NLWJC - Kagan
DPC - Box 064 - Folder-001

Welfare-Privatization [4]

Kevin Thurm

(1) Reengineer + build a new info. syst - (some but
But Q about elig. system (no RFO)

(2) Release RFO - [redacted]
has to be consistent w/ [redacted] law
i.e. - elig determ by SSI ECs
refer to food stamp regs -
interview - public through electronic
allows them to integrate programs
but not much priv.
outreach on to priv

(3) If they want to ...
substate -
come back w/ a proposal

cc: Cynthia Rice
Diana Fortuna
+ return

AFSCME®
AMERICAN FEDERATION STATE COUNTY MUNICIPAL EMPLOYEES AFL-CIO

WISCONSIN OFFICE • 8033 Excelsior Dr., Suite A • Madison, WI 53717-1903 • Telephone 608/836-6666 • Fax 608/836-3333

April 28, 1997

Sent to: Senators Herb Kohl and Russ Feingold and
Representatives Thomas Barrett, Jay Johnson, Ron Kind, Gerald Kleczka,
Scott Klug, Mark Neumann, David Obey andThomas Petri

Dear (Senator/Representative) _____:

Wisconsin has a long and proud tradition of delivering high quality services to its constituents in a system that is accountable to the taxpayers and that employs a professional, merit-based workforce.

This superb system of government service is in danger of being turned over to out-of-state corporations whose primary interests are corporate bottom lines, not the long term care and well-being of our state's most vulnerable citizens.

As you know, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allows states to privatize as much of their Temporary Assistance for Needy Families program as they wish. However, Congress explicitly declined to revoke the requirement that agencies with merit-based personnel systems administer the food stamp and Medicaid programs. Nevertheless, Wisconsin is already seeking waivers from this new federal law.

We are writing to seek your assistance in strongly urging both the Department of Health and Human Services and the U.S. Department of Agriculture (USDA) to deny the state of Wisconsin waivers to privatize eligibility determination for food stamps and medical assistance benefits.

While we support program and policy changes that improve the system in which our members so proudly work, we cannot be party to recommendations that remove the last vestiges of a safety net from public oversight and accountability. We hope that you will assist us in preventing this outcome.

The state of Wisconsin has gone beyond "reforming welfare, as we know it" and is systematically attempting to privatize the entire health and human services system. The current waivers submitted to the Health Care Finance Administration and the USDA, as well as language in Wisconsin's 1997-99 Biennial Budget, clearly demonstrate this intent.

The first focus is on services for poor families. The next target will be the system that cares for our elderly and disabled citizens.

These citizens, as well as the 60,000-plus public employees in Wisconsin, ask for your assistance in encouraging Secretarys Donna Shalala and Dan Glickman to deny Wisconsin their submitted waivers. We hope to discuss this important issue with you when our leadership and members visit Washington, D.C., next week for the annual AFSCME Legislative Conference. If you or your staff have questions in the interim, please feel free to contact our Public Policy Analyst, Jennifer Grondin, at 608-836-6666.

Thank you for your time and efforts on our behalf.

Sincerely,

Gary Lonzo, President
AFSCME Council 24

Marty Beil, Director
AFSCME Council 24

Mike Murphy, President
AFSCME Council 40

Bob Lyons, Director
AFSCME Council 40

Martha Love, President
AFSCME Council 48

xc: Bruce Reed, Advisor to the President for Domestic Policy

The Honorable Donna Shalala, Secretary
U. S. Department of Health and Human Services

The Honorable Dan Glickman, Secretary
U. S. Department of Agriculture

Texas Welfare Privatization Proposal
4/30/97

Question: Is it true that you are wavering on whether or not to grant the Texas request to privatize its welfare operations?

Answer: My staff has made some recommendations, and I've asked them to take another look at the issue. My principal interest is what's best for families who rely on Medicaid and food stamps.

Question: When will Texas get an answer? Do you expect this matter to be settled at Friday's meeting between HHS Deputy Secretary Kevin Thurm and Texas Health and Human Services Commissioner McKinney?

Answer: I do not know. I hope the state of Texas shares our interest in doing what's best for the recipients of public assistance, and that we can come to some understanding soon.

Communications Workers of America
AFL-CIO, CLC

501 Third Street, N.W.
Washington, D.C. 20001-2797
202/434-1110 Fax 202/434-1139

Morton Bahr
President

cc: Elmer K.

Via Fax

April 30, 1997

Mr. John Podesta
Deputy Chief of Staff
The White House
Washington, D.C. 20500

Dear John:

Tomorrow the Texas House will pass HB 2777 (3rd reading), an amendment to an appropriation bill, thus veto proof, that will restrict privatizing of welfare activities to the technological systems.

It seems to me that unless the Administration is ready to deny the granting of waivers, the President should at least wait to let the members of his own party deal with the issue locally before taking any action whatsoever.

Sincerely,

Morton Bahr
President

Wisconsin Works (W-2) - Fact Sheet

- The Wisconsin Works (W-2) demonstration proposal is a Statewide project which, in part, would establish competitively-bid *County* contracts with public or private agencies. The public or private agencies would be responsible for certification actions such as gathering client eligibility information, conducting eligibility interviews and inputing data for those food stamp households which are subject to W-2 work requirements.

- There are 72 counties and 11 Indian Tribal Organizations (ITO) in Wisconsin. In 61 counties, the County Social or Human Services Department earned and exercised its right of first selection to administer the W-2 project. Two ITOs also earned and exercised the right of first selection. Therefore, competitively-bid contracts will be awarded for the W-2 project in 11 counties and 9 ITOs. However, the State could, at some point in the future, contract with a private agency for the W-2 project in a County office that does not meet a specified level of performance.

- Private organizations that are awarded contracts may perform aspects of the certification process that are currently required to be handled by merit employees. W-2 employees will be responsible for food stamp households that are subject to work requirements. Food stamp households that are exempt from W-2 work requirements, such as the elderly and disabled, will continue to be certified by public employees.

- In Milwaukee County (which is divided into six regions), six private, non-profit agencies have been awarded contracts. The State indicates that these agencies will be subcontracting with County merit employees to perform the food stamp eligibility interviews and related verification functions. Approximately ~~60~~ 45 percent of the State's food stamp caseload is in Milwaukee County.

- The public and private agencies administering the W-2 project are required to use the State's computer system. The W-2 project contractors will not be responsible for any redesign or related maintenance of the State's computer system.

3% - 7 small counties - want out to help

45% - Milwaukee - want to do them athletic!

(do this as a condition?)

(take long time to do all these attrition)

(how would mixed system work)

quality/appeals - by state

all else - by private - final certification by computer!

Ks - for 2 years.

Other counties might do too? Yes - would have to prevent this (if wanted to) through terms + conditions (⇒ counties failing to meet perf. stds)

Restrictions on future Ks + K changes w/out coming back.

Program integrity / confidentiality - safeguards.

→

Another month of work with Rem; giving over factual data, finalizing terms + conditions, etc. Would give signal new.
(at least - maybe 2-3)

Medicaid line - not workable. They want the entire MT

P County-~~administered~~ states - around 12

NY, MD, NJ, VA, MN, OH, WI, CO, NE, ~~WD~~ W, CA, WI.

=

We are privatizing 370 of WR caseload
(how many EEs)
(prob around 340 as well)

~~Up to~~
Additional privatizing of MI - but only three regional activities.

cc: Bruce R
Cynthia
Diana
+ return

Citizen Action

1730 Rhode Island Avenue, Suite 403
Washington, DC 20036
(202) 775-1580 • (202) 296-4054 FAX

2608 Green Bay Road
Evanston, IL 60201
(847) 332-1776 • (847) 332-1780 FAX

April 30, 1997

The Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Clinton:

On behalf of Citizen Action, the nation's largest consumer and environmental watchdog organization, and Texas Citizen Action, we want to express our strong opposition to proposals to privatize the administration of Medicaid, Food Stamps and other public services. Therefore, we ask that you reject the pending request by the state of Texas to implement such a program.

Citizen Action believes that public services should be administered through publicly-accountable agencies. We are greatly concerned that determinations involving the health and well-being of children and families should not be turned over to private contractors, where concerns about profits may outweigh concerns about people's lives. Privatization would make it extremely difficult to guarantee adequate staff training, oversight, and public input. It would increase the difficulties already facing those most vulnerable among us and those families struggling to cope with temporary economic dislocations.

While we agree with the need to make public services as efficient and effective as possible, there is no evidence that privatization will lead to either goal. Instead, there is ample evidence pointing to problems with private contracting for public services, including duplication, cost overruns, inadequate investment in equipment and personnel, and fraud and abuse. Privatization will likely lead to new and greater problems. These problems, however, will be harder to address because private contractors are not subject to the same accountability requirements as public agencies and because employees of private contractors do not have the same protections as public employees. The Texas privatization scheme, which remains ill-defined and has not even been subject to public discussion within the state, is simply bad public policy.

Both the federal and state governments are responsible for making the wisest use of taxpayer dollars and for properly implementing public programs. Neither the state of Texas nor any other state should be allowed to shirk that responsibility or turn it over to private contractors. Again, we strongly urge you to protect the public interest by rejecting privatization proposals.

Sincerely,

Cathy L. Hurwit
Deputy Director
Citizen Action

Sandra Haverlah
Executive Director
Texas Citizen Action

cc: The Honorable Donna Shalala
The Honorable Dan Glickman
John Podesta

TALKING POINTS ON APPLICATION OF MINIMUM WAGE

- This Administration is committed to moving people from welfare to work. But this Administration is also committed to making sure that workers get paid at least the minimum wage for their efforts.

- That means all workers -- whether or not they come off the welfare rolls. No one doing real work should be paid a subminimum wage.

- You know as well as I that there are complicated legal questions here, involving who counts as a "worker" and who as a "trainee" under the minimum wage law.

- But you should know that we will apply the law consistent with its intent -- to protect American workers and to make sure that no employer can take advantage of people's need.

TALKING POINTS ON TEXAS PRIVATIZATION

- You know that we are considering Texas's proposal to privatize substantial parts of its Medicaid and food stamp operations.

- We have talked with AFSCME leaders often on this issue, and I know Administration officials will talk with you again this week,

- No final decisions have been made. But I can assure you that this Administration will do what is best for recipients of public assistance, and that this Administration will look out for the interests of the workers who devote their lives to helping those recipients. If the Texas scheme is inconsistent with those goals, then we will not permit the State to proceed.

ARN 4-26-97

Stenholm impatient for privatization of state welfare operations

By RICHARD HORN Staff Writer

Like other Texas leaders, U.S. Rep. Charles Stenholm is impatiently waiting for the federal go-ahead to explore privatization of state welfare operations.

"It's way overdue," he said Friday. "I made a mistake and predicted two weeks ago we'd have an answer by the end of that week. I will not make that mistake again."

The Texas Legislature two years ago approved a plan calling for the state to solicit bids for private companies to control who gets welfare benefits.

Because federal rules dictate how states should distribute social services money, Texas needs federal approval of the project before bids can be requested. That decision in past weeks has moved from the Department of Health and Human Services to the White House. It was supposed to be announced by March 31.

Texas would be the first state to privatize welfare, a move that's drawn strong opposition from several corners, most notably organizations representing state workers.

But Stenholm argued all Texas wants at this point is to look at the competing bids from the private sector and the public sector.

"The Legislature has suggested that this might save $10 million a month, and that's money that could go back into nutrition programs," he said. "If that is right, why would we not do it? If it's wrong, then we would not even consider the (private) bid. But let's have the proposals and then let's make the judgment."

The Abilene Democrat said he believes President Clinton favors approving at least a major part of the Texas project but is under "tremendous pressure from within not to do it" and thus is trying to work out a compromise.

He said he does not believe welfare will ever be fully privatized, but he said if the private sector can do the job with substantial savings then Texas should be able to find out if that is the case. The public sector would then have the opportunity to argue it could do a better job, he said.

"We would have that argument then and make the proper decision," he said. "But (opponents) are wanting to kill it before the private sector is given the chance, and that's wrong."

Critics of the plans contend state lawmakers, wanting to save costs, will allow privatization to harm workers and welfare beneficiaries alike. For-profit companies, they contend, will not have the public good foremost in mind and will trim services and jeopardize applicants' confidentiality.

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

March 31, 1997 WR - privatization

MEMORANDUM

For: Barry White, Deputy Associate Director, Human Resources Division, Office of Management and Budget

From: Ray Uhalde, Acting Assistant Secretary

Subject: Draft Privatization Letter

This follows up on our phone conversation of last week. The purpose of this memo is to comment on the draft privatization letter and to provide further details about the types of employee protections that should be provided when any function of Federal-State programs is privatized. I note that these protections, however, should not be used to justify any decision as to whether, or to what extent, a governmental function should be privatized. This memo also includes a brief discussion of the need to seek the approval of the State legislature before privatizing any Federal-State function.

(1) **Comments on the Draft Privatization Letter**

First, we would recommend that the draft letter be revised to make it more clear what activities can and cannot be privatized in the Medicaid program. We would suggest the following revisions:

Paragraph 3, First Sentence

"As Texas moves forward with this process, ~~HHS recommends that~~ the State ~~bear in mind~~ must comply with provisions of Sections 1902 of the Social Security Act which ~~reflect~~ embody the principle that certain activities included in the eligibility determination process be performed by public agencies."

Paragraph 4, First Sentence

"~~In many respects, we believe this principle mirrors~~ This requirement is reflected in current practice in the Medicaid program."

Second, we believe it is essential to require any privatization proposal for an entitlement program to include contract terms to assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data. Accordingly, we would suggest the following revision in the second sentence of the last paragraph:

"~~In examining offers, we encourage Texas to consider~~ At the same time, it is essential that any such approach include contract terms which assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data to measure successful contractor performance."

Third, we believe that the significant privatization of Federal-State programs, such as Medicaid, could result in a failure to maintain the quality of program services for some significant period if a large number of existing experienced employees are replaced with new, inexperienced employees. In order to avoid such a result, we would recommend adding a new sentence to last paragraph, as follows:

"Moreover, in order to retain experienced employees and assure program quality, the approach must include the provision of worker protections to existing workers, including the right of first refusal, pay and benefit retention, and outplacement assistance in finding new jobs."

(2). **Assuring the Quality of Program Services Through Worker Protections**

Significant privatization of Federal-State programs could result in the replacement of most existing employees with new, inexperienced employees and a resulting failure to achieve minimum standards of efficiency. The intended recipients of these programs deserve to have the quality of program services maintained during the change. I assume that any contract to privatize governmental functions will include performance standards intended to maintain or improve service quality.

Providing worker protections can further ensure service quality and is consistent with past decisions in which the Federal Government provided assistance to groups of workers to alleviate adverse employment effects caused by direct Federal action. These protections have ranged from efforts to make workers whole to assisting workers in making the transition to new employment. (See attached survey.) In some instances, these worker protections were funded by the Federal government, while in other cases the Federal government mandated that the protections be provided and funded by other parties.

The following guidelines are intended to minimize the replacement of experienced staff with inexperienced staff:

Right of First Refusal -- Existing employees performing the functions to be contracted out would have the right of first refusal to employment under the new contract in positions for which they are qualified.

Pay and Benefit Retention -- In order to provide the greatest possible incentive for existing employees to accept employment under the new contract and thereby assure the quality of program services, they would be paid their existing pay and benefits for some temporary period (e.g. a minimum of 24 months).

