
CRS REPORT FOR CONGRESS

EMPLOYMENT OF PERSONS WITH HANDICAPS UNDER THE JAVITS-WAGNER-O'DAY ACT:
SUMMARY OF THE SPECIAL PROCUREMENT PROGRAM AND CURRENT ISSUES

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SUMMARY

This report discusses the special Federal procurement program under which the Federal Government purchases commodities and services from nonprofit sheltered workshops that employ persons with handicaps. This program is authorized under the Javits-Wagner-O'Day Act (JWOD). The JWOD program is implemented through sheltered workshops that are authorized to pay subminimum wages to persons with handicaps. Subminimum wages are paid when individual productivity is less than that of able-bodied persons doing similar work.

Other Federal statutes that affect the JWOD program include affirmative action requirements for Federal contractors under the Rehabilitation Act and subminimum wage requirements under the Fair Labor Standards Act.

Hearings held in May 1987 surfaced issues regarding upward mobility and affirmative action for handicapped workers in the JWOD program. Some witnesses alleged that qualified persons with handicaps were sometimes not promoted into management, administrative, or supervisory positions within the workshops, and that these positions were being filled by able-bodied persons. Other witnesses stated that there were promotions within the JWOD workshops, but that due to the severity of the disabilities of most JWOD clients, upward mobility was limited. The JWOD statute does not address promotion of persons with handicaps into management, administrative and supervisory positions, but the statute does require a minimum percentage of persons with handicaps in the direct labor positions.

There has been no legislation introduced in the 100th Congress to amend the JWOD program.

CONTENTS

I.	BACKGROUND ON THE JAVITS-WAGNER-O'DAY PROGRAM	1
A.	Structure and Functions of the Procurement Committee	2
B.	The Central Nonprofit Agencies	2
C.	The Seventy-five Percent Direct Labor Requirement	3
D.	Volume of Business Under the Special Procurement Program	3
E.	Other Federal Statutes Governing the Special Procurement Program	4
	1. Affirmative Action Requirements.	4
	2. Requirements Regarding Determination of Wages Paid in Sheltered Workshops	5
II.	ISSUES REGARDING THE SPECIAL PROCUREMENT PROGRAM	7
A.	Promotion from Direct Labor to Management, Administrative, or Supervisory Positions	7
B.	Affirmative Action Enforcement in the JWOD Program	11

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I. BACKGROUND ON THE JAVITS-WAGNER-O'DAY PROGRAM

The Javits-Wagner-O'Day Act authorizes a special procurement program under which the Federal Government purchases goods and services from nonprofit sheltered workshops that employ blind and other severely handicapped persons. 1/ The JWOD program was originally established in 1938 to provide employment opportunities for blind persons and was expanded in 1971 to include severely handicapped persons.

As of the end of FY 1987, the JWOD program was operating in 6 percent of the sheltered workshops certified by the Department of Labor, and 6 percent of all sheltered workers employed in certified workshops were clients of JWOD programs. 2/

1/ 41 U.S.C. 46-48.

2/ As of September 30, 1987, there were a total of 5,165 certified sheltered workshops, of which 320 had JWOD contracts. Of a total of 275,358 clients employed in all certified sheltered workshops, 16,012 were working under JWOD contracts. **Source:** Telephone communication with the Acting Director of the procurement committee, August 15, 1988.

For additional information, see U.S. Library of Congress. Congressional Research Service. Sheltered Workshops for Persons with Handicaps: Background Information and Recent Legislative Changes. Report No. 87-362 EPW, by Mary F. Smith. Washington, April 22, 1987.

A. Structure and Functions of the Procurement Committee

The JWOD statute established the Committee for Purchase from the Blind and Other Severely Handicapped, hereinafter called the procurement committee, to administer and monitor the program. The procurement committee determines which products and services needed by the Federal Government are suitable for production or provision by sheltered workshops. These products and services are added to the list of procurements according to procedures established by the procurement committee. When a service or commodity is added to the procurement list published by the procurement committee, all Federal agencies are required to procure the item from one or more designated sheltered workshops. Examples of goods or commodities produced under the JWOD program include paper towels, writing pads, ball point pens, and mattresses. Examples of services include janitorial and grounds maintenance.

The procurement committee makes the determination that the addition of a commodity or service to the procurement list will not have an adverse impact upon the current or most recent contractor for the commodity or service. The procurement committee also establishes a fair market price for these products and services and revises these price determinations as market conditions change. In addition, the committee determines which nonprofit workshops meet the qualifications in the statute for participation in the program. The law requires that workshops for the blind be given preference over workshops for other severely handicapped persons for the production of commodities.

The procurement committee is composed of 15 members appointed by the President. Eleven are representatives of Federal Government agencies and four are private citizens familiar with employment of blind and other severely handicapped persons. The procurement committee has a staff of 12 persons and a

budget of \$850,000 for FY 1988. (The Administration requested \$864,000 for FY 1989.)

B. The Central Nonprofit Agencies

As required by statute, the procurement committee has designated two national nongovernmental agencies to assist in the implementation of the Act: National Industries for the Blind and National Industries for the Severely Handicapped. These central nonprofit agencies (CNAs) facilitate the distribution of work among sheltered workshops serving the blind and other severely handicapped persons and offer assistance to the workshops regarding production, management, and administration of the program. The CNAs are authorized to receive a maximum fee of 4 percent for their participation in the sales related to the procurement program. Commissions on the procurement contracts are paid by sheltered workshops to the CNAs. The commissions are paid from the Federal contract funds. 3/

C. The Seventy-Five Percent Direct Labor Requirement

Under the JWOD program, handicapped workers must account for not less than 75 percent of the total direct labor hours performed in the workshops participating in the special procurement program. The 75 percent direct labor requirement includes preparation, processing and packaging of a commodity, or work directly related to performing a service. Direct labor does not include supervision, administration, inspection or shipping.

3/ A General Accounting Office report of June 1986 (GAO/HRD-86-82BR) found that the procurement committee's decision to retain the ceiling of 4 percent for the CNAs was not unreasonable.

D. Volume of Business Under the Special Procurement Program

According to the 1987 annual report of the procurement committee, workshops sales to the Federal Government under the JWOD procurement program during FY 1987 were \$328 million, an increase of \$40 million over the previous fiscal year. 4/ Of this total, \$196 million was sales from workshops for the blind and \$132 million was sales from workshops for the severely handicapped. During FY 1987, workshops for the blind participating in the program employed 4,522 persons in 78 workshops, and workshops for the severely handicapped employed 11,490 persons who worked in 242 workshops.

Even though there were new items added to the procurement list in FY 1986 and FY 1987, the number of new items decreased from 117 in FY 1985 to 62 in FY 1986 and 72 in FY 1987. 5/

E. Other Federal Statutes Governing the Special Procurement Program

The JWOD program is also governed by two other statutes that affect treatment of persons with handicaps. The Rehabilitation Act requires

4/ Data in this section were taken from the Annual Report, Committee for Purchase from the Blind and Other Severely Handicapped, 1987.

5/ According to congressional testimony, this decrease in new additions to the procurement list resulted from the diversion of staff time from procurement work to responding to numerous requests for information from a law firm challenging procurement committee proposals. Source: U.S. Congress. House. Committee on Appropriations. Subcommittee on Treasury, Postal Service, and General Government. Mr. Frank Gearde, Jr., Chairman, Committee for Purchase from the Blind and other Severely Handicapped. Hearings, March 9, 1988. In response to questions from members of the Subcommittee, this witness stated that over the past several years, a law firm representing some commercial business firms has challenged