act is perhaps at its broadest when the Administrator is issuing prevailing wage schedules. The statute requires, in relevant part, that all Federal service contracts include "[a] provision specifying the minimum monetary wages to be paid various classes of service employees . . . as determined by the Secretary [of Labor] . . . in accordance with prevailing rates for such employees in the locality[.]" 41 U.S.C.

§351(a)(1). Like its sister statute, the Davis-Bacon Act, nowhere does the SCA prescribe a specific methodology to be used by the Secretary or her designee, the Administrator, when determining the prevailing wage. Perhaps the clearest indicator of the very great deference owed to the Secretary and the Administrator when determining prevailing wage rates is the clear body of case law holding that the substantive correctness of wage determinations is not subject to judicial review. *United States v. Binghamton Construction Co.*, 347 U.S. 171, 177 (1954) (under the Davis-Bacon Act); *Commonwealth of Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979) (under the Davis-Bacon Act); *AFGE v. Donovan*, 25 Wage & Hour Cas. (BNA) 500, 1982 WL 2167 at *2 (D.D.C. 1982), *aff'd* 694 F.2d 280 (D.C. Cir. 1982) (table) (under the Service Contract Act). Judicial review "is limited to due process claims and claims of noncompliance with statutory directives or applicable regulations." *Commonwealth of Virginia* at 592 (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

Although the 15% cap may not be explicitly authorized under the Act, neither is it prohibited. The Board previously considered the Administrator's similar application of a 15% cap on a wage rate increase in the *D.B. Clark III* case, ARB Case No. 98-106 (Sept. 8, 1998). While noting in *Clark* that the 15% cap policy apparently was not memorialized either in the SCA regulations or the Wage and Hour Division's internal operating procedures, we nevertheless approved the capping methodology based on the record that was before us in the case, finding that the approach was reasonable and within the Administrator's broad discretion to devise "program guidelines that are administrable and produce consistent results." *Clark,* slip op. at 8.

We reach the same conclusion in this case. Once the Administrator decided to shift to the BLS's Seattle CMSA wage survey as the data source for wage determinations in the Puget Sound region, the Administrator concluded that an abrupt shift from the "old" subregional data to the "new" CMSA data would produce comparatively dramatic shifts in wage rates for some occupations. Instead of implementing the change to the Seattle CMSA data cold turkey, the Administrator chose to temper the impact that would be caused by the change to the new survey instrument by limiting the maximum 1-year change in wage rates to 15%. Recognizing that both the lower "old" and the higher "new" survey results are valid – if different – expressions of the wage rates prevailing "in the locality," it is our conclusion in this case that the Administrator's 15% cap methodology is a reasonable transitional tool that is consistent with the Administrator's discretion under the Act, and also promotes a useful predictability in the procurement process.

3. The link between the Service Contract Act's "due consideration" clause and the use of CMSA data when computing Federal employee locality pay differentials.

Armed Forces/Intervenors – In the determination letters to each of the Armed Forces, the Administrator noted that the BLS's Seattle CMSA wage data also is used for computing the locality pay adjustments for Federal employees under the Federal Employees Pay Comparability Act. In the Administrator's view, the fact that the BLS data is used for Federal comparability pay purposes provides further justification for using the same data as the basis for SCA wage determination rates, because of the Service Contract Act's Section 2(a)(5) requirement that

"[t]he Secretary shall give due consideration to" the wages paid to Federal employees in comparable job classifications when issuing SCA wage determinations. 41 U.S.C. §351(a)(5).

The Armed Forces contest the Administrator's reliance on the "due consideration" clause of Section 2(a)(5) to justify using the Seattle CMSA wage survey data, asserting that the goals of the SCA and of Federal employee pay legislation are different. Reply Brief at 10-12. The Petitioners point out that the wage standards for white collar Federal employees (*i.e.*, the "GS" wage schedule) establish uniform pay rates for work at similar grade levels, and that these pay levels are largely uniform throughout the country. In contrast, the Service Contract Act requires that SCA wage rates reflect locally prevailing wages. *Id.* The Petitioners acknowledge, however, that locality pay adjustments for Federal employees, which have been extended since their inception to cover a significant number of metropolitan areas, have diluted the effect of the Federal pay schedules that apply nationally. *Id.*

Administrator – Before the Board, the Administrator reiterates his argument that reliance on the CMSA data is justified under the "due consideration" provision of Section 2(a)(5) of the SCA, because the same BLS survey is used for computing locality pay adjustments for Federal employees in the Seattle area. *See* Notices, Dept. of Labor, BLS, 57 Fed. Reg. 30982, 30983 (1992). *See generally* 59 Fed. Reg. 62549 (1994) (Presidential memorandum for the Secretary of Labor, the Director of OMB and the Director of the Office of Personnel Management regarding their joint report containing locality pay recommendations); 5 U.S.C. §§5301-07 (1994). In addition, the Administrator points to the observation found in the SCA regulations at 29 C.F.R. §4.51(d) that the purpose of the "due consideration" provision is to narrow the gap between the wage rates paid to Federal employees and those paid to service employees. Admin. Brief at 16-17.

Analysis – Section 2(a)(5) provides that "[t]he Secretary shall give due consideration" to the rates "that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5, United States Code, were applicable" in setting the minimum wage rates payable to employees covered by the Act. 41 U.S.C. §351(a)(5). The plain language of Section 2(a)(5) thus indicates that Congress intended that SCA wage rates be linked in some way to Federal employee pay rates; that intention is also reflected in the legislative history of the 1972 SCA amendments, which demonstrates concern that the gap between Federal employee salaries and those paid to SCA-covered employees be narrowed. *See* 118 Cong. Rec. 27136 (Statement of Rep. Thompson), 31282 (Statement of Sen. Gurney) (1972)*; see also AFGE v. Donovan, supra* (examining Section 2(a)(5) legislative history in rejecting argument that "due consideration" provision required SCA wage rates to be no less than Federal Wage Board prevailing rates). Section 4.51(d) of the Title 29 regulations implements the Section 2(a)(5) due consideration provision by requiring the Wage and Hour Division to consider "those wage rates and fringe benefits which would be paid under Federal pay systems" when calculating the SCA wage rates. 29 C.F.R. §4.51(d).

In these cases, the Administrator does not claim that the wage rates in the challenged SCA wage determinations reflect a direct comparison with wage rates paid to specific

comparable classifications of Federal employees. Instead, the Administrator argues that because the geographic area used for computing Federal employee "comparability pay" – *i.e.*, the Seattle CMSA – is the same geographic area used for the BLS survey that is the basis of the challenged wage determinations, the Section 2(a)(5) "due consideration" clause of the Service Contract Act lends legal validity to the Administrator's conclusion that the Seattle CMSA is an appropriate locality under the SCA.

On its face, Section 2(a)(5) does not address the use of local pay areas established under Federal employee pay systems as the localities for which prevailing wages will be set under the SCA. To determine whether the Administrator's argument holds, we turn to the Act's legislative history for guidance. *See Fort Hood Barbers Assoc. v. Herman,* 137 F.3d 302, 307-08 (5th Cir. 1998). *See generally AFL-CIO v. Donovan,* 757 F.2d 330, 344 (D.C. Cir. 1985) (holding that arguments regarding general congressional intent "cannot overturn the clear language of a specific provision"). An examination of the intention of the lawmakers who incorporated the references to Sections 5332 and 5341 into Section 2(a)(5) must focus on the substance and application of those provisions at the time of the 1972 and 1976 amendments. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 378-79 (1982), and cases there cited. Our examination reveals that the pertinent SCA legislative history and the antecedent Federal pay systems that are referenced by Section 2(a)(5) do not support the Administrator's contention.

Section 2(a)(5) was added to the Act in 1972 and amended in 1976. Pub. L. No. 92-473, §2, 86 Stat. 789 (1972); Pub. L. No. 94-489, §2, 90 Stat. 2358 (1976). The 1972 amendment directed that, when issuing prevailing wage determinations under the SCA, the Secretary must consider the wage rates that would be paid to service employees were they hired directly by the Federal government under Section 5341 of Title 5 of the United States Code, which addresses pay rates for Federal Wage Board, or prevailing rate system, employees. Pub. L. No. 92-473, §2. The 1976 amendments added to Section 2(a)(5) the reference to Section 5332 of Title 5, which addresses pay rates for Federal General Schedule employees, the counterpart to white collar workers in the private sector. Pub. L. No. 94-489, §2.[17/]

The legislative history of the 1976 SCA amendments does not suggest that Congress anticipated that local areas established under the Federal General Schedule would be relied on as localities under the SCA. *See* S. Rep. No. 1131, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3534; H.R. Rep. No. 1571, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5211; 118 Cong. Rec. 27136-42, 31281-82, 32530 (1972); 122 Cong. Rec. 31575-78, 33842-43 (1976). Indeed, the concept of locality-based pay for Federal employees under the General Schedule was not enacted into law until passage of the Federal Employees Pay Comparability Act of 1990. *See* Pub. L. 101-509, 104 Stat. 1427 (1990); H.R. Rep. No. 730, 101st Cong., 2d Sess. 68-84 (1990); *General Services Admin., Reg. 6*, Case No. 86-SCA-WD-

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[17/] The 1976 SCA amendments also legislatively overruled court decisions that had construed the statute as not providing coverage for white collar workers. H.R. Rep. No. 1571, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5211-14; Pub. L. No. 94-489, §1.

12, Dep. Sec. Dec. (Jan. 27, 1988), slip op. at 5-6 (statement of the Administrator distinguishing between General Schedule "national pay scales" and SCA locality rates). Although the legislative history of the 1972 amendments suggests that Congress possibly contemplated a link between the system for setting SCA wage rates and the Federal prevailing wage rate system,[18/] the legislative history of the 1976 amendments provides no similar indication concerning the concept of locality pay for Federal General Schedule employees. *See* H.R. Rep. No. 1571, *supra*; 122 Cong. Rec. 31575-78, 33842-43, *supra*. On the foregoing basis, we conclude that any link between the "due consideration" language of Section 2(a)(5) of the Act and use of the CMSA unit as an SCA locality is too attenuated to support the Administrator's position in this regard. Although we disagree with the Administrator on this one point, we nonetheless conclude that the Administrator's other arguments in support of using the BLS Seattle CMSA wage data are sufficient justification to affirm the Administrator's decision.

C. Whether the wage rates issued by the Administrator in the 1997 Tacoma and Bremerton-Shelton wage determinations are incorrect *in fact* because they are inconsistent with wage rates paid in these communities.

Armed Forces/Intervenors – In addition to arguing that the Seattle CMSA is an inappropriate "locality" as a matter of law, the Armed Forces and Intervenors assert that factual evidence in the record documenting wage rates paid in the Tacoma and Bremerton-Shelton areas demonstrates that the 1997 CMSA-based wage determination rates do not reflect actual pay practices in these outlying areas. In support of this argument, the Petitioners cite various submissions:

- Data showing that salaries earned by firefighters in Kitsap are 25% lower than the salaries paid to their Seattle counterparts, and that volunteer firefighters are heavily relied upon in Kitsap County (comprising 67% of the firefighters). Navy Brief at 10, Encl. 2; Reply Brief at 14; AR, Tab E, Exh. C-1.

- Data showing that the average hourly wage rates for 158 police officers and deputy sheriffs working in five municipalities in Kitsap County is $18.61, or approximately 15% lower than the $21.35 hourly rate provided in WD 94-2559 (Rev. 9) and WD 94-2560 (Rev. 7). Navy Brief at 10, Encl. 2; Reply Brief at 14; AR, Tab E, Exh. C-2.

[18/] Only weeks before passage of the 1972 SCA amendments, which added the reference to Section 5341 regarding the Federal prevailing wage rate system, Congress had passed the Prevailing Rate Systems Act, Pub. L. 93-392, §1(a), 86 Stat. 564 (1972) (codified as amended at 5 U.S.C. §5341 *et seq.*). That enactment continued the Civil Service Commission practice of conducting local area wage surveys as a basis for regularly adjusting Federal prevailing wage rate system pay rates. See *id.*; S. Rep. No. 791, 92d Cong., 2d Sess. 2-3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2980, 2981-82; *U.S. Information Agency v. FLRA,* 895 F.2d 1449, 1451 (D.C. Cir. 1990).

- Collectively bargained wage rates compiled by the Navy after surveying several Kitsap County employers showing that wages in the Bremerton-Shelton area are lower than rates for many classifications in the 1997 CMSA-based Seattle and Bremerton-Shelton wage determinations, and a statement by Johnson Controls accompanied by copies of collective bargaining agreements that its collectively bargained wage rates are based on wage levels in the Kitsap County area rather than the "higher scales" paid in the Seattle area. Navy Brief at 10-11, Encl. 6, 7; AR, Tab E, Exh. B; Tabs DD, EE.

- Copies of 1996 Washington State Employment Security wage surveys for Kitsap County and for Clallam and Jefferson Counties, and a comparison of those rates with specific wage rates provided by the 1997 CMSA-based Seattle wage determination. Navy Brief at 15; Reply Brief at 14-15; AR, Tab E, Exh. A; Tab GG.

- Comparisons of wage rates from the 1997 CMSA-based Tacoma and Bremerton-Shelton wage determinations with wage rates from the predecessor wage determinations for the same locations. Air Force Brief at 5-6, Encl. 2; Navy Brief, Encl. 2; AR, Tab E, Exh. A; Tab F, Attachment 1.

- Comparisons of 1997 CMSA-based Seattle wage determination wage rates with rates from predecessor wage determinations for Tacoma and Bremerton-Shelton, Air Force Brief at 4-5, Encl. 2; Navy Brief at 6-7, Encl. 2; AR, Tab E, Exh. A; Tab F, Attachment 1. The Navy summarizes the comparative data for Bremerton-Shelton as demonstrating that, when wage rates are ultimately "uncapped," wage rates for 84% of the 294 classifications will increase by more than 25% (31% of the classifications would increase by up to 25%, 44% of the classifications by between 25% and 49%, and 9% of the classifications by more than 50%). Navy Brief at 6-7, Encl. 4. The Air Force characterizes the comparative data for Tacoma as demonstrating a "substantial inflation" of wage rates resulting from application of the Seattle CMSA wage data. Air Force Brief at 4-5.

- Federal wage grade equivalents and wage rates for specific classifications included in the 1997 CMSA-based Seattle wage determination. Navy Brief, Encl. 2; AR, Tab E, Exh. A.

- Comparison of wage rates for Tacoma with rates for Seattle, taken from the respective wage determinations for these areas issued prior to the CMSA-based wage determinations in 1997. Air Force Brief, Encl. 2; AR, Tab F, Attachment 2. The Air Force urges that this comparative data demonstrates a wage structure in Tacoma that is based on "substantially lower wage rates" than those in Seattle. Air Force Brief at 5-6.

In addition, the Air Force notes the failure of the Administrator to specifically address the evidence and argument that the Air Force presented to the Administrator in its initial challenge to the 1997 CMSA-based Tacoma wage determination. Air Force Brief at 2. The Air Force also questions the Administrator's rationale for rejecting the data submitted below by the Navy, particularly the Washington State wage survey data. *Id.* at 2-4.

In sum, the Armed Forces argue that the 1997 CMSA-based wage determinations do not reflect the wage rates in the communities where the Petitioners' SCA contracts will be performed, *i.e.,* the Tacoma and Bremerton-Shelton areas, but instead more closely reflect wages prevailing in Seattle/King County. Joint Pet. for Rev. at 2.

Administrator – The Administrator discounts the wage rate data submitted by the Petitioners, arguing that the Armed Force's statistics either are of questionable reliability or are misleading.

The Administrator criticizes the Washington State Employment Security Department wage survey data as lacking reliability because, unlike the BLS survey data (which is gathered through on-site visits by BLS field economists), the State survey depends on employers to classify their employees and then submit their responses by mail. The Administrator also notes the relatively high non-response rate among employers participating in the Washington State surveys, *i.e.,* 48% on the Kitsap County survey and 43% on the Jefferson/Clallam Counties survey; and that this high non-response rate contrasts with the 16% non-response rate for the BLS-conducted Seattle CMSA survey. Admin. Brief at 23-24; *see* AR, Tabs GG, W. The Administrator also notes that because the Washington State survey data does not distinguish between rates paid to different levels within employee classifications, it is "impossible to make valid comparisons between the State and BLS data." Admin. Brief at 24.

Similarly, the Administrator questions the usefulness of the Navy's survey of police and fire departments, because the documentation (a) does not specify whether the wage rates represent an average wage rate or an entry level wage rate for each profession, (b) does not indicate how many employees are actually employed under the collective bargaining agreements covering Kitsap area protective service personnel, and (c) does not provide job descriptions for the classifications listed in the agreements. *Id.*; *see* AR, Tab E, Exhs. B - C-2; Tab DD. The Administrator further contends that even if the Navy's data were complete and reliable, this evidence does not demonstrate that rates based on the Seattle CMSA data are excessive because some of the Navy's survey wage rates are *higher* than corresponding wage rates in the challenged wage determinations. Admin. Brief at 24; *see* AR, Tab DD.

The Administrator also disputes the Armed Forces' reliance on a comparison of predecessor wage determination rates with the rates in the 1997 CMSA-based wage determinations. The wage rates in the predecessor wage determinations – although issued within a matter of weeks prior to the issuance of the CMSA-based wage determinations – were based on BLS data from surveys conducted in 1993-94. Admin. Brief at 25; *see* AR, Tab E, Exhs. B-C-2; Tab F, Attachments 1, 2. The Administrator urges that because there had been no interim

increases in the wage determinations issued between 1994 and 1997, it is not possible to draw any useful conclusions about the relative economic conditions in different parts of the Puget Sound region by comparing these wage rates based on "old" data with the rates in the 1997 Tacoma and Bremerton-Shelton wage determinations that are based on the Seattle CMSA data. Admin. Brief at 25; *see* AR, Tabs N-Q.

The Administrator also takes issue with the comparative data submitted by the Armed Forces that relies on "uncapped" wage rates, *i.e.,* wage rates taken directly from the 1997 Seattle CMSA-based wage determination which, in many cases, were not fully implemented in the 1997 CMSA-based wage determinations for Tacoma and Bremerton-Shelton because of the capping methodology. Admin. Brief at 25. The Administrator urges that the Armed Forces' use of the uncapped Seattle wage rates distorts the effect of the Administrator's reliance on the CMSA wage data for the challenged Tacoma and Bremerton-Shelton wage determinations. *Id.*

Analysis – At the outset of our consideration of the Armed Forces' wage data, it is useful to acknowledge first the overriding significance of our earlier discussion of "locality." Having found that the sprawling Seattle CMSA is an acceptable "locality" for developing SCA prevailing wage rates, based on OMB's criteria for designating metropolitan areas (*supra*), it follows that a comparison of wage rates between different *subareas* of the Puget Sound region adds little to the discussion. Stated differently, once we conclude that a geographic area manifests sufficient economic integration that the Administrator reasonably may deem it a "locality" under the Act, it is largely irrelevant that wage rates may be higher in some parts of the community than in others. For example, wages for clerical employees working at downtown offices in some cities may be higher than the rates paid for comparable positions in outlying suburban areas, but by itself the disparity in wage rates would not mean that the downtown and suburban locations are different "localities" for SCA purposes. Labor market and commuting patterns are far more meaningful in this regard.

The regulatory scheme under which SCA wage determinations are developed directs the Administrator to exercise discretion when determining the specific methodology to be employed in calculating particular wage rates. The Board "will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision, taking into account the applicable law and the facts of the case." *Court Security Officers [of Austin, Texas],* ARB Case No. 98-001 (Sept. 23, 1998), slip op. at 4, *aff'd sub nom. Richison v. Herman,* No. W-97-CA-385 (W.D. Tex. Feb. 1, 1999); *see also D. B. Clark III,* slip op. at 6. Thus, the central question on appeal in these consolidated cases is not whether a different methodology from the one chosen by the Administrator might have been *more* reasonable, but simply whether the Administrator's chosen methodology is consistent with the law and the facts before us. *See COBRO Corp.,* ARB Case No. 97-104 (July 30, 1999), slip op. at 23. The quality of the evidence in the record can be a significant consideration in determining whether to uphold the Administrator; as the Deputy Secretary noted in *Tri-States Service Co.*, an analogous case involving a challenge to SCA wage determination rates, "the basic issue to be decided is whether the wage information supplied by Petitioner represents more accurate and probative evidence

of the prevailing wages in the locality than the data and methods utilized by the Wage and Hour Division." Case No. 85-SCA-WD-12, Dep. Sec. Dec. (Sept. 18, 1990), slip op. at 5.

Although we recognize the substantial effort expended by the Armed Forces in developing their documentary exhibits, we agree with the Administrator's conclusion that none of the exhibits demonstrates that the Administrator erred in relying on the BLS's Seattle Occupational Compensation Survey, and thereby using data from the entire Seattle Consolidated Metropolitan Statistical Area. Based on OMB's regulatory criteria for designation of statistical areas, reinforced with commuting statistics developed by the Census Bureau, we found above that the CMSA is an acceptable "locality" under the Service Contract Act.

Neither the Armed Forces nor the Intervenors have challenged the underlying methodology or accuracy of the BLS's Occupational Compensation Survey, which is an extensive cross-industry survey of employers using sophisticated statistical techniques. *See* AR, Tab W Appendix. For all the reasons cited by the Administrator, *supra*, we are persuaded that the wage data submitted by the Armed Forces is less complete and less reliable than the BLS-conducted Seattle CMSA survey, and that the Administrator's decision not to reconsider the wage rates in the 1997 Tacoma and Bremerton-Shelton wage determinations therefore was reasonable.

D. Whether the Administrator's shift to the Seattle CMSA survey data as the basis for the challenged 1997 wage determinations reflects an error in policy.

In addition to challenging the Administrator's conclusion that the CMSA is an appropriate "locality" under the SCA, and submitting evidence in support of their claim that the 1997 Tacoma and Bremerton-Shelton wage determination rates are inconsistent with wages actually paid in these communities, the Armed Forces and the Intervenors also criticize the Administrator's decision to use the BLS Seattle CMSA data as a poor policy choice. This criticism is approached from several directions.

Citing the tremendous volume of SCA contracts that are entered into by the Department of Defense (DOD), the Armed Forces point out that they are a major constituent of the SCA wage determination process. They note various cooperative efforts between the Wage and Hour Division and the DOD in recent years that resulted in a streamlined process by which blanket requests for wage determinations are submitted to the Department; additional progress has been made in developing computerized access to wage determinations. Reply Brief at 20. The Armed Forces complain that DOD had expected that the cost savings achieved by the Wage and Hour Division through these streamlined procedures would be invested "in developing appropriate SCA WDs." *Id.*

In addition, the Armed Forces disparage the Administrator's shift to the regional BLS data by arguing that the decision is more motivated by Department of Labor fiscal concerns than by concerns regarding effective implementation of the Service Contract Act. They characterize the shift to Seattle CMSA data as "budget-friendly" from the standpoint of the Wage and Hour

Division, but inadequate for developing the "locality"-based wage determinations required under the Act. Air Force Brief at 11; *see* Joint Pet. for Rev. at 2, 6; Reply Brief at 10. Intervenor CSA cites the significant fiscal impact that an increase in SCA contract wages will have on Federal procurement costs, and urges that "concern with creating an efficient survey process should be balanced with its resulting impact on the Federal government as a whole." CSA Brief at unnumbered p. 9.

The Armed Forces contend further that the shift to using a new BLS survey instrument as the foundation for the wage determination program makes the resulting wage schedules legally suspect. In their view, the Administrator has chosen to use the CMSA survey data simply because that data is readily available; they posit that the use of "perpetually changing methodologies" by the Wage and Hour Division has resulted in a wage determination process that is "so arbitrary and inconsistent as to be without any credible foundation." Reply Brief at 13, 15, 21.

The Armed Forces also suggest that the shift to the CMSA-based data may lead to undesirable swings in SCA wage rates, both higher and lower. Although the Armed Forces specifically challenge the 1997 CMSA-based Seattle wage determinations in this case because, in their view, wage rates have *increased* too much, they also warn that the shift to the CMSA-based data could result in future *decreases* in wage rates. They observe that "the extensive combination of large, disparate communities into one single wage survey effort" could result in a significant decline in wages, which would have an equally disruptive effect on the SCA labor market. Joint Pet. for Rev. at 2; *see* Air Force Brief at 9.

Analysis – In Service Contract Act cases, the Administrative Review Board's role is to provide appellate review of the Administrator's decisions, having "jurisdiction to hear and decide . . . appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative . . . ." 29 C.F.R. §8.1(b). Although the Board is "delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions" in matters arising under the Service Contract Act (Secretary's Order 2-96, 61 Fed. Reg. 19982 (1996)), it is the Administrator, not the Board, who has primary responsibility for implementing and enforcing the SCA. To that end, the Board and its predecessor agencies extend broad deference to the Administrator's interpretations of the Act and its implementing regulations, so long as the Administrator's policies and determinations are legally sound and otherwise reasonable. For example, in a 1996 case involving conflicting interpretations of Section 4(c) of the Act, we observed that:

> [The] Petitioners contend that there are good policy reasons for interpreting the statute differently [from the Administrator].... The Board of Service Contract Appeals has previously recognized on numerous occasions that the Administrator is granted broad discretion in interpreting the SCA. *Service Employees International Union, AFL-CIO, CLC*, BSCA Case No. 92-01, Aug. 28, 1992. The express language of Section 4(c) [at issue in this

> case] certainly does not dictate an interpretation different from the Administrator's. The Administrator's reading of this provision is reasonable and not a departure from accepted canons of construction. Therefore, the Administrator's interpretation is accorded great weight. The Board should not substitute its own policy preferences for those of the official in whom primary responsibility for enforcing the statute is vested. *See A. Vento Construction*, WAB Case No. 87-51, Oct. 17, 1990 and *Titan IV Mobile Service Tower*, WAB Case No. 89-14, May 10, 1991.

ITT Federal Services Corp (II), ARB Case No. 95-042A (July 25, 1996), 1996 WL 415926 at *3, 4. Thus, our inquiry on review is focused simply on whether the Administrator's decision reflects a *reasonable* interpretation of the statute and regulations, not whether we believe it to be the best policy choice.

Although the basic concept behind the Service Contract Act – *i.e.*, that employees on Federal service contracts should not be paid less than the locally-prevailing wage and fringe benefit rates – is straightforward, the implementation of the statute is complex and raises many difficult questions. Fundamental concepts of "locality" and "prevailing" are critical threshold issues in wage determination matters, but they are followed by a host of equally challenging problems such as competing methodologies for collecting and analyzing wage data. In many of these situations requiring interpretation of the statute or its regulations, there is no single "right" or "obvious" answer to these questions. Instead, the Administrator must choose from a variety of options while trying to reconcile several interests: the statutory mandate that local labor standards be protected; the need to establish predictable and enforceable policies; the goal of promoting stability in the Federal procurement system; and the obligation to be an effective steward of the resources provided by Congress for implementing the statute, using them as efficiently as possible. It is not an easy job.

The Armed Forces and Intervenors raise important concerns in challenging the Administrator's CMSA-based wage determinations. The Administrator's shift to wage determinations based on CMSA data results in significant pay increases for workers in the outlying counties of the Seattle metropolitan area. Furthermore, as the Armed Forces point out, the geographical area encompassed within the Seattle CMSA is very large and the "old" urban centers that formed the basis for the predecessor wage determinations continue to be urban focal points that could be used to support a series of wage determinations based on the smaller PMSAs, rather than the sprawling CMSA – if such subregional wage data were available. Indeed, we acknowledge that the very same analysis of OMB's standards for determining metropolitan areas that we adopted earlier in finding the Seattle CMSA to be an acceptable "locality" under the SCA (*supra* at 17-24) could be used to support a finding that the smaller PMSA units also would be acceptable "localities" under the Act. The Armed Forces' policy argument that these smaller geographical units are preferable "localities" for SCA purposes is not without substance.

The Board's limited mandate, however, is to determine whether the Administrator's determination is consistent with the law and reasonable, and not to weigh whether the Administrator's approach is "better" than the one advocated by the Petitioners. Almost any change in wage data methodologies will advantage some groups and disadvantage others, but this is precisely the kind of judgment call that is uniquely within the Administrator's power. In this instance, merging all the regional wage data into a single survey tends to increase SCA wage rates in the Tacoma and Bremerton-Shelton areas (where wage rates historically have been lower than in King County); as a corollary, it would appear that this same process ultimately will result in *lower* SCA wage rates in the Seattle urban core, compared with the rates in the predecessor Seattle wage determinations. Today, the Army, Navy and Air Force assert that the new wage rates in Tacoma and Bremerton-Shelton are too high, from the perspective of the contracting agencies and contractors performing work at facilities in these outlying areas; tomorrow, service employees working in downtown Seattle may assert that the CMSA wage data has produced SCA wage rates that are too low, from the workers' perspective, when compared with wage rates paid to workers performing similar work in the Seattle urban core, which presumably is their preferred "locality." But once the Wage and Hour Administrator has selected an appropriate "locality" for SCA purposes, the statute does not require the wage determination process to be balkanized to suit the unique perspectives of specific constituencies.

In this decision, we have found that the Administrator's shift to using CMSA-based data represents a reasonable interpretation of "locality" under the Act because government statistical data show that the Puget Sound region is economically integrated. In addition, we have found that the wage and economic data supplied by the Armed Forces does not make a compelling case that the Administrator's CMSA-based wage determinations for the Tacoma and Bremerton-Shelton areas must be reconsidered. We also have found that the Administrator's 15% capping methodology is a reasonable transitional device, based on the record before us. To the extent the Armed Forces argue to this Board that an alternative approach would be *preferable* to the methodology chosen by the Administrator, they have raised a question of policy that does not properly belong before us.

ORDER

Accordingly, the petitions for review submitted by the Armed Forces are **DENIED**, and the Administrator's April 20 and July 20, 1998 rulings are **AFFIRMED.**

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

APPENDIX - MAP OF WASHINGTON STATE COUNTIES