Provision of Adjustment Services -- Workers who do not choose contract employment or choose to leave such employment within a specified period (e.g. 2 years) would be provided assessment, counseling, funding and arranging of needed training services and job search assistance prior to actual displacement, in order to place workers either in other State jobs or in private sector jobs.

I note also that any decision to privatize raises serious questions regarding the representational rights of organized employees whose jobs are to be contracted out. These employee representation questions need to be examined before any privatization decisions are made.

(3). **Required Approval of the State Legislature**

The approval of the State legislature should be sought when any Federal-State program is a candidate for privatization. It is our view that the approval of privatization plans by State legislatures, especially where Federal programs and services are provided by State agencies, is likely to lead to more orderly privatization processes which reflect a consensus within a State.

Certain authorizing statutes may be interpreted to require State legislative approval. For example, Section 4 of the Wagner-Peyser Act provides a significant role for State legislatures by requiring that States can receive Employment Service appropriations only if their legislatures accept the provisions of the Act and designate or authorize the creation of a State agency to operate the program. Because privatizing or contracting out would constitute a transformation of the existing State agency, we have determined that Section 4 of Wagner-Peyser requires that such privatization plans must be approved by the State legislature.

I am prepared to discuss these comments at your convenience. Please share them as appropriate.

WR-privatization

Stacy L. Dean 03/28/97 06:12:16 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP, Kenneth S. Apfel/OMB/EOP

cc: See the distribution list at the bottom of this message
Subject: Privatization Papers

We've had a chance to review the one page HHS privatization paper on principles and USDA's two drafts of a letter to Texas. We understand that HHS also has drafted a letter, but we haven't seen that yet. Also, USDA is planning on revising their letter for a second time.

Two things jump out at us.

First, the HHS paper and the USDA letter leave us with the impression that the agencies are willing to allow the up front "intial application processing" to be privatized through the interview. The final decision would be made by a State employee. This is based on the Medicaid model which only allows the initial application work to be contracted out. That represents a significant amount of the Medicaid work since there is not as much on-going certification in Medicaid as in Food Stamps or AFDC/TANF. The USDA letter mirrors the HHS paper and therefore only applies to the up-front work, leaving out a significant amount of the work which is typically performed by an eligiblity worker through frequent on-going contact with the household. It was rather clever on their part, but I think the State might not react well. I don't think they were trying to put anything past us; instead, this oversight indicates that there is still some miscommunication regarding what functions should be privatized. For instance, in the meeting held earlier this week, B. Vladek was talking about privatizing much the same Elena has talked about it, i.e. through and including the interview. K. Thurm was using a vocabulary which indicated a position much more akin to USDA's which says that the interview has too much discretionary decision making to be privatized. The paper is a slightly different take from both of those views because it would only privatize up-front application work rather than the ongoing work over the months and years to determine if the individual maintains their eligibility. (Perhaps the HHS letter is different, but I'm assuming that it follows the paper.)

Barry, in his role as Ken this week, believes that the players should sit down one more time to go over exactly what we all mean by "initial processing", "decision making" and "certification" before HHS makes a call to the State and certainly before any paper or letters are shared with the State. We should be very clear on what we all mean so that we give consistent responses to the State -- because they will ask questions.

Second, both the HHS paper and the USDA letter are rather technical. They don't address the broadbased principles which Raines and Koskinen feel should apply to any privatization initiative: improved program performance, improved financial integrity and improved cost effectiveness. A whole range of issue are captured under these umbrella terms such as quality control, recipient access to benefits, the role of current state employees, etc. We know that we owe you language, but its not clear that the letters as written are appropriate for this kind of discussion. That's a problem easily solved, but again we probably need to sit down and make sure we are all on the same page with regards to process. Also, as Barry mentioned in his e-mail both letters should be reviewed by Labor and OPM.

I don't think Ken will be back until mid-week. We'd prefer to wait for him, but we and Barry can

wp-privatization

MEMORANDUM

TO: ELENA KAGAN
CYNTHIA RICE

CC: KEN APFEL
JOHN MONAHAN

FROM: ANNE LEWIS

RE: COMMENTS ON DRAFT TEXAS LETTER

DATE: MARCH 31

I do not think the Texas letter as it currently stands takes a strong enough position.

The language is very cautious and I believe could be read as a more ambiguous signal then we intend to send. Suggestions for strengthening it are:

3rd graphRewrite : HHS believes states must bear in mind Section 1902 of the SSA which establishes the principle that ....

Delete the qualifier, "In general ..."

4th graph:Add a sentence which explicitly states that while the Medicaid principle is the basis for our guidance, we do not wish to imply that the incentives in Medicaid are analagous. (HHS can craft appropriate language.)

7th graph:Rewrite: "HHS endorses the search for increased efficiency and accelerated innovation through the use of outside contractors. At the same time, however, we emphasize thast contract terms must assure program integrity and embody incentives that tightly align contractors' interests with program goals. Further, contract terms must provide for the kind of complete and transparent data that allows for meaningful evaluation and on-going competition.

WR-privatization

FACSIMILE TRANSMISSION
Office of the Assistant Secretary
The Administration for Children and Families

DATE:

TO: Cynthia Rice

Telephone:

Fax: 4567028

Number of Pages (excluding cover): 4

FROM: Margaret Pugh

Telephone: (202)401-6944
Fax: (202)401-4678

MESSAGE:

As requested, two TIES documents:
① the Medicaid language sent out earlier
② this language transposed into a draft letter from Kevin to McKinney
We're assuming that you'll take care of circulating this to necessary DPC/OMB/NEC people. Let me know your comments. Thx.

Department of Health and Human Services
Administration for Children and Families
370 L'Enfant Promenade, S.W., Washington, D.C. 20447
Phone: (202) 401-9200

DRAFT 3/26/97

The State of Texas has asked that HHS and USDA provide final guidance under which Texas could release the request for offers (RFO) for its Texas Integrated Enrollment Services (TIES) project, if it so chooses.

At this time, HHS will approve Federal matching funds for project planning activities for the costs incurred through the release of the RFO. We will consider HHS funding for the actual project itself, at such time as the State submits an Implementation Advance Planning Document (IAPD) for approval by the federal agencies.

As Texas moves forward with this process, HHS recommends that the State bear in mind provisions of Section 1902 of the Social Security Act which reflect the principle that certain activities included in the eligibility determination process be performed by public agencies. In general, these provisions require public agencies to evaluate the sufficiency of individuals' applications for public assistance and to make the essential eligibility determination decision.

In many respects, we believe this principle mirrors current practice in the Medicaid program. Typically, under Medicaid, some (but not all) phases of the eligibility determination process for federal public assistance programs may be performed by outside contractors. Contractors (i.e., persons who are not employees of the State) can perform "initial processing" functions further described below.

Permitted contractor-performed functions can include, for example, taking applications, assisting applicants in completing applications, providing information and referrals, obtaining required documentation, assuring that information contained in applications is complete, and conducting any necessary interviews.

Contractors are specifically precluded from evaluating the information contained in the application and supporting documentation, making a determination of eligibility or ineligibility, certifying a determination of eligibility, and notifying applicants of the results of the eligibility determination and informing them of their appeal rights. These functions must be performed by a State employee authorized to make eligibility determinations for the State Medicaid agency.

HHS appreciates that Texas is committed to exploring innovative ways to deliver public services. In examining offers, we encourage Texas to consider contract terms which assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data to measure successful contractor performance.

DRAFT 3/26/97

March XX, 1997

Michael D. McKinney, M.D.
Commissioner
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

Dear Commissioner McKinney:

I am writing to follow up on our most recent conversations and to respond to your March 5, 1997 letter to me concerning the Texas Integrated Enrollment Services (TIES) project. In that letter, you asked that we provide final guidance under which Texas could release the TIES request for offers (RFO), if it so chooses, with the U.S. Department of Health and Human Services' (HHS) approval.

This letter provides that guidance, approves your request for planning funds, and outlines several considerations which we encourage Texas to take into account when contracting with outside parties for the delivery of services. Assuming that the RFO which you intend to release to the public reflects the substance of our staff discussions and the guidelines described below, we see no problem with your proceeding at this time.

Let me take this opportunity to briefly summarize where we are in the process. Over the past several months, our staff have been working together very closely to resolve many systems issues related to the development of the TIES program. As you know, our approval of the release of the RFO is a first step in the process for approving use of federal funds for the development and implementation of a state's computerized eligibility determination systems for Medicaid. (Funding for systems development under TANF does not require federal approval.)

In order for HHS to consider approving and funding a contract which may result from release of the RFO, the State must submit an implementation advanced planning document (IAPD) for HHS' prior approval following the solicitation process, in accordance with the rules at 45 CFR Part 95, Subpart F. The IAPD must meet the requirements specified in the cited rules and provide a rigorous and positive cost benefit analysis for the project. The State may want to advise potential offerors to make use of HHS' cost benefit analysis guidance for State systems, which I have included for your review.

At this time, HHS will approve Federal matching funds for project planning activities for the costs incurred through the release of the RFO. We will consider

HHS funding for the actual project itself, at such time as the State submits and IAPD for approval by the federal agencies. We understand that you plan to move forward with this process.

As you proceed, we recommend that you bear in mind provisions of Section 1902 of the Social Security Act which reflect the principle that certain activities included in the eligibility determination process be performed by public agencies. In general, these provisions require public agencies to evaluate the sufficiency of individuals' applications for public assistance and to make the essential eligibility determination decision.

In many respects, we believe this principle mirrors current practice in the Medicaid program. Typically, under Medicaid, some (but not all) phases of the eligibility determination process for Federal public assistance programs may be performed by outside contractors. Contractors (i.e., persons who are not employees of the State) can perform "initial processing" functions further described below.

Permitted contractor-performed functions can include, for example, taking applications, assisting applicants in completing applications, providing information and referrals, obtaining required documentation, assuring that information contained in applications is complete, and conducting any necessary interviews.

Contractors are specifically precluded from evaluating the information contained in the application and supporting documentation, making a determination of eligibility or ineligibility, certifying a determination of eligibility, and notifying applicants of the results of the eligibility determination and informing them of their appeal rights. These functions must be performed by a State employee authorized to make eligibility determinations for the State Medicaid agency.

We appreciate that Texas is committed to exploring innovative ways to deliver public services. In examining offers, we encourage you to consider contract terms which assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data to measure successful contractor performance.

Our staff also would like to continue their ongoing discussions with your office in order to better understand TIES in the context of Texas' implementation of the new welfare law. Mark Ragan, Director of the Office of State Systems, or his staff will be in contact with your office shortly to further discuss these issues and to confirm several other administrative matters.

I hope that you find this additional guidance helpful in your decision-making. Again, I want to express my appreciation for your understanding of the complex issues raised by our consideration of the TIES project. I appreciate all of the time and effort you and your staff have contributed towards moving these issues to

resolution. If you should have any questions concerning the content of this letter, please do not hesitate to call me or Mark Ragan at (202) 401-6960.

Sincerely,

Kevin Thurm

wk-privatizatic 3/28/97

DRAFT

Dr. Michael D. McKinney
Commissioner
Texas Health and Human Services Commission
4900 North Lamar
Fourth Floor
Austin, TX 78751

Dear Dr. McKinney:

This is to inform you of our conditional approval of your Request for Offers (RFO) for the Texas Integrated Enrollment Services (TIES) project and of our approval of the Planning Advanced Planning Document (PAPD). Once we receive confirmation of your concurrence with the conditions for approval specified in this letter, the Food and Consumer Service (FCS) will approve Federal Financial Participation (FFP) for project planning activities. The total amount requested from FCS is 32.97 percent of the total estimated cost of $702,316, or $231,554. The FCS FFP at 50 percent of $231,554 is $115,777.

To receive continued FFP from FCS beyond the planning process, the State must submit and receive Federal approval of an Implementation Advanced Planning Document (IAPD) in accordance with 7 CFR 277.18. Also, as agreed to during our discussions and as specified in your December 13, 1996 modifications to the TIES RFO, continued FFP is contingent upon our advance review and approval of the contract to be entered into with the winning bidder. Finally, continued FFP will be contingent upon our ongoing monitoring and review of the implementation and operations of TIES. Such reviews, would be conducted in accordance with the current regulations.

The following sections are divided by program or operational area and identify the conditions for approval. *We must receive your written concurrence with these conditions* The following sections also include general comments. While concurrence with the following sections identified as *Comments* is not necessary, we believe they provide additional clarification in the RFO.

FOOD STAMP PROGRAM - Conditions for Approval (State concurrence required)

Section 2.7.6, Certification

The RFO must include clarifications reflecting Merit System requirements under the Food Stamp Act and corresponding regulations which specify that certification of applicant households is a State responsibility that must be conducted by a State employee. Thus, a public employee must evaluate the completed application to make a determination of

eligibility, ineligibility or determine any additional actions that must be taken prior to making the final decision of eligibility. A computer system designed and operated by the State would not suffice as meeting the requirements of the final determination of household eligibility.

The State may contract for functions which will assist merit system employees to make the certification determination which include, but are not limited to, taking applications, assisting applicants in completing the application, obtaining required documentation to verify household circumstances, providing information and referrals, and assuring that information on the application is complete. However, to contract the responsibility of the food stamp interview to non-merit employees, the State must request and receive approval of an administrative waiver of the appropriate regulations under 7 CFR 272.4 This section specifies that the State agency is responsible for conducting the food stamp interview.

Note: Additional comments pertaining to issues already resolved with the State will be included in the final letter to the State.

FEATURE

All TIED Up In Washington

BY MICHAEL KING

"In my state, we take people at their word."

That was the Governor of Texas putting Donna Shalala on notice that he is powerfully annoyed at the continuing delay over the state's request for a federal waiver for its welfare reform program. Governor Bush wrote the Secretary of the Department of Health and Human Services on April 3, reminding Shalala that she had "promised" an answer to the waiver request by the end of March. As this issue of the Observer went to press (April 15), there was still no approval from Washington—and it seems increasingly likely that whatever answer Bush eventually gets in DC, he will run into additional obstacles in Austin.

At issue is the Texas Integrated Eligibility System (TIES), a computer-based and privatization-driven welfare eligibility program which the Governor insists will "save taxpayers' money and improve services for welfare recipients." Not everyone is convinced. Some legislators, public interest groups such as the Center for Public Policy Priorities, and unions (led by the Texas State Employees Union) have registered strong disagreements over the design and implementation of TIES (*Observer*, "Virtual Welfare," March 14). Opponents charge the TIES is much more ambitious than the computer upgrade authorized by the 1995 Legislature, that it threatens wholesale privatization of what should rightly be public business, and that it can only produce the savings its supporters promise by slashing programs and firing state employees.

The public argument over TIES has at least temporarily moved from Austin to the White House. According to several sources, one reason the Texas waiver decision has been so long in coming is that President Clinton and his staff have become deeply involved in the process that would usually be the province of the departments of Health and Human Services and Agriculture (which supervises the Food Stamp program). The administration is fully aware that its decision will set a welfare precedent for the whole country—and that if it allows Texas to radically privatize social services, it will be hard-pressed to deny other states permission to do likewise. Health and Human Services spokesman Michael Kharfen said that because of the complexity and importance of the Texas program, the administration had been involved "from day one." Kharfen says the federal agencies have been in regular contact with the Governor's office and other Texas officials concerning TIES, and that he has "just about exhausted the synonyms for 'soon'" in anticipating the forthcoming decision.

In addition to Governor Bush, other Texas politicians have begun to take public positions on the controversy. Senator Phil Gramm recently wrote to White House Chief of Staff Erskine Bowles, echoing the Governor's impatience and urging approval of TIES "without delay." Gramm denounced reported national union lobbying of the White House, and asked that Bowles reject attempts "to inject politics into this policy decision."

But not everyone is eager to see the White House approve TIES. Houston Congressman Gene Green has written Secretary Shalala and Governor Bush, objecting to the TIES provisions that would privatize eligibility determination for social services such as Medicaid, Temporary Aid to Needy Families, and Food Stamp assistance. In a detailed letter to Bush dated March 17, Green wrote, "I strongly disagree with the efforts to contract out [eligibility determination]," saying such a move would jeopardize accountability for government funds and make stockholder profit a priority over both service and savings. The Governor answered that he appreciated Green's concerns, but "respectfully disagreed" with his conclusions.

The unions, locally and in Washington, readily acknowledge their determination to delay or derail the federal approval of TIES. TSEU president Linda Herrera described TIES as a threat to social services as well as the jobs of union members, and vowed that the union would continue to fight. (TSEU has launched a statewide advertising campaign against TIES, and members were planning to show up in force in Austin on April 15 to talk to their legislators.) In D.C., the Communications Workers of America (TSEU's national affiliate), joined by AFSCME and, reportedly, AFL-CIO President John Sweeney himself, have lobbied the federal agencies and the White House. Texas Republican Party Chairman Tom Pauken told the *Houston Chronicle* that the unions were simply supporting the "welfare state," and Texas Health and Human Services Commissioner Mike McKinney—responsible for drafting the TIES proposal—accused the unions of "seeing boogeys in all the bushes."

CWA spokeswoman Debbie Goldman defended the union against Republican charges of politicizing the welfare issue, saying that Gramm and the others are "scapegoating the unions because they can't respond to the substance of the issues [the unions] have raised." Goldman argued that the track record of private companies in social services contracting ("in Florida, Connecticut, and in Texas job support") has been very poor, and that in bringing this record to light, the unions were making certain that the Clinton administration could not defend privatization as a cure-all for social service programs. The unions have been supported in their lobbying effort by several public interest organizations which focus on welfare programs. Henry Freedman of the Welfare Law Center wrote Agriculture Secretary Dan Glickman, urging him to reject the Texas privatization initiative—Freedman argued that it would

be an open invitation to welfare profiteering, poor service, and "outright corruption" on the part of private companies. Robert Fersh of the Food Research & Action Center, a non-profit legal advocacy group which focuses on welfare issues, warned Erskine Bowles that privatization and computerization of Food Stamp programs "could make it very difficult, if not impossible, for many needy people to apply for benefits."

It remains uncertain to what extent the Clinton administration—which approved the Republican-drafted "welfare reform" legislation just prior to last November's election—is willing to listen to the unions and their supporters. According to CWA's Goldman, it appears that the administration "wants to give states flexibility" in welfare reform, but "they're caught in real policy questions" about the Texas TIES program, as currently drafted. "The new federal welfare law," said Goldman, "says all discretionary activities must be done by merit system employees. The Congress had a chance to [delete those provisions] but they did not. So the TIES program raises real problems for any federal waiver: legal problems, policy problems, and political problems."

Back in Austin, TIES may face additional hurdles. Houston Representative Garnet Coleman, author of the 1995 Texas welfare legislation which created TIES, has said that whatever decision comes out of the Clinton administration, the Legislature needs to revisit TIES and scale it back to the more limited intent of the '95 legislation (see "The Legislature Has a Role," *Observer*, April 11). Asked last week if he thought the lobbying in D.C. was having any effect, Coleman smiled broadly and answered, "Don't expect a waiver anytime soon." Coleman argued that even if TIES is implemented in some form, the large initial expense means it will be several years before any savings are realized, and the state needs to be absolutely certain it will get a good return on its expenditures, estimated to be as much as $2-3 billion. In response to the Governor's reiterated impatience, Coleman added, "There's no urgency whatsoever to issuing a waiver. This is a five-year process, and there's no urgency [to act] if the process is wrong."

Coleman has proposed one of several bills intended either to limit the TIES program or to provide more direct legislative oversight. Similar bills are sponsored by Austin Representatives Elliott Naishtat and Glenn Maxey—significantly, they have already garnered support from the House leadership. Speaker Pete Laney has spoken out on the need to revisit the issue of privatization, and Rob Junell, chairman of the House Appropriations Committee, is now a co-author (with Naishtat) of a "scale-back" proposal. Naishtat told the *Observer* that in Washington, "TIES is out of Shalala's hands," and that he believes that in Austin, the state's Democratic leadership will defend jobs and social services in Texas. "We're going to scale back the TIES process to its original intention," said Naishtat, "an automation of some services, not wholesale privatization. And we're going to protect the jobs of thousands of state employees, who have been dedicated employees, the workhorses of social services."

There remains yet another voice to be heard on TIES. Last fall TSEU and Public Citizen charged that several former state officials now working for private companies with an interest in TIES had violated the state's "revolving door" and conflict-of-interest laws, and they called for an investigation. The Travis County Attorney's office is expected to issue its report on its joint investigation with the District Attorney's office, said a spokesman, "soon."

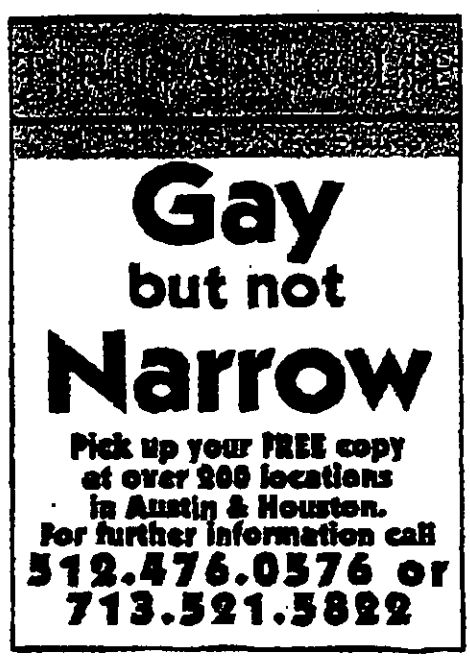
In the phrase of the Governor, in Texas we take people at their word. It remains to be seen, however, precisely who speaks for Texas. □

"For Sale," from p. 5

et al. and used it to trounce Republican challenger Jerry Moon by a 64-to-36 margin. Dan Kubiak, a Rockdale Democrat who served in the House from 1969-83, then returned in 1991, used $12,000 in Republican funding to defeat challenger James Hartley by a 60-to-40 percent margin. Keith Oakley probably needed the $10,000 provided by the tort-reform PAC to defeat Republican challenger Betty Brown by a 53-to-47-percent spread. And the two most powerful Democrats in the House, Speaker Pete Laney and Calendars Committee Chair Mark Stiles, would have done just as well without the courtesy checks ($5,000 and $2,000) each got from Texans for Lawsuit Reform. Two thousand five hundred for Rob Junell, who last year raised more than $150,000 and faced no opponent, was pocket change for the Appropriations Committee chair, who carries two or three tort reform bills each session, anyway. (Junell himself gave $1,000 to Republican Supreme Court Justice John Cornyn.)

Add to the above totals $7,000 to keep East Texas Democrat Ron Lewis bought, $5,000 for El Paso freshman Norma Chávez, and additional contributions scattered around the Mexican-American and Black Caucuses ($4,000 for Diana Dávila of Houston and $2,500 for Dallas freshman Terri Hodge) and 76 in 96 begins to look like a *76-in-97* legislative tactic—rather than the electoral promise that 76 in 96 and Associated Republicans failed to deliver last year.

Some of the tort reform bills filed this session will make it through Patricia Gray's House Committee on Civil Practices and onto the floor—where Republican investors will be expecting some tangible returns on their Democratic investments. □



Wprivatizati—

Cynthia A. Rice 04/25/97 08:28:00 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:

Subject: I spoke to Ed Lorenzen about our favorite topic

He says Rep. Stenholm is reaching the boiling point and will not be able to avoid publicly criticizing us for much longer now that GOP members of the Texas delegation are doing so.

He says Rep. Sam Johnson plans to raise the issue when the technicals bill is on the floor of the House and may pursue attaching legislation to the supplemental appropriations bill or introducing a separate bill. Stenholm would be compelled to co-sponsor these efforts. Ed thinks Johnson could be disuaded from doing this if he could have a face to face meeting with Bowles.

Also, he said if we wanted to quietly float something with the governor that he could have Stenholm call him directly.

THE WHITE HOUSE

WASHINGTON

April 25, 1997

MEMORANDUM FOR ERSKINE BOWLES

FROM: BRUCE REED
ELENA KAGAN

SUBJECT: TEXAS PRIVATIZATION

This memo outlines four possible responses to Texas's request to privatize medicaid and food stamp operations. The first was previously recommended to the President. The rest cut back, in three different ways, on the extent of privatization allowed under that recommendation.

1. Prior recommendation. Under this approach, Texas could privatize data processing, outreach activities, and the key intake activities of collecting documents and interviewing applicants. All evaluation of information and determinations of eligibility would remain in the hands of state employees.

2. Cut back on privatizable functions. Under this approach, Texas could privatize data processing and outreach activities, but not the intake activities of collecting documents or interviewing applicants. This approach does not go much beyond current law -- for example, most data processing is already privatizable -- and does not give Texas much of what it asked for.

A variation of this position is to allow Texas to privatize all intake activities other than the interview (most notably, document collection). This distinction, though highly artificial, may give the State something vaguely useful. HHS, however, is still looking into whether it is legal.

3. Insist on a county-based demonstration project. This approach, based on Wisconsin's pending request, would allow privatization of the functions specified in our old recommendation, but only in specified counties of the State. The approach probably will not work in Texas, given its lack of experience with or interest in county-based welfare systems.

4. Draw the line at Texas. Under this approach, HHS and USDA would allow Texas to privatize to the extent specified in our prior recommendation, but would refuse to grant any other requests for statewide privatization until persuaded that the Texas experiment was working. The agencies could retain the ability to grant state requests for county-based demonstration projects, as described in Option 3 above. This option probably would give Texas enough to keep it from squawking, but would provoke fights with other states that want what Texas has gotten.

HHS and DPC both believe that option 4 is the best of the new options. We have not yet heard from USDA.

Texas Integrated Enrollment Services (TIES) Project

ISSUE: To what extent should Texas be permitted to transfer the responsibility for eligibility determinations for Federal public assistance programs to the private sector.

OPTION 1: Require Texas to perform all eligibility functions, including intake, interviews, processing, evaluation, and making and certifying the actual determination, except where Congress has specifically identified exceptions in the Medicaid statute that permit non-State employees to be involved in the eligibility process.

STATUTE AND REGULATIONS: Under Medicaid law, States are required to establish or designate a single State agency to administer their Medicaid program and determine Medicaid eligibility. Moreover, the Medicaid statute requires that the State agency responsible for Medicaid not delegate authority to "exercise administrative discretion in the administration or supervision of the plan" to non-government entities. The regulations implementing that part of the statute also require that other agencies which perform services for the State agency "must not have the authority to . . . substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency."

Indeed, the presumption that all stages of the eligibility determination process must ordinarily be performed by governmental employees was implicitly endorsed by Congress in 1990. This provision requires that States provide for "receipt and initial processing" of Medicaid applications at certain locations other than State public assistance offices ("outstation" locations). The legislative history indicates that Congress believed that this provision created a specific exception to the general rule that eligibility functions were State functions, and provided specific guidance on the circumstances and extent under which non-State employees could be involved in the eligibility process. The legislative history of the Medicaid statute demonstrates a clear recognition that such functions must generally be performed by government employees. This distinction applies to Medicaid only and should not be interpreted to apply to other programs.

OUTSTATIONING UNDER MEDICAID: States are required to perform outstationing functions in disproportionate share hospital and federally qualified health centers. Under Medicaid regulations, States are permitted to perform outstationing functions in other, non-specified locations where pregnant women and children receive services; for example school-linked service centers and family support centers. Outstation locations do not include State or county public assistance offices. States may staff outstation locations with State employees or non-State employees (e.g., contractors or volunteers), or a combination of both. Because outstationing can involve the use of non-State employees to perform certain eligibility-related functions, Medicaid regulations specify which functions can be performed by non-State employees and which must be performed by State workers. Non-State employees can take applications, assist applicants in completing applications, provide information and referrals, obtain required documentation, and information gathering interviews. Non-State employees are specifically precluded from: (1) conducting evaluative interviews or evaluating the information in the application and supporting documentation; and (2) making a determination of eligibility. Actual evaluations and determinations can be made at the outstation location or at a State Medicaid agency office, but they must be made

by a State employee authorized to make eligibility determinations for the State Medicaid agency.

Impact on Texas: Requiring the interview to be conducted by public employees except in the case of outstationed Medicaid workers will presumably diminish the ability of private contractors to achieve costs savings through outsourcing. However, this option does preserve the contractor's ability to implement an integrated corporate system for eligibility decisions and to explore aggressively the existing outstationing authority.

OPTION 2: Permit Texas to conduct a demonstration in a sub-state area of several counties that would test whether the privatization of certain eligibility functions is effective. As a matter of policy, we recommend permitting privatization of only those functions that outstationed Medicaid eligibility workers are currently permitted to perform (see above).

STATUTE AND REGULATION: Section 1115 of the Social Security Act grants the Secretary broad discretion to waive provisions of Title 19 in support of a demonstration project consistent with the purposes of SSA. Utilizing this authority, the Department could waive the Single State Agency and merit personnel requirements of Title 19 to the extent necessary to permit the demonstration to proceed.

IMPACT ON TEXAS: While this option would permit increased privatization in some counties and the resultant potential cost savings, the State is likely to be concerned about the burden of operating two eligibility determination systems in the State.

Med. autostatic line - 1.

IV - by state - IV is crucial to determ elig.

me - 2 kinds of IVs??

you can ask the info + docs - can assess veracity?

me - do you have to have both IVs?

Medicaid - prob more routine.

FS - prob Yes.

O2 - line of current (ie. 3-way) memo, but in substate form.

HHS

690 - 7000

5006??

Bruce V. / Kevin T.

01 - except where outlying authd by law

outreach [outreach activs
data processing - prob can do now.

rulebk [no initial info collection interview

State for anything they can't now do?

THE WHITE HOUSE

now - all public.

priv. [in coll'g info ← split track? seems silly.
pub [eval determ

but gives some of leeway to do what could from 1st memo?

02 - old memo, but substate kt - never raised in any conv. extreme bad faith

but - duplicg whole trumpty view of them too.

03 - Draw line at Tx.
If no legal imped - HHS comf.

CLINTON LIBRARY PHOTOCOPY

From: Kenneth S. Apfel on 04/09/97 05:05:59 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP, Anne H. Lewis/OPD/EOP
Subject: Re: Sect. Glickman and Privatization

I'd like to see some language limiting scope as much as possible. Sending signals that this is the 50 state model would really raise a ruckus; but indicating that the idea will only be approved for single state might be a stretch

Cynthia A. Rice 04/07/97 12:00:22 PM

Record Type: Record

To: Kenneth S. Apfel/OMB/EOP, Anne H. Lewis/OPD/EOP

cc: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP
Subject: Draft HHS letter to Texas

If the decision is made to draw the "Medicaid line" HHS wants to send its letter to Texas ASAP. Thus, they've me to circulate a copy to you all in case you have any objections. I will red dot a copy to each of you now.

Cynthia A. Rice 04/09/97 03:36:19 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Sect. Glickman and Privatization

If we get a decision drawing the "Medicaid line" --

Secretary Glickman would like to put in the Dept. of Ag's letter to the state of Texas that this will be a one-time experiment -- just because the Dept. of Ag. will grant an administrative waiver to the state of Texas does not mean it will do so for other states. He would have prefered such language in the memo to the President but knows it was taken out at HHS' request.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Diana Fortuna/OPD/EOP
Anne H. Lewis/OPD/EOP
Kenneth S. Apfel/OMB/EOP

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C 20006
(202) 637-5000

EXECUTIVE COUNCIL

JOHN J. SWEENEY
PRESIDENT

RICHARD L. TRUMKA
SECRETARY-TREASURER

LINDA CHAVEZ-THOMPSON
EXECUTIVE VICE PRESIDENT

Albert Shanker
Vincent R. Sombrotto
John T. Joyce
Jay Mazur
George J. Kourpias
Michael Sacco
Gloria T. Johnson
J. Randolph Babbitt
Pat Friend
Sumi Haru
Leon Lynch
Arthur Moore
Jake West

Edward T. Hanley
Gerald W. McEntee
Morton Bahr
Lenore Miller
John N. Sturdivant
Ron Carey
Douglas H. Dority
Clayola Brown
Michael Goodwin
Carroll Haynes
Doug McCarron
Arturo S. Rodriguez
Alfred K. Whitehead

Wayne E. Glenn
William H. Bywater
Robert A. Georgine
John J. Barry
Frank Hanley
Arthur A. Coia
George F. Becker
M.A. "Mac" Fleming
Joe L. Greene
James LaSala
Andrew McKenzie
Robert A. Scardelletti
Andrew L. Stern

James E. Hatfield
Marvin J. Boede
Gene Upshaw
Moe Biller
James J. Norton
Frank Hurt
Stephen P. Yokich
Carolyn Forrest
Sonny Hall
William Lucy
A.L. "Mike" Monroe
Robert E. Wages

March 20, 1997

Mr. Bruce Reed
Advisor to the President for
Domestic Policy
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Reed:

Thank you for arranging the opportunity for us to present our views on the privatization of the Medicaid and Food Stamp programs. It should be clear from our discussion that we think the federal government would be ill-advised to permit the deputation of private companies to administer these public welfare programs for at least the following reasons:

The Food Stamp Act and Medicaid Place Broad Restrictions on Delegation of Administrative Functions to Non-Public Employees, and a Waiver of These Protections Would be Vulnerable in a Legal Challenge.

Discretionary decisionmaking in these two programs is to be performed by public officials and employees. For example, the statutory language governing certification of eligibility for food stamps is clear that eligibility determinations must be made by public employees. Specifically, the Food Stamp Act states that "the State agency personnel utilized in undertaking . . . certification shall be employed in accordance with the current standards for a Merit System of Personnel Administration . . ." 7 U.S.C. § 2020(e)(6). The Department of Agriculture's regulations reinforce the fundamental principle that public employees must conduct certification interviews and certify households for food stamps:

> State agency employees [employed in accordance with a merit system of personnel administration] shall perform the [eligibility] interviews required in § 473.2. **Volunteers and other non-State agency employees shall not conduct certification interviews or certify food stamp applicants.**

7 C.F.R. § 272.4(a)(2) (emphasis added).

Similarly, Medicaid requires that States establish or designate a single State agency for administering their Medicaid plans, and provides that "the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan" -- that is, by public employees. 42 U.S.C. § 1396a(a)(5). The accompanying regulations echo this point, directing that the State agency "must not delegate, to other than its own officials, authority to (i) [e]xercise administrative discretion in the administration or supervision of the plan, or (ii) [i]ssue policies, rules, and regulations on program matters." 42 C.F.R. § 431.10(e).[1]

The foregoing statutory and regulatory provisions plainly demonstrate Congress' and the Executive Branch's clear expectation that administrative functions in the Food Stamps and Medicaid programs are to be handled by public employees -- an expectation which we believe is firmly grounded in compelling policy arguments, set forth below, in favor of public administration of public benefits programs. The Administration should not act in a manner contrary to legislative intent in evaluating proposals implicating these provisions.

Waiver authority under these programs is limited, and privatization of discretionary administrative functions will in most instances exceed that authority. Both the Food Stamps and Medicaid programs authorize waiver of certain requirements under certain limited circumstances.[2] The scope of administrative waiver authority is

---

[1] It is worth noting, as we discuss in greater detail below, that one area where HHS has permitted privatization -- i.e., outstationing of intake functions at hospitals -- remains overwhelmingly public.

[2] It is our understanding that no waiver request has been submitted in connection with the proposed privatization of numerous programs by the State of Texas. Given the clear statutory language mandating eligibility determinations by public employees in the Food Stamps and

constrained by important elements of these programs. Only limited changes in the provision of services are permitted, subject to individual assessment and approval of a particular state's waiver request.

The Secretary of USDA may waive requirements of the food stamp program only for pilot projects of a limited duration and only "to the extent necessary for the project to be conducted." 7 U.S.C. § 2026(b)(1)(A), as amended by P. L. 104-193, § 850. "[I]mprov[ing] program administration" and "allow[ing] greater conformity with the rules of other programs" are among the permissible purposes of a waiver arguably relevant to the issue at hand, id., but any such initiative "must be consistent with the food stamp program goal of providing food assistance to raise levels of nutrition among low-income individuals." House Rep. 104-725, accompanying H.R. 3734, at 479. Thus, in order to justify a waiver of the public eligibility determination requirement, the Secretary would need to demonstrate (1) that the waiver was necessary for the project in question; (2) that the project furthered a permissible purpose, e.g., that is, that the project would actually improve program administration; (3) that the project furthers the goal of providing food assistance to low-income individuals; and (4) that the project is of a limited duration. For the reasons set forth below, we believe a studied review of an actual request to privatize eligibility determinations will reveal that contrary to improving program administration, privatization will in reality have a detrimental effect on program administration as well as on benefit recipients. Consequently, we believe approval of a waiver request seeking to privatize eligibility determinations will be vulnerable in any subsequent judicial review.

Similarly, while the Secretary of HHS is permitted to waive requirements of the Medicaid statute for an "experimental, pilot, or demonstration project" which is "likely to assist in promoting [statutory objectives]", 42 U.S.C. § 1315(a), that authority is not without its limits. Rather, "§ 1315(a) plainly obligates the Secretary to evaluate the merits of a proposed state project, including its scope and its potential impact on [benefit] recipients." Beno v. Shalala, 30 F.3d 1057, 1068 (9th Cir. 1994). In other words, "[o]n its face, the statute allows waivers only (1) for experimental, demonstration or pilot

---

Medicaid programs, it is manifest that no privatization is permissible in those programs unless the federal government approves a State waiver request following notice, comment, and agency evaluation of any such request. In any case, we do not believe a waiver permitting privatization of eligibility determinations would be permissible under the standards set forth in the statutes, as described in more detail above.

projects, which (2) in the judgment of the Secretary are likely to assist in promoting the objectives of the Social Security Act and only (3) for the extent and period she finds necessary." Id. at 1069 (emphasis added). As with waivers under the Food Stamp program, we believe careful scrutiny of a proposal to privatize eligibility determinations in the Medicaid program will reveal that such an approach contravenes the purposes and objectives of the Social Security Act, compromises a strong policy in favor of public administration, and negatively impacts Medicaid recipients. Consequently, we believe such a waiver would be vulnerable under judicial review.

TANF did not alter these fundamental principles. When the Congress passed, and the President signed, the most sweeping repeal of an entitlement program since the Social Security Act was passed, Congress stopped short of expanding private administration and eligibility determinations in the Food Stamp and Medicaid programs even as they were allowing private actors to play a greater role in former AFDC functions. For all the changes in administrative procedures which the new law allowed, it made precious few changes in Food Stamp and Medicaid administration. In fact, while one version of the 1995 welfare bills struck the merit-based requirement for food stamps, it was restored in the conference committee. Given this legislative history, it would be particularly distressing if the Administration now chose to move in a policy direction which Congress rejected in favor of public provision of services.

Publicly-Funded Benefit Programs Deserve Public Accountability

Federal benefit programs funded by taxpayer dollars, and especially programs of the magnitude of Food Stamps and Medicaid, deserve full public accountability, which we believe is best provided through public administration by public employees. Private contractual arrangements cannot sufficiently assure the requisite level of public accountability. Moreover, privatization of public benefit eligibility determinations raises numerous other problems, described in greater detail below. For these reasons, as State waiver requests are received, we believe the Administration would be well advised to disapprove requests for private administration and eligibility determinations.

Privatization of Public Benefit Programs Faces an Array of Problems

Discretionary control over access to public programs. As we illustrated in our discussion, the intake processes around Medicaid and Food Stamps are replete with instances where personnel are making judgements about the validity of information and

the weight of various factors. Under private determinations, this discretion is exercised under the direct influence of financial incentives which may work counter to public goals.

During our discussion, the issue of private control over distribution of public benefits in the Pell Grant and Guaranteed Student Loan programs was raised. However, these programs, and the types of private activities conducted under them, are in no way comparable to Food Stamps and Medicaid. First, it is important to point out that Congress expressly contemplated significant activity by private actors in these programs, contrary to the Food Stamp and Medicaid programs. Furthermore, the Pell Grant and Guaranteed Student Loan programs are extremely small compared to the billions of dollars spent under Food Stamps and Medicaid. Unlike student loans, food and medicine are fundamentally more important to survival than are other categories of benefits. The types of clients and the nature of the decision being made are more complex. What is more, the incentives under Pell Grants and Guaranteed Student Loans would encourage oversupply of loans, not restrictions on benefits as would be the case for food stamp or Medicaid eligibility under private determinations. It is worth noting that just two days ago Pell Grants were the subject of a Wall Street Journal article highlighting fraud problems involving overpayment by colleges.

Unlike student aid, the private entities which would be asked to determine Food Stamp and Medicaid eligibility have no particular expertise in these programs and are being asked to enter a policy area undergoing dramatic change. Finally, the food stamp program includes specific, detailed provisions governing the behavior of eligibility workers (e.g., face-to-face interviews, etc.) and even the facilities in which interviews can occur (in order to preserve privacy). This detail suggests that the framers of the legislation understood that the benefits and information they were dealing with are uniquely sensitive and must be protected through merit-based personnel. Taken together, the combination of discretion, financial incentives, lack of expertise, and vitally important benefits argues strongly against private eligibility determination in these programs.

Eligibility determination related to appeals process. It is important to remember that the lead staff person on eligibility is also responsible for informing clients of their appeal rights. We believe that allowing private contractors to stand between clients and the right to appeal will raise serious issues around due process. We fear that private contractors are both more likely to deny clients due to financial incentives and less likely to be forthcoming about appeal rights than are public servants.

Private internal accounting process can disadvantage clients. Particularly in social service areas, measurement issues influence outcomes. For example, President Nixon used administrative authority instead of legislation to reduce welfare payments by changing "quality control" measures to look only at overpayments. Even if states make no legislative changes, private firms have every reason to monitor themselves only in ways that reduce payments. Sometimes this will match public goals and sometimes it will not. These issues are extremely difficult to specify in advance through contract arrangements, given the control over internal accounting which private firms will always enjoy.

Contractual boundaries are not as protective as direct public accountability. Privatization advocates will argue, in the abstract, that private contracts can capture all contingencies. We don't believe this. It is simply untenable that a written agreement with private firms can adequately safeguard against all contingencies. The essence of public, merit-based service provision is the emphasis on public accountability, procedural guidelines, and extensive written records. Complete protection of public trust through contract language is unrealistic. Public provision of services acknowledges that all contingencies cannot be predicted, replacing the rigidity of contracts with direct democratic accountability. Privatization places supervisors and auditors outside the process of determinations, forcing them to evaluate reports without being able to assess the capabilities of the individuals who compiled the information or the validity of the documents upon which they are based. Line supervisors, on the other hand, are in direct contact with the individuals responsible for eligibility determination. The accountability is direct, personal, and informed by practice. In private settings, ultimate accountability is to shareholders, not elected leaders. Taxpayers don't elect the CEO of Lockheed. It is the combination of discretion over vital benefits and financial incentives to limit their distribution that troubles us.

Accurate accounting requires vast monitoring expense. We do not believe it is possible to effectively monitor contracts in a manner that is less costly than public provision. Cost estimates for private contracts never fully account for the cost of public monitoring. Moreover, private contracts run the risk of generating both public and private layers of management, auditing, and processing functions. If the federal action allows states to hand off contracts, the federal government will end up spending more on administrative oversight or risk political and financial problems.

The potential for fraud and cost over-runs appears high. Current practice proves that contract monitoring must be taken very seriously. As mentioned in our meeting, Canadian experience with the same contractors that are pursuing contracts in Texas raises serious questions about cost over-runs and performance. The Department of Public Works and Government Services canceled their $44.5 million contract with Andersen when the company failed to meet its obligations and demanded a doubling of the contract cost.

Experience in the U.S. also encourages caution. Lockheed and Martin Marietta, for example, have paid millions of dollars in fines related to bribery lawsuits. In December, Lockheed Martin paid over $5 million to settle a lawsuit involving overcharging. In Texas, former state officials have left public service specifically to pursue more lucrative private contracts. Andersen Consulting's contract for the Child Support Enforcement Tracking System is currently four years behind schedule and the contract cost has grown 600 percent. The Texas auditor's report noted that Andersen underestimated the complexity of the tasks and made insubstantial provisions for a changing environment.

From the individual level all the way to corporate policy, public monitoring of private contractors would have to be extremely vigilant -- and even then there will be problems which involve misuse of federal dollars. Moreover, the cost-sharing relationships which exist in these programs open the federal government to greater financial and legal exposure when contracts go awry.

Confidentiality issues. We are concerned that the full extent of confidentiality problems have not been addressed. Eligibility determiners enter social security data, unemployment insurance databases, and other public program benefit files. Allowing private individuals connected to private firms to access these databases raises a wide range of confidentiality issues, some of which will be unforeseeable.

Private encroachments into Medicaid already go too far. We acknowledge that private firms are entering new areas related to Medicaid right now. But these incursions only illustrate the negative consequences. We believe the Administration has gone too far in allowing private actors to encroach upon the Medicaid program. For example, new positions called Health Benefits Manager should be public, not private. The honest broker role may not be "honest" if private, self-interested parties are involved. Mathematica's evaluation of Medicaid managed care in California (May 1996) illustrates

this problem. They describe the privatized enrollment process as "chaotic and problematic". The solution proved even worse:

> Recognizing the confusion, DHS allowed providers to assist individuals to enroll but this actually led to even greater problems. Doctors (and clinics) worked with patients to complete enrollment forms designating themselves as primary care provider (in whatever plan they belonged to). Unfortunately, however, since many clients visit more than one provider, many clients enrolled in several plans, selected several doctors as their primary care physicians, or both.

Ultimately, DHS had to step in to untangle the problems and the study notes that "DHS admits it had too few staff to fully monitor the conversion." With crucial health and nutrition benefits on the line, we believe it is inappropriate to risk similar problems on a national scale.

The Outstationing Experience. HCFA has acknowledged the constraints placed by the Medicaid statute on eligibility determinations. It did so in the context of promulgating regulations to enforce the requirements of OBRA 1990 that states provide for the receipt and initial processing of applications of certain persons at locations other than welfare offices. Such "outstation" locations include certain hospitals and health clinics. In interpreting what "initial processing" means for purposes of this requirement, HCFA explained that "[i]f we were to define initial processing to include making a determination of eligibility, the definition would conflict with the requirement of [42 U.S.C. § 1396a(a)(5)]. Under [that] section, the plan must be administered by a single State agency and determination of eligibility is restricted by this section to the Medicaid agency, the title IV-A agency, or SSA when administering the SSI program." Medicaid and Medicare Guide, para. 42,662 at 41,820.

We question whether HCFA exceeded its authority by bifurcating initial processing and eligibility determinations in this way, and by permitting initial processing to be performed by private actors. These eligibility functions are closely related, and do not lend themselves to such an artificial division of labor, as indicated by the apparent reluctance of states to utilize private actors at outstations. In any case, outstationing remains overwhelmingly public. Only a handful of states have health care provider staff trained to be outstationed eligibility workers. (Medicaid Source Book, CRS, 1993). Two of the largest programs, Los Angeles County and New York City, use public workers for

these functions. The State of Ohio outstationed these functions to county public health providers who were public employees. Similarly, in New Mexico, even though private workers are involved in application intake, a public welfare worker is on-site and involved in the process. In other words, even when given the opportunity to privatize, states are quite reticent, for good reasons, to permit private providers to engage in eligibility functions.

As the foregoing discussion demonstrates, we believe any decision to expand private functions within the Medicaid and Food Stamps programs will put federal dollars, federal agencies, important federal programs, and recipients of federal benefits at risk.

While our discussion last Friday did not focus on the severe impacts on the almost 500,000 public employees whose jobs potentially are in danger, I would like to close this letter by noting that these are enormous issues in their own right. The public employees who currently administer the Food Stamps and Medicaid programs are commited public servants who have devoted their energies and talents to important social programs. They deserve our appreciation and respect. Privatization of the administration of these programs could well result in dedicated employees losing their jobs and job-related benefits, to the advantage of private corporations with an incentive to maximize profits by keeping wages and benefits as low as possible. However, because we believe proposals to privatize the administration of Food Stamps and Medicaid fail for the reasons detailed in this letter, we have not focused here on the extensive worker protections, standards, and programs that would be required in any privatization initiative.

I would appreciate your prompt consideration of these points.

Sincerely,

Gerald M. Shea

Gerald M. Shea
Assistant to the President

cc: Gene Sperling
Ken Apfel

cc: Bruce
Cynthia
Diana
John Podesta
Ken Apfel
(+return)

March 27, 1997

MEETING WITH LABOR LEADERS

DATE:	March 27, 1997
LOCATION:	Oval Office
BRIEFING TIME:	12:00 pm - 12:15 pm (Oval Office)
EVENT TIME:	12:15 pm - 1:00 pm
FROM:	Bruce Reed

I. PURPOSE

Labor leaders want you to hear first-hand their concerns regarding two welfare reform issues: whether states can privatize certain administrative functions of the Food Stamp and Medicaid programs, and whether worker protection laws -- particularly the minimum wage (Fair Labor Standards Act) -- apply to work programs under the new welfare law.

II. BACKGROUND

We have had a continuing dialogue with John Sweeney, Gerald McEntee and other union representatives on these issues over the last several months, including White House meetings on March 10th and March 14th.

We are almost ready to issue guidance that will please the unions (and greatly displease the states) on the minimum wage issue. We have given the labor leaders private assurances on this score, but they are impatient for us to announce the policy. **You should provide further assurances that our interpretation of the law is consistent with their postion and that we will issue guidance very shortly.**

We have reached a consensus recommendation on the privatization issue that will anger the unions, although it gives states only part of what they want. The unions have low expectations of how we will come out on this issue, but they care about it greatly. **We think you should refrain from giving the union leaders any encouragement on this issue.**

The attached memo provides you with more detailed information on these two issues. We urge you to read the memo carefully before the meeting.

III. PARTICIPANTS

Briefing Participants:
John Podesta
Bruce Reed
Elena Kagan
Gene Sperling

Event Participants:
Gerald McEntee, President AFSCME
John Sweeney, President AFL-CIO
Morton Bahr, President CWA
Andrew Stern, International President SEInternational U
Gerry Shea, Assistant to the President, AFL-CIO

John Podesta
Bruce Reed
Elena Kagan
Gene Sperling

IV. PRESS PLAN

Closed

V. SEQUENCE OF EVENTS

Discussion. Gerald McEntee should be the first union representative to speak.

VI. REMARKS

No formal remarks required.

VII. ATTACHMENTS

Attached is a memo discussing the privatization and labor protection issues in more detail.

Ask John

Clearly
- Reserve it to say are - conditioned on switch bits etc
- Look at others very carefully - make clear it's an experiment. Weigh TX experiment + see how it comes out.

Call Ron - wants to play!

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: RU DATE: 3/25/10

~~CONFIDENTIAL~~...INTERNAL WORKING DOCUMENT

MEMORANDUM March 24, 1997

To: **Larry Matlack**

From: **Ray Uhalde**

Subject: **Privatization of Federal Public Assistance Programs**

This follows up on my earlier comments to page 10 of the interagency paper on privatization issues. The purpose of this memo is to provide further details about the types of employee protections that should be provided when any function of Federal-State programs is privatized. I note that these protections, however, should not be used to justify any decision as to whether, or to what extent, a governmental function should be privatized. This memo also includes a brief discussion of the need to seek the approval of the State legislature before privatizing any Federal-State function.

(1). Assuring the Quality of Program Services Through Worker Protections

Significant privatization of Federal-State programs could result in the replacement of most existing employees with new, inexperienced employees and a resulting failure to achieve minimum standards of efficiency. The intended recipients of these programs deserve to have the quality of program services maintained during the change. I assume that any contract to privatize governmental functions will include performance standards intended to maintain or improve service quality.

Providing worker protections can further ensure service quality and is consistent with past decisions in which the Federal Government provided assistance to groups of workers to alleviate adverse employment effects caused by direct Federal action. These protections have ranged from efforts to make workers whole to assisting workers in making the transition to new employment. (See attached survey.) In some instances, these worker protections were funded by the Federal government, while in other cases the Federal government mandated that the protections be provided and funded by other parties.

The following guidelines are intended to minimize the replacement of experienced staff with inexperienced staff:

> Right of First Refusal -- Existing employees performing the functions to be contracted out would have the right of first refusal to employment under the new contract in positions for which they are qualified.

Pay and Benefit Retention -- In order to provide the greatest possible incentive for existing employees to accept employment under the new contract and thereby assure the quality of program services, they would be paid their existing pay and benefits for some temporary period (e.g. a minimum of 24 months).

Provision of Adjustment Services -- Workers who do not choose contract employment or choose to leave such employment within a specified period (e.g. 2 years) would be provided assessment, counseling, funding and arranging of needed training services and job search assistance prior to actual displacement, in order to place workers either in other State jobs or in private sector jobs.

I note also that any decision to privatize raises serious questions regarding the representational rights of organized employees whose jobs are to be contracted out. These employee representation questions need to be examined before any privatization decisions are made.

(2). Required Approval of the State Legislature

The approval of the State legislature should be sought when any Federal-State program is a candidate for privatization. It is our view that the approval of privatization plans by State legislatures, especially where Federal programs and services are provided by State agencies, is likely to lead to more orderly privatization processes which reflect a consensus within a State.

Certain authorizing statutes may be interpreted to require State legislative approval. For example, Section 4 of the Wagner-Peyser Act provides a significant role for State legislatures by requiring that States can receive Employment Service appropriations only if their legislatures accept the provisions of the Act and designate or authorize the creation of a State agency to operate the program. Because privatizing or contracting out would constitute a transformation of the existing State agency, we have determined that Section 4 of Wagner-Peyser requires that such privatization plans must be approved by the State legislature.

I hope these comments are reflected in the next version of the paper and look forward to discussing them with you at your earliest convenience.

MEMORANDUM

Garnet F. Coleman
Texas House of Representatives
District 147

To: Bruce Reed, Director of Domestic Policy Council,
The White House
Attention: Kathy Mays

From: Garnet Coleman
Texas State Representative, District 147 Houston

Re: TIES

Date: March 25, 1997

VIA FACSIMILE

****

Enclosed please find the information we discussed. The Austin American Statesman article clearly reflects the concerns the state legislature has regarding the Texas Integrated Enrollment System (TIES). The Workforce Development Oversight Committee Report shows the problems with the agency's creation. I have also included an explanation of the alternative Department of Human Services (DHS) streamlining initiative and the State Auditor's summary of the Protective and Regulatory Services (PRS) automation. If you have any other questions or need further explanation of these documents, please do not hesitate to contact me at my office at (512) 463-0524 or you may page me at (713) 891-7979.

Thank you.

Member:
House Appropriations Committee
House Committee on Public Health

DHS STREAMLINING INITIATIVE

The DIIS initiative is designed to streamline public assistance programs in an effort to cut costs, reduce fraud, increase efficiency and strongly encourage work while providing temporary assistance if needed. Linking appropriate state agencies (such as DHS, TWC, AG-Child Support Enforcement, TDH, etc.) will also save time and eliminate duplication by allowing people seeking aid to be simultaneously screened for services offered by different agencies. The DIIS initiative will:

- Improve client satisfaction and access to services through a single process with multiple access points. A virtual one-stop concept will provide a state-of-the-art integrated system that uses a single application process that can be accessed from the client's home, one stop centers, local faith-based and charitable groups, local providers, hospitals, nursing homes and other locations via telephone, computer terminal or face-to-face encounter. Night and weekend availability will better meet the needs of the working community. The process will emphasize and reward work and personal responsibility.
- Maximize efficiency through a streamlined reengineered process that eliminates duplicate data collection, reduces fraud, reduces time per case, allows flexibility to meet local community needs and for local options related to wage supplementation, child care and other benefits as a substitute for cash assistance, and optimizes employment and eligibility expertise. By combining the best of both the public and private sectors, the State's investment in staff, hardware and facilities will be protected while leveraging private sector technology and service expertise. Balancing the experience of the public sector with the innovation of the private sector will build on the strengths of both to create a system that really works.
- Increase responsiveness and accountability by employing a system that tracks and reports on the progress of programs. Detailed information on where Texas dollars are going, who is receiving assistance, and the efficiency of the implementation and ongoing process will allow problems to be spotted quickly, provide information for public policy decisions and measure results and performance outcomes.
- Texas will lead the nation in meeting federal welfare reform requirements for a central client registry by expanding the capability of the State's Integrated Data Base Network. This capability will give access to client demographic, screening and referral data to all appropriate agencies and legislative inquiry access to facilitate alternative policy development scenarios.

KEY ASSUMPTIONS

- DHS can enter into a contract with a private contractor for Call / Mail Center operations, development of procurement documents, and technical oversight without further competition
- DHS will implement a comprehensive transition placement program that will provide the maximum amount of assistance possible in helping staff adversely impacted by agency downsizing secure employment as quickly as possible
- Start date of 9/1/98 for application development (coding) includes time for competitive procurement of application development and hardware and education of the new contractor to reengineered processes
- Cost of severance package (insurance continuation, retention pay) not included in projected costs
- DHS administrative structure will be substantially changed to support the new business operation
- The current 10 region administrative structure will be realigned to a 6 area administrative structure
- Legislative authority to cancel leases and close offices will need to be obtained up front
- Current service locations (448 permanent locations and 35 itinerant locations) will be reduced to 221 permanent service locations and 84 itinerant locations (Closures FY 00 - 37, FY 01 - 46, FY 02 - 98)
- All service locations will be configured to comply with 153 square foot requirement and will optimize opportunities for collocation
- Legislative authority to transfer funds within DHS appropriation to pay for application development, technical infrastructure and hardware will be obtained
- The application development and hardware will be competitively procured in a single offering containing both hardware and application development. The awarded vendor will be paid in installments tied to client usage.

NAFTA Displacement Funds

Work in Progress

a report by the
WORKFORCE DEVELOPMENT
LEGISLATIVE OVERSIGHT COMMITTEE

to
THE GOVERNOR,
THE LIEUTENANT GOVERNOR AND
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
OF THE STATE OF TEXAS

December 31, 1996

SENATOR RODNEY G. ELLIS, CHAIR
REPRESENTATIVE RENÉ O. OLIVEIRA, VICE-CHAIR
SENATOR ROYCE WEST
REPRESENTATIVE KIM BRIMER
REX MCKINNEY

WORKFORCE DEVELOPMENT LEGISLATIVE OVERSIGHT COMMITTEE

SENATOR RODNEY ELLIS
CHAIRMAN
REPRESENTATIVE RENE OLIVEIRA
VICE CHAIRMAN

SENATOR ROYCE WEST
REPRESENTATIVE KIM BRIMER
MATTHEW DOWD
REX MCKINNEY

December 31, 1996

The Honorable George W. Bush
The Honorable Bob Bullock
The Honorable Pete Laney

Gentlemen:

The Workforce Development Legislative Oversight Committee is pleased to present its report pursuant to charges in House Bill 1863, SECTION 11.02(b).

Respectfully submitted,

Senator Rodney G. Ellis
Chair

Representative René O. Oliveira
Vice-Chair

(Sen. West was not present to sign this page, but has approved the full report)
Senator Royce West
Member

(Rep. Brimer submitted the letter in Section IV)
Representative Kim Brimer
Member

(Mr. McKinney was not present to sign this page, but has approved the full report)
Rex McKinney
Member

P.O. BOX 12128, CAPITOL STATION • AUSTIN, TEXAS 78711-2128
PHONE: 512/463-0220 • FAX: 512/463-0207 • INTERNET: TED.MCLINDAAAS_3C@SENATE.STATE.TX.US

Executive Summary

WHY REFORM? THE FORCES FOR CHANGE

Three distinct forces converged to bring about Texas' workforce reforms. The hodgepodge of federal/state programs cobbled since the 1960s could not withstand the combined pressures of global competition, widespread dissatisfaction with job training and employment programs, and the shift to a new federalism.

Advances in information technology and communications thrust Texas and Texans—and their counterparts nationwide—into a global economy, where businesses and workers are as likely to find their competitors across continents as across town.

As policy makers and the general public realized that technology had changed the nature of work fundamentally and forever and that jobs which pay a living wage require more education and greater skills than in the past, there grew both a sense of dissatisfaction with public education and a perception that public job training and employment programs were not doing their jobs.

LEGISLATIVE FRAMEWORK FOR REFORM

The convergence of these three forces provided the impetus for systemic federal and state reform of workforce development efforts.

Federal proposals generally consolidated the categorical job training and employment programs, block granted funding to the states and provided relief from the more onerous federal workforce laws, rules and regulations. Federal reform efforts, unfortunately, stalled in the last Congress.

Workforce reform in Texas began with the passage of Senate Bill 642, the Workforce and Economic Competitiveness Act of 1993, and continued during the next legislative session with amendments to House Bill 1863, the welfare reform measure which became law in June 1995.

Texas' reforms were predicated on similar reforms at the federal level, but the failure of federal reforms should not be allowed to sink Texas' fledgling workforce system.

Forging a Statewide Workforce Development System

Together S.B. 642 and H.B. 1863 forge an integrated statewide workforce development *system* out of the myriad job training programs which previously operated independently of one another, without an overarching mission and without common purpose.

A better system is, however, simply a better means to Texas' larger goal: mak... a state where employers create high-skill, high-wage jobs, where residents have t... and training to fill them, and where everyone enjoys a high standard of livi...

MAR

Decisions about implementing the new system should therefore be made in this context. State officials and local boards would serve Texas employers and residents well if they first asked, *Does the proposed change contribute to making Texas employers more competitive or to preparing Texas workers for high-skill, high-wage jobs?*

THE GOAL OF TEXAS' NEW SYSTEM

S.B. 642 and H.B. 1863 delineate roles and responsibilities, set limits, define governance and management structures, and parcel out the funds to build an integrated workforce system that will better serve employers and residents. A better system is, however, simply a better means to Texas' larger goal: making Texas businesses and residents more productive and therefore more competitive in the global economy.

In other words, the goal is to make Texas a state where employers create high-skill, high-wage jobs, where residents have the knowledge and training to fill them, and where everyone enjoys a high standard of living. S.B. 642 and H.B. 1863 create a system which supports getting there, but the system itself should not become the end of the state's workforce initiative.

Dancing Toward the Vision

Though structured and legalistic in setting the parameters of Texas' reformed system, S.B. 642 and H.B. 1863 also choreograph the broad outlines of a new state/local workforce dance, one that keeps the economy humming and makes room for all Texans to share in the prosperity.

Though unwritten, this choreography transcends the rules and regulations. It lays out a vision of sweeping movement, of partners moving in step to the same rhythm, of a dance which:

- Eliminates artificial boundaries between programs and streamlines administrative costs.
- Opens access to everyone.
- Offers services that make a difference in people's lives.
- Connects training and employment to real, well-paying jobs.
- Provides employers an adequate supply of qualified workers.

- Makes workers lifelong learners who earn living wages and whose education and skills keep pace with technology.

Moving with Principle

This dance moves in accordance with several underlying principles, principles state officials and local boards should follow as they design and implement Texas' integrated workforce delivery system. In order that it better serve employer and resident needs, the new system should:

- Offer universal access, opening access and information to all employers and residents, not just the unemployed or economically disadvantaged.

- Be customer oriented, operating with a "services first" philosophy that puts decisions about services and quality in the hands of customers.

- Be demand driven, recognizing that high-performance employers create and control the jobs of the future.

- Maintain a high-skill, high-wage focus, targeting special services to employers who invest in workers and reward them well.

- Take a systems approach to service delivery, asking about every activity and decision, *What does it contribute to meeting employer and resident needs?*

- Customizes services to customer needs, assessing those needs objectively and addressing them creatively.

- Is outcomes based and accountable, focusing on performance and results.

ROLES & RESPONSIBILITIES IN THE NEW SYSTEM

By statute, the roles and responsibilities for implementing Texas' integrated workforce system are divided among state and local governments. Over time, the state's new system will give local areas unprecedented freedom and responsibility to operate their workforce programs, but the front-end job of setting up the statewide integrated workforce system fell largely to the Texas Workforce Commission.

As if this alone were not challenge enough, the commission was given responsibility for building itself as a new state agency at the same time—while also continuing to deliver services without interruption. The commission faced a monumental task even before it had leadership or staff.

Workforce Development in Texas Makes an About-Face

It is the integration of programs into a single system that poses the greatest challenge to the Texas Workforce Commission. The paradigm under which services are provided to customers must make a radical shift. Employment and training programs for too long tried to sell what they had available. Adopting a customer-oriented approach—imposing the same market forces on Texas' workforce development system that the system's customers face every day—represents an about-face.

STATUS OF IMPLEMENTATION TO DATE

Changes of the magnitude envisioned for Texas' workforce system will take years. While much remains to do, much has been accomplished in the 18 months since H.B. 1863 passed in June 1995.

The state has made significant progress toward fulfilling its responsibilities.

+ The governor designated 28 local workforce development areas and appointed workforce commissioners as well as members of the Texas Skill Standards Board.

+ The Texas Council on Workforce and Economic Competitiveness drafted and the governor approved a strategic plan with statewide goals, objectives and core performance measures.

+ The Texas Workforce Commission is up and running as a new state agency. Commissioners have been appointed and key management positions filled. The commission has transferred 28 programs from 10 different agencies, made progress toward an integrated management structure organized along functional lines and begun developing the necessary management control systems to ensure accountability and performance.

Local areas have also made significant progress in the process that begins with their forming local workforce development boards and culminates in their receiving formula allocations of funds.

As of December 20, all but four of the 28 workforce areas had submitted applications for board certification. Twenty-two boards had received certification by the governor. In addition, two areas had submitted strategic and operational plans, and another had submitted a strategic plan.

START-UP PROBLEMS

Not surprisingly, most of the problems cited in this report reflect the challenge of simultaneously establishing a new state agency and a new state/local service delivery system.

Getting a Slow Start

The state was slow to get moving on forming the Texas Workforce Commission—appointing commissioners, hiring the executive director and filling key management staff positions—and recent staff turnover may also slow progress.

Giving Conflicting Instructions

Because the Texas Workforce Commission has not instituted a systematic process for developing and transmitting policy directives—and other information—it has given conflicting instructions and sent mixed signals to its own staff and others.

Offering Minimal Help, Limited Guidance

The commission offered local areas minimal help and limited guidance in the formation of local boards.

Limiting Local Flexibility

A policy determination by the U. S. Department of Labor has prevented the formula allocation of Employment Services dollars to local workforce boards. Not block granting these funds to local boards will limit their flexibility to design and operate service delivery systems offering universal access. To date the Texas Workforce Commission has been unsuccessful in obtaining approval to formula allocate Employment Services monies, but negotiations continue.

LONGER-TERM IMPLEMENTATION CONCERNS

Leaders at the state and local levels and in the business and labor communities report several concerns about longer-term implementation issues which may obstruct future progress.

At the State & Local Levels

CATEGORICAL THINKING CONTINUES CATEGORICAL PROGRAMMING

Each revision of the Texas Workforce Commission's organizational chart shows the functional integration of services has progressed, but conflicting cultures are evident among staff transferred from different categorical programs. Not evident, however, is any indication the commission is taking steps to help staff escape their categorical boxes and take a broader view. Categorical thinking continues categorical programming, jeopardizing the commission's chances of building an integrated statewide system.

FEDERAL FUNDING SILOS COMPLICATE REFORMS

Texas can implement an integrated workforce services delivery system without federal workforce reforms, but the job will be harder. As long as federal funds target specific groups and limit allowable services, Texas is denied the freedom to set its own workforce funding priorities and design creative, appropriate solutions to employers' and residents' workforce problems.

PERFORMANCE PRESSURES ENCOURAGE CREAMING

The tendency in systems held accountable for producing results is to serve those who need the least help, to "cream" the best candidates off the top. How does a workforce system that promises universal access to residents and high-quality workers to employers avoid this and reserve resources for those with multiple barriers to employment?

WELFARE REFORM THREATENS WORKFORCE REFORM

Welfare reform flips the issue of creaming over and raises the specter of welfare recipients' crowding out everyone else who needs help from Texas' workforce system.

AUDITOR TAGS INADEQUATE MANAGEMENT CONTROL SYSTEMS

A state auditor's report raised questions about the Texas Workforce Commission's progress in developing important management control systems to reduce the financial risk of allocating funds to local workforce boards, ascertain the effectiveness of state and local operations and ensure the accountability of local programs.

OTHERS FLAG TOP-DOWN MANAGEMENT INFORMATION DESIGN

State officials and local workforce board staff have also noted that the Texas Workforce Commission has not sought input from end users in designing the management information systems they will have to use. Instead of working bottom up, the commission is working top down.

MINORITY PARTICIPATION LAGS

Several state legislators have concerns about lagging minority participation in the new workforce system. They want top management staff at the Texas Workforce Commission to better reflect the diversity of the state, and they also want assurances of minority participation in providing workforce services at the state and local level.

Doubts build about welfare proposal

■ Legislators question turning process over to private companies

By Suzanne Gamboa
American-Statesman Capitol Staff

It began as a few innocuous paragraphs tucked into a multipage, multidimensional welfare reform bill. Legislators overwhelmingly gave it their stamp of approval.

Then the sentences that talked of streamlining and cutting costs blossomed into a grandiose welfare experiment. To the chagrin of some lawmakers, the language became a proposal for a $2 billion contract that would make Texas the first state to let private companies control who gets welfare.

Two years later, some legislators say it's time to back up.

Even as Gov. George W. Bush is pushing the federal government to approve the Texas Integrated Enrollment Systems proposal, doubt is growing in the Legislature over the project's merits.

"I've been supportive of privatization when it makes sense, when there are cost savings, and we can perform a better service for the state," said Rep. Rob Junell, D-San Angelo, House Appropriations Committee chairman. "I'm not sure that's true in this case."

Rep. Garnet Coleman, D-Houston, said the objective of the legislation that started the proposal — to simplify the way Texans sign up for welfare and other benefits — has been lost in the push to go

See Doubts, Back page

Doubts grow about merits of taking welfare private

Continued from A1

private.

"Everybody is reviewing (the project) to see if there are other options," said Coleman, who co-sponsored the 1995 welfare reform law.


Garnet Coleman

Already, the potential role of the private sector is being reduced.

"Even if we go through with privatization," said Mike McKinney, the state's health and human services commissioner, "it's not going to be at the level everybody thinks or as high as I've been led to believe from what I've read in the media."

McKinney is in charge of writing the proposal that would be used to solicit bids. Because federal rules dictate how states should distribute social services money, Texas needs federal approval of the project before bids can be requested.

Lawmakers' doubts

The lack of federal approval is one of many concerns about the project. Consider what else is working against it:

■ Some lawmakers believe the Legislature never endorsed turning over government-run welfare services to private companies.

■ Thousands of state employees could lose their jobs and numerous state offices could be closed, something many lawmakers don't want in their districts.

■ One prospective bidder, the Texas Workforce Commission, hasn't earned the confidence of state lawmakers with its performance. The abrupt departure of the agency's executive director and questions about the agency's spending controls have lawmakers skittish about possibly handing the agency billions in state and federal money.

■ Some believe the project has been tainted by revelations that Dan Shelley, the governor's former chief legislative aide who guided the law through the Legislature, is now lobbying for prospective bidder Lockheed Martin IMS.

■ Other automation projects by Arthur Andersen Co., another prospective bidder on the welfare project, have been costly and are behind schedule. One of those is a child-support collection system in the attorney general's office, the other a system in the Department of Protective and Regulatory Services.

"I think the Legislature needs to take back this issue and have it resolved one way or another before we leave in June," Junell said.

The 1996 law directed the Council on Competitive Government, which includes representatives of Bush, Lt. Gov. Bob Bullock and House Speaker Pete Laney, to study whether the state could save the $563 million a year that it spends deciding who gets more than $11 billion in welfare, Medicaid, food stamps and other benefits.

"I certainly support the Council on Competitive Government," Junell said. "But I think in retrospect that this is a legislative issue."

Sen. Bill Ratliff, R-Mount Pleasant, said he supports turning functions over to the private sector if it saves taxpayer money and can be done more efficiently. But he also has questioned whether the state would save more in the long run if it does not deal with a for-profit company.

Waiting on Washington

Bullock said he doesn't think Texas should move ahead with the experiment until the federal government approves it.

"There is too much at stake at this to be gambling on it," Bullock said. "I've read a letter (from the federal government) that was sent in here, and it cast enough question in my mind that now is the time to stop, look and listen before we jump into this."

Bush remains committed to the project and to as much private sector involvement as possible. The governor last week called Donna Shalala, U.S. Health and Human Services secretary, to explain the project's importance and ask for approval or disapproval of the project.

Karen Hughes, Bush's press secretary, said Shalala promised to have an answer in three weeks.

Bush said if the federal government does not approve the project, it is dead.

"If they say no, I presume the project doesn't go forward because there will be a financial cost that will be hard for the state to bear," Bush said. "We just want an answer."

Austin American-Statesman Monday, March 10, 1997

FRONT PAGE

Welfare privatization hits snag

HOUSTON CHRONICLE

By POLLY ROSS HUGHES
Houston Chronicle Austin Bureau

MAR 24 1997

AUSTIN – Texas' top welfare official declared late last week that nothing short of states' rights were at issue in a feud with the federal government over a multibillion-dollar welfare privatization plan.

On Monday he called a truce – at least temporarily – after federal officials warned that Texas could be risking billions in federal welfare funding by moving ahead on the trail-blazing project without first obtaining explicit federal approval.

"We're not going to endanger federal funds I'm not stupid," said Texas Commissioner of Health and Human Services Mike McKinney.

"Because they did respond, negotiations are ongoing. We're still working with the federal government. We're still trying to get their approval," he added. "I'm not going to unilaterally thumb my nose at them and put the offer for bids on the street."

McKinney and Gov. George W. Bush have said they believe Texas has implicit federal approval to move ahead on the project based on a federal rule that requires a definitive federal response to state proposals within 60 days. Bush spokesman Ray Sullivan said Monday that they still hold that opinion.

McKinney, who suspects national labor unions of contributing to a three-month delay of federal approval for the pilot, said he retains the option at any time to start seeking bids for the contract.

"It depends on the negotiations between now and in two weeks," he said. "It's a political issue. I think (opposition) is coming from people who are afraid of change. I think it's probably some unions who are opposed to anything that looks like efficiency."

With Bush's approval, McKinney had planned to start seeking bids within two weeks on the contract, the first of its kind in the nation.

The contract, called the Texas Integrated Enrollment Services, would let a private technology company create and possibly run a system to screen applicants for more than $8 billion in welfare benefits. The project is comprehensive, encompassing 21 different social service programs. Some have estimated the project could cut up to 7,000 state jobs.

Worth an estimated $2 billion over five years, the contract has drawn the attention of several companies interested in bidding: Lockheed-Martin, IBM, Electronic Data Systems, Unisys and Andersen Consulting.

The plan also has set off alarms throughout the national labor movement. Union leaders fear the precedent-setting Texas privatization project could spread to other states.

Last December, presidents of the AFL-CIO, American Federation of State, County and Municipal Employees and Communications Workers of America discussed the Texas project with President Clinton's outgoing chief of staff, Leon Panetta, and current Chief of Staff Erskine Bowles, according to Brooks Sunkett, national vice president of Public and Health Care Workers of the CWA.

"I think obviously they're taking a closer look at this because of our concerns," Sunkett said. "We suggested jobs being at stake nationally. We're also concerned that privatizers are going to be making a profit off of other people's misery."

Uncertainty over the Texas project is frustrating members of the Texas Legislature. Lawmakers widely support the concept of a streamlined system for screening welfare applicants, but not all of them agree on how far privatization should go.

The state's desire to move forward on the project vs. the federal government's painfully slow approval process is cause for further anxiety.

"I have very mixed feelings about it," said state Sen. Judith Zaffirini, D-Laredo, chairwoman of the Senate Health and Human Services Committee. "They haven't raised any real objections. It's frustrating. We're trying to deal with a situation, we're trying to save money and we're trying to serve people who need it."

Sen. Bill Ratliff, R-Mount Pleasant, said he thinks the state should give serious thought to doing much of the project with state employees, especially considering the federal foot-dragging.

"I'm nervous about going ahead without explicit approval," said Ratliff, chairman of the Senate Finance Committee. "Maybe we ought to consider doing it in-house. Someone might even make a case there would be some savings. It's possible."

Rep. Harvey Hildebran, R-Kerrville, chairman of the House Human Services Committee, said he is pleased that negotiations remain open between the state and federal governments.

"Obviously, if we're going to lose money, I wouldn't advise them to move forward today," he said. "They temporarily have put it on hold. I think that is the correct action."

Rep. Garnet Coleman, D-Houston, said it could be appropriate for private companies to supply computers and develop software programs for the new system, but he thinks the line on privatization should be drawn there.

"I believe some form of privatization is good," he said. "But knowing how to approach and deal with clients that have little education and have tremendous needs may be better left in the hands of those that have been doing this for a very long time and that's the Department of Human Services."

TSEU UPDATE

National Union Leaders Meet w/ Clinton Administration On Texas Privatization

Three key national union leaders met with Administration officials on December 21 to push for a stop to privatization in Texas. Privatization planned under TIES or under Local Workforce Development Boards would require federal waivers or other approval. AFL-CIO President John Sweeney (also representing the SEIU), CWA President Morton Bahr, and AFSCME President Gerald McEntee met with outgoing White House Chief of Staff Leon Panetta, incoming Chief of Staff Erskine Bowles, Deputy Chief of Staff Harold Ickes, and the new Director of the Office of Management and Budget.

Welfare regrets

State wise not to jump into privatization

THE LUFKIN DAILY NEWS

Tuesday, March 11, 1997

Texas lawmakers are finding that sometimes it's best to leave well enough alone.

Two years ago, the state passed legislation designed to make Texas the first state to let private companies control who gets welfare benefits.

Even as the state is pushing the federal government to approve the Texas Integrated Enrollment Systems proposal, doubt is growing in the Legislature over the project's merits. "I've been supportive of privatization when it makes sense, when there are cost savings, and we can perform a better service for the state," said Rep. Rob Junell, D-San Angelo, House Appropriations Committee chairman. "I'm not sure that's true in this case."

The objective of the legislation — to simplify the way Texans sign up for welfare and other benefits — has been lost in the push to go private.

Among the concerns are:

- Some lawmakers believe the Legislature never endorsed turning over government-run welfare services to private companies.
- Thousands of state employees could lose their jobs and numerous state offices could be closed, something many lawmakers don't want in their districts.
- One prospective bidder, the Texas Workforce Commission, hasn't earned the confidence of state lawmakers with its performance. The abrupt departure of the agency's executive director and questions about the agency's spending controls have lawmakers skittish about possibly handing the agency billions in state and federal money.
- Some believe the project has been tainted by revelations that Dan Shelley, the governor's former chief legislative aide who guided the law through the Legislature, is now lobbying for prospective bidder Lockheed Martin.

Right now, the state spends $563 million a year deciding who gets more than $11 billion in welfare, Medicaid, food stamps and other benefits.

There are too many unanswered questions for the state to plow head-long into a project that has the potential for disaster.

It's no great secret that the welfare system is flawed — too many undeserving people are able to stay on the rolls because of a disinterested, bureaucratic system.

Something *does* need to be done about welfare, but not at the risk of jeopardizing those who truly need assistance.

62.

Diana Fortuna 03/27/97 08:42:20 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Emily Bromberg/WHO/EOP

cc:

Subject: Stenholm's guy

Stenholm's guy Ed Lorenzen left me a message telling me where Lt Gov. Bullock is on privatization. He said Bullock is still very much in favor of letting the state go the next step of issuing the RFO, but that that shouldn't obligate anyone to finally let a contract. I was surprised how much he stressed the notion that it remain an active option for the state to do no contract at all, after it examines bids.

Emily, he also said that we should make sure that Bullock is notified by us rather than the Governor. I will reinforce with Monahan.

Monahan also left me a message saying he needs our comments because HHS needs to get back to state tomorrow -- but I thought it was Monday or Tuesday.... I will ask him why he said tomorrow.

cc: Cynthia
Bruce
Diana

Stacy L. Dean	03/05/97 05:19:01 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:
Subject: privatization paper

Attached is the lastest draft of the agency privatization paper. There is another option and one or two more policy issues. It is a long read, but almost everything is there. If I were to do it again, I'd differentiate more between Wisconsin and Texas. Wisconsin has a more performance based approach which expands or contracts their privatization efforts based on how the public counties do compared with the privatized counties.

This version is being distributed to all the agencies tonight.

texcomb2.wp

Also

Where are we/what is happening on Wisconsin?

(1) Need to get better understanding of incentives
+ also penalties (q.c)

(2) Need to get btr understanding of what's nec. to do this – e.g., waiver, reg change?

Med - seems like the binding?
USDA - need waiver or just change reg as re let of certification?
OPM involvement?

(3) Need to figure out set of best national options.

(4) Need to figure out – anything Ken would give? what? Vice versa for us.

PRIVATIZATION OF FEDERAL PUBLIC ASSISTANCE PROGRAMS

New Draft

I. OVERVIEW & ISSUES

This paper has been prepared jointly by staff from the Departments of Agriculture (Food and Consumer Service), Health and Human Services (Health Care Financing Administration and Administration for Children and Families), Labor (Employment and Training Administration), and the Office of Personnel Management (OPM). The Federal agencies have been meeting recently to discuss the general background and issues surrounding privatization initiatives that are under review within the Departments and to explore options for making final decisions and responding to States. Decisions made here will set the precedents for proposals around the country.

Policy Issues: To what extent should the States be permitted to transfer the responsibility for eligibility determination for Federal public assistance programs to the private sector through competitively bid contracts?

Legal Issues: May the Merit System of Personnel Administration requirements, applicable in different ways in each statute, be waived to allow States to enter into contract agreements?

II. BACKGROUND

There is increasing interest among the State welfare agencies in transferring the administration of public assistance programs to the private sector through competitively bid contracts. This interest stems in part from the efforts of the Federal and State governments to test new methods to reduce costs, to improve program services and to increase self-sufficiency among program recipients.

Contracting or privatizing certain functions of the public assistance programs is not new, e.g. backroom data processing. What is new is the possibility of contracting with private entities to perform functions that have historically been the responsibility of the public sector, such as conducting the determination of eligibility and certification for public assistance programs like the Federal Food Stamp Program and Medicaid. While the new welfare law explicitly permits States to privatize TANF administration and service provision, no other major Federal public assistance program has such broad latitude[1]. Other programs became part of this issue because typically eligibility for AFDC (now TANF), Food Stamps and Medicaid and a host of other programs has been determined by a common process and worker.

---

[1] Note that eligibility for $6 billion in Pell Grants and $25 billion in student loans is routinely determined largely by non-Federal, non-public entities.

MAR-06-97 10:00 FROM:OMB ID: PAGE 2/16

III. THERE ARE CURRENT PROPOSALS BEFORE THE ADMINISTRATION REQUIRING DECISIONS ABOUT THE EXTENT TO WHICH PRIVATIZATION SHOULD BE PERMITTED

A. Texas Integrated Enrollment Services (TIES)

TIES is a statewide privatization initiative of the Texas Health and Human Services Commission (HHSC) and the Texas Council on Competitive Government (CCG) in support of a State law enacted in 1995. Under TIES, the certification and eligibility determinations for most public assistance programs, including the Food Stamp, Special Supplemental Nutrition Program for Women, Infants and Children (WIC), TANF and Medicaid programs, would be contracted to the private and/or public sectors through competitive bids.

USDA has determined the TIES proposal would require a waiver of the merit system requirements under the Food Stamp Act. HCFA is still reviewing the extent to which merit system requirements must be waived. The Federal agencies and the State of Texas have been negotiating the conditions for releasing a Request for Offers (RFO) for TIES since May 1996. With the exception of a final decision about the merit system provisions contained in the RFO, and the role of the single State agency, all other issues have been resolved with regard to the draft RFO.

Texas was expecting final approval of the RFO in January to be able to release the RFO by the end of the month. Two consortia have been developed with the intention of bidding on the RFO. One consortium is composed of the Texas Workforce Commission, International Business Machines Corporation and Lockheed Martin Corporation. The other consortium consists of the Texas Department of Human Services, Electronic Data Systems Corporation and the Unisys Corporation. Arthur Anderson has also indicated an interest in the proposal but has not aligned itself with a State agency.

Wisconsin Works (W-2)

Under the W-2 proposal, the State is contracting on a competitive basis with public or private agencies for certification actions such as gathering client eligibility information, conducting eligibility interviews and data input. The State, presuming the Department of Agriculture's approval of its waiver request of the merit system requirements for the Food Stamp Program, released its Request for Proposals (RFP). While the State can issue the RFP without USDA's approval, they will need to hear back from USDA in order to award the contract. State officials have advised that the contract process has been completed for one County (with over 60 percent of the State caseload) without the inclusion of the Food Stamp Program. Contracts have been awarded to six private,

MAR-06-97 10:00 FROM:OMB ID: PAGE 3/18

non-profit agencies.

C. Employment Services – One-Stop Grant

Legislation enacted in the State of Texas, effective September 1, 1996, provides for the delivery of labor exchange services that are authorized under the Wagner-Peyser Act and currently delivered by State employment security agencies by local workforce development boards and private, non-governmental providers. Thus far, Texas has not considered contracting out the delivery of unemployment insurance services. The Department of Labor has urged Texas to delay implementation until the Department's review is completed.

In addition, the State of Massachusetts, with the Department of Labor's approval of a 1994? grant to implement a competitive One-Stop Career Center system throughout the State, has awarded contracts to private-for-profit entitles to deliver labor exchange services in several local areas under that grant. Other States such as Montana, Utah, Pennsylvania, and Iowa are on the threshold of requesting similar approval.

IV. ORGANIZED LABOR RESPONSE

The Departments of Agriculture and Health and Human Services have received numerous letters from employee unions about the TIES proposal, including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Federation of State, County, and Municipal Employees (AFSCME) and the Service Employees International Union. The unions assert that a waiver of the merit system would result in a decline of client services, including access to program benefits and client confidentiality. The Department of Agriculture received over 1,000 letters from employees in Wisconsin objecting to the W-2 project.

In the case of the Texas workforce development legislation, the Department of Labor has received a letter from the AFL-CIO questioning the legality of privatizing employment services.

In the Massachusetts One Stamp project, the State AFL-CIO concurred in the proposal but current implementation problems are raising new concerns.

V. THE TEXAS SITUATION

A. Food Stamp Program–Certification and Other Program Requirements

The Food Stamp Act requires certification, i.e., the application and the components of

MAR-06-97 10:01 FROM:OMB ID: PAGE 4/16

the eligibility determination process, to be completed by merit system employees. Certification, however, is not defined in statute. As supported by legislative history to the Act, current regulations specify that the required interview be conducted by merit system employees. Given the complexity and discretion that may be required in the food stamp certification process, the food stamp interview is crucial to accurate determinations of eligibility and benefit level. It is through the food stamp interview that the worker solicits most household information, determines the necessity for additional verification or resolution of questionable information, and ascertains the need for appropriate policy decisions. It is also the applicant household's opportunity to have face-to-face contact with a public employee. Volunteers and other non-merit employees may assist an applicant household in other actions related to certification but may not conduct the food stamp interview or certify a household.

During recent debate on welfare reform legislation, Congressional conferees reinserted the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

B. Medicaid--Certification and Other Program Requirements

Similar to Food Stamps, the entire application process, from taking an application to making the final eligibility determination, is performed almost entirely by employees of the State agency responsible for administering the Medicaid program. Under Medicaid law, States are required to establish or designate a single State agency to administer their Medicaid program and determine Medicaid eligibility. Moreover, the Medicaid statute requires that the State agency responsible for Medicaid not delegate authority to "exercise administrative discretion in the administration or supervision of the plan" to non-government entities. The regulations implementing that part of the statute also require that other agencies which perform services for the State agency "must not have the authority to ... substitute their judgement for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency."

Unlike Food Stamps, the Social Security Act also provides for "outstationing", which allows the State to use private sector employees to perform some of the eligibility process at locations other than State TANF offices for certain groups of applicants. Outstationing was incorporated into the law to increase program access when the law was amended to substantially broaden the categories of eligible individuals.

States have the option of staffing outstation locations with State employees or non-State employees (e.g., contractors or volunteers), or a combination of both. Because outstationing can involve the use of non-State employees to perform certain eligibility-related functions, Medicaid regulations--but not the law--specify which functions can be

MAR-06-97 10:01 FROM:OMB ID: PAGE 5/16

performed by non-State employees and which must be performed by State workers.

Non-State employees staffing outstation locations can perform "initial processing" which includes: (1) taking applications; (2) assisting applicants in completing the application; (3) providing information and referrals; (4) obtaining required documentation; (5) assuring that information contained in the application is complete; and (6) conducting any necessary interviews.

Non-State employees are specifically precluded from: (1) evaluating the information contained in the application and supporting documentation; and (2) making a determination of eligibility or ineligibility. Actual evaluations and determinations can be made at the outstation location or at a State Medicaid agency office, but they must be made by a State employee authorized to make eligibility determinations for the State Medicaid agency.

C. Temporary Assistance for Needy Families

Section 104 of the Block Grant for Temporary Assistance for Needy Families (TANF) specifically allows States to "~~administer and provide services~~" under titles I and II of the welfare reform legislation through contracts with charitable, religious or private organizations. Therefore, there are no prohibitions to privatization ~~initiatives~~, such as TIES, related to merit personnel provisions for TANF. Most States have procedures where one generic worker may accept a joint application for food stamp, TANF and Medicaid benefits. If a household is determined eligible for TANF, they are automatically eligible for Food Stamps and Medicaid. Therefore if a State choose to administer the TANF program with a private contractor, large portions of Food Stamp and Medicaid eligibility could effectively also be privatized.

D. Waiver Authority to Conduct Demonstration Projects

The Food Stamp and Social Security Acts provide the two Departments with the authority to waive most statutory requirements to allow the States to conduct demonstration projects. However, because its authority for the Merit System of Personnel Management was transferred from USDA to OPM under the Intergovernmental Personnel Act of 1970, USDA would need to obtain concurrence from OPM prior to approving any demonstration project that would waive the Merit System of Personnel Management. However, HHS believes they would not need OPM's concurrence for such a waiver.

USDA - needs OPM concur for waiver -

Why??

MAR-06-97 10:01 FROM:OMB ID: PAGE 6/16

E. Intergovernmental Personnel Act

For decades, a Merit System of Personnel Administration was routinely established for many Federal-State grant-in-aid programs as now codified within the Intergovernmental Personnel Act (IPA) because it was presumed by Congress that services would be provided directly by State or local employees who were acting in lieu of Federal employees. The IPA is not a genuine statute; its provisions only come into play when another law or regulation invokes it.

While the IPA is silent on whether States or local governments may contract for services, the law does provide for maximum flexibility within the requirements for merit principles in the administration of grant-in-aid programs by grantees. However, as the roles of government and the relationships between the State and the Federal government continue to evolve, a determination must be made as to whether new ways of doing business can be carried out under existing laws, or whether change in those laws is required. While government contracting with the private sector for commercial products and services is not new, the Texas proposal raises the possibility of contracting with private entities to perform functions that have historically been the responsibility of the public sector. The proposal, as currently drafted, would require a waiver by OPM of current statutory and regulatory provisions related to the Merit System of Personnel Administration provision of the IPA.

Aspects of the current proposals under review by Federal agencies appear to conflict with the general requirements of the IPA, but as noted above, the key issue is defining precisely what aspects of program processes are in fact covered by the IPA. Although OPM has not consulted with their General Counsel for a legal opinion, OPM is confident that it does not have authority to waive any provisions of the statute. In fact, OPM counsels have consistently held that OPM does not have authority to waive its own regulations, unless such waiver is specifically provided for in the applicable statute. The Administration could elect to seek legislative change if the determination of what processes are covered presents the need.

This leads us back, then, to examining the Texas proposal and shredding out what is "inherently governmental" for these programs at issue and must therefore be performed by merit system employees, and what is commercial and can therefore be contracted out. The OPM General Counsel has relied on OMB Circular A-76 to define what is and is not an inherently governmental function for programs whose statute relies upon IPA coverage. Included in the definition of governmental functions are "those activities which require either the exercise of discretion in applying Governmental authority or the use of value judgment in making decisions for the Government. ...Governmental functions normally fall into two categories: (1) The Act of governing;....(2) Monetary transactions and entitlements...." It would appear that some contracting is appropriate

MAR-06-97 10:02 FROM:OMB ID: PAGE 7/16

but wholesale contracting of Food Stamp and Medicaid eligibility may raise questions of consistency with the intention of Congress to ensure that administration of these programs be conducted by employees covered by a merit system of personnel administration.

G. Options for Texas TIES

1. Allow the State to fully privatize its eligibility process, requiring only that the State itself certify the determination. Under Medicaid, implementing this option would essentially involve an administrative decision, and possibly publishing a Federal Register Notice announcing the decision. For the Food Stamp program , this option would involve approving a waiver of the Merit System of Personnel Administration. It would also require use of the Food Stamp Program's statutory demonstration authority, with the necessary approval of waivers of the Merit System of Personnel Administration by OPM. The Agriculture Department's waiver authority for demonstrations is intended to test innovations and is not intended to approve long-term operational alternatives such as those proposed by Texas. The majority of the 15,000 employees would be at risk of losing at least their State merit systems protections and possibly their jobs.

Approval of this option would result in additional objections from employee unions and advocacy groups that believe State employees will treat welfare recipients more fairly than contractors. It would be supported by States, the National Governors Association and private corporations which have formed alliances with public agencies to respond to the RFO.

2. Require the State to perform all eligibility functions, including intake, processing, and making and certifying the actual determination. This option would effectively deny the State's request to privatize its eligibility process. Even though this is the most restrictive option, it may be the most legally supportable option for the Medicaid program, based on a restrictive reading of statutory and regulatory requirements involving proper and efficient administration of the program. An argument can be made that outstationing establishes a precedent for permitting at least some privatization. However, a legal counter argument could be made that the Medicaid statute restricts non-government eligibility activities to specific eligibility groups and situations and, thus, is not applicable to the TIES proposal.

For the Food Stamp Program, this option would mean denial of a waiver of the Merit System of Personnel Administration. This option also would require the State to continue to be responsible for the Food Stamp interview and determinations of eligibility and benefit level. It is also important to note that during the recent debate on welfare reform legislation, Congressional Conferees reinstated the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

MAR-06-97 10:02 FROM:OMB ID: PAGE 8/16

The Federal agencies would receive serious objections from the State and private corporations. Also, a denial may be viewed as inconsistent with the Administration's support for allowing the private sector to be more involved in the administration of public assistance programs.

3. Approve an information system project as a stand alone effort. This option would allow the State to replace its outdated information systems with a new integrated system. Once completed, the TANF program could be administered through a private contractor using the new integrated information system, while eligibility for the Food Stamp and Medicaid programs could be handled by State employees. This approach would demonstrate the merits of privatization in these types of programs and not require a waiver of the other program rules.

This approach would require the State to fund the system development effort as it is being developed. Under the approach outlined in the RFO, the winning vendor would pay for the system development costs and then recoup its costs through administrative fees charged to the State once the system was operational. This option may satisfy the vendor community by reducing the risks associated with the up-front costs of developing the large system and still allow a significant privatization effort associated with TANF and other State programs. If information sharing rules can be resolved, the State may be able to satisfy its cost saving goals.

4. Allow the State to privatize its eligibility process to the same degree that privatization is permitted under the Medicaid outstationing process. This option would allow the State to privatize the application, interview, and information gathering/verification process, but require the State to do and certify the actual eligibility determination. For the Food Stamp Program, this option would require a redefinition of "certification". The Food Stamp statute requires certification to be completed by merit system employees, while the Medicaid statute allows non-State out stationed personnel to perform some elements of the application process. States want to reinterpret the laws so that compliance could be achieved through the automated processing of data by computers which are programmed under State agency direction to make eligibility and benefit decisions.

A middle ground could preserve more government involvement in a complex eligibility determination process that requires judgment. The Federal agencies could revise regulations (Food Stamp Program) or publish an appropriate Notice in the Federal Register (Medicaid) to require government review of applications and interview results before eligibility for benefits is determined (a process comparable to the Medicaid outstations, or supervisory reviews currently used by many State agencies in the Food Stamp Program). However, this option may not allow the States to make privatization initiatives financially worthwhile. The agencies do not have an estimate of how many

MAR-06-97 10:02 FROM:OMB ID: PAGE 9/16

State jobs would be at stake under this option.

5. Approve small-scale demonstration projects. The Departments support privatization initiatives that may result in improved services and/or administrative costs savings. However, both Departments have concerns about statewide initiatives that have not been proven to be effective and may seriously affect program access to low-income households. For instance, TIES is a Statewide initiative in a State that issues annually approximately 10 percent of food stamp benefits issued nationwide. The Department of Agriculture further believes it would be imprudent to eliminate the interview from merit employees on a statewide basis without further testing.

A demonstration limited to a small number of counties, for say 3 years, may be supportable by the advocacy groups. Private corporations may object or lose interest in small-scale demonstration projects or they could see it as the way to prove the benefits to all programs for contracting out on a larger scale. It is unclear how the unions and other States would react to such a compromise. It is estimated that an evaluation of a Food Stamp and Medicaid demonstration would cost at least $1 million.

VI RELATIONSHIP TO THE TEXAS EMPLOYMENT SERVICE AND OTHER ES PROPOSALS

The issue of whether an entity other than the SESA may deliver basic labor exchange and unemployment insurance services has been raised in the context of Employment and Training (ETA) sponsored initiatives to build new State workforce development systems utilizing One-Stop Career Centers. This system building at the local level involves the delivery of labor exchange services under the Wagner-Peyser Act and may involve the unemployment insurance program for payment of benefits under the Social Security Act (SSA). Basic labor exchange and unemployment insurance services are funded through a dedicated employer tax, the Federal Unemployment Tax Act (FUTA).

As noted, this Administration has already permitted Massachusetts to privatize its employment services, office by office, through competitive bidding.

Unemployment Insurance - Contracting out of benefit eligibility determination and tax functions raise different conceptual issues. Arguably these functions involve much more use of value judgments in Government decision making than ES. However, it may be permissible to contract out those data gathering functions that can be broken out in an effective, cost-efficient manner, without deterioration of services to claimants and employers.

The Texas proposal is largely limited to Food Stamps and Medicaid, however, policy

MAR-06-97 10:03 FROM:OMB ID: PAGE 10/15

makers should be aware that a decision for these programs may well set precedent for other public assistance programs such as Foster Care and Child Care.

The merit system requirements remain in effect for the Title IV-E of the SSA (Foster Care). Historically, ACF has offered the State agencies administering the foster care program the option of contracting to private, non-profits for such administrative activities such as licensing, recruitment, supervision and training. ACF is currently in the process of reviewing the foster care statutory language to determine what effect, if any, the merit system standards may have on a State's ability to contract out certain administrative activities in the private sector.

VII Related Issues

Job Protection -- Successorship

As stated above, one of the most significant concerns of organized labor is the risk State employees face under privatization. Thousands of State eligibility workers could lose their jobs if private employees are hired to replace them. Typically, the Federal Government has taken an interest in economy and efficiency, and recognizes benefits from the fact that a carryover workforce will minimize disruption to the delivery of services during any period of transition and provide the advantages of an experienced and trained workforce.

The Clinton Administration has a clear position with regard to employees working under Federal service contracts. In October 1994, the President signed E.O. 12933 "Non-Displacement of Qualified Workers Under Certain Contracts". The E.O. protects workers under Federal contracts from being displaced when a successor contract is awarded, by assuring them the right of first refusal to employment under the new contract in positions for which they are qualified.

why not? Partially

It is unclear whether such protections could be required of a State seeking to privatize Food Stamp and Medicaid eligibility workers. However, wherever possible -- especially under a waiver -- the programs could establish a requirement similar to the EO. These non-displacement protections would require successor contracts to offer those employees (other than managerial and supervisorial employees) whose employment would be terminated as a result of the new contract, a right of first refusal to employment under the contract in positions for which they are qualified. No employment openings could be filled under the contract until such right of first refusal has been provided. This option has not yet been explored with the program agencies.

MAR-06-97 10:03 FROM:OMB ID: PAGE 11/16

Entitlement Guarantee

One of the Administration's key principles during the Congressional budget battles of 1995 and 1996 was that Medicaid beneficiaries should retain a legally enforceable right to Medicaid. HCFA believes this principle could be compromised by allowing private contractors to make eligibility determinations. HCFA staff suggest making decisions about the eligibility of needy people for health care is one of the most fundamental functions of government. Giving so basic a function to the private sector raises questions about what role government legitimately serves in assuring the protection of the most vulnerable among us.

Confidentiality

As a result of negotiations between the State of Texas and Department of Agriculture, the RFO was revised to include language ensuring that the contractor would adhere to the confidentiality provisions under the Food Stamp Act and that applicants and recipients would have the right to fully understand how information would be used in determining eligibility. The RFO currently includes language specifying that the use or disclosure of information about applicants or clients during the screening and referral and the eligibility determination and enrollment processes shall be restricted to purposes directly connected with the administration of assistance programs. Information supplied for the purpose of determining eligibility may not be made available to other programs in TIES without the consent of the client. Bidders must demonstrate how clients will be advised of their right to confidentiality and how their concurrence would be obtained.

While these revisions ensure compliance with the Food Stamp and Social Security Acts, the Departments continue to have concerns that wide-scale privatization and potential loss of merit system protections may undermine the client confidentiality. Merit Personnel systems have historically established incentives for maintaining the integrity of public assistance programs. It is uncertain how privatization would influence the relationship between case workers and clients.

Conflict of Interests in Policy

It should not be assumed that a public employee would be more interested in operating public assistance programs better than a private employee on the basis of his or her status as a merit employee. However, private employees hired to carry out the TIES system may be affected negatively if the contractor does not realize a profit. The profit incentive raises numerous questions regarding the effect such wide-scale privatization would have on employees who are responsible for the determination of eligibility as well as the effect on overall client services. For instance, the TIES RFO proposes to use

MAR-06-97 10:04 FROM:OMB

client surveys to measure the contractor's performance. Will the interest in maintaining client satisfaction increase a caseworker's incentive to approve benefits, even if questionable information about the applicant's eligibility exists? Would profit incentives alter the current incentives out stationed non-merit employees have for their role in the Medicaid certification process?

Also, a conflict of interest may be created by the increased flexibility provided to the States through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. While the State of Texas retains the authority to establish program policy decisions, the State may come under heavy influence by the contractor to approve policies that assist the contractor in containing costs, possibly at the expense of client services.

State/Contractor Program Responsibilities

Under the proposed TIES RFO, the State maintains responsibility for developing program policy, conducting Quality Control (QC) reviews and fair hearings. The TIES contractor is responsible for implementing program policy. The TIES system, therefore, adds an additional level to the current bureaucratic structure. The FCS and the State of Texas have negotiated revisions to the RFO to clarify Federal/State and State/Contractor relationships. However, the Departments continue to have serious concerns about the increased complexity of the certification process under a Statewide privatization initiative and whether any resulting barriers to participation would be created as a result of these split relationships. These relationships may become even further complicated if the responsibility for the certification process becomes split between State and contract employees.

Risk of Loss

The draft TIES RFO specifies the financial incentives for good performance and fiscal penalties for poor performance. One financial penalty to the contractor is the liability of QC sanctions. The Department and State of Texas have negotiated additional language that clarifies that the Federal Government will continue to hold the State liable for the QC sanctions and that the Federal and State governments would be responsible for negotiating the resolution of any Federal QC liability.

The Departments have concerns that the contractor may have more interest in cost savings and less interest in resulting QC liabilities. Should a contractor experience a financial loss due to a QC liability, the potential for litigation between the State and contractor would appear to be great. The Departments also share concerns about the potential of increased litigation between the State and contractor if the certification process becomes a joint responsibility between State and private contract employees.

MAR-06-97 10:04 FROM:OMB ID: PAGE 13/18

The Departments have concerns about how these potential conflicts would affect the ongoing operations of the Food Stamp and Medicaid Programs throughout the State.

Payment Arrangements

The contract as described in the Request for Offer (RFO) draft provides for a cost incentive formula for payment to the supplier. The proposal being contemplated is a Fixed Price Incentive Fee/Performance Fee contract based on a 60/40 share ratio cost incentive formula for the State and the Supplier. Payment to the selected supplier will be monthly at 80% of the negotiated billing amount. The State will review the supplier's cost and performance for every three-month period throughout the term of the contract. In the event the supplier's incurred costs in any given three-month period are less than the total costs contained within the negotiated billing amounts for the same period, the supplier will earn and be paid an additional fee in an amount equal to 40% of the cost underrun of the three-month period.

Conversely, if the supplier-incurred costs are over the total costs contained within the negotiated billing amounts for the three-month period, the supplier's fee for that period will be reduced by an amount to equal 60% of the cost overrun for that period. In either case, every three months, the supplier will be paid all costs not paid against the three monthly billings plus fees adjusted up or down to reflect its increase or decrease resulting from the application of the 60/40 share ratio formula, subject to an absolute price ceiling of 110% of the total contract price for the three -month period. In no event shall the supplier be paid , for any given three-month period, a total amount greater than the ceiling price established for that period.

In addition to the above cost incentive, the State will negotiate a portion of the total fees available for performance incentives. This will be done on a quarterly basis and the award determination is unilateral and not subject to dispute by the Supplier.

Because Medicaid and Food Stamps pay for the actual cost to the State programs of acquiring this system, the above payment arrangement would be eligible for Federal Financial Participation (FFP).

Potential Financial Conflicts of Interest

Under CFR 45 Part 74 in Subpart E, section 74.81 (Prohibition against profit) no HHS funds may be paid as profit to any recipient even if the recipient is a commercial organization, and HHS feels that this could be cited as a basis for limiting the payments in the above described situation to the costs of the State governmental agency.

MAR-06-97 10:05 FROM:OMB ID: PAGE 14/16

The RFO may permit a situation that could give rise to a potential conflict of interest. The terms of the RFO are such that it permits a potential supplier to be a State governmental agency. In this situation (where the supplier is a State governmental agency) the State shall propose an interagency contract with the supplier in accordance with the Interagency Cooperation Act, Chapter 771, Texas Government Code. In otherwords, the State would not pay the contractor for services to be performed by the subcontracting State agency. Rather, the State will pay the supplier/sub-State agency directly.

This scenario could result in payments to the supplier/sub-State agency in an amount that would be in excess of what had been paid when the State was performing the same functions. Consequently, the payments made could be in excess of the cost of providing the services. This may create an opportunity for intergovernmental transfers (IGTs) which could return a portion of the State's payment to the sub-State agency back to the State to be re-used for the State's share of the match for additional Medicaid expenditures.

According to CFR 45 Part 74 in Subpart E, section 74.81(Prohibition against profit) no HHS funds may be paid as profit to any recipient even if the recipient is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs. This could be cited as a basis for limiting the payments in the above described situation to the costs of the State governmental agency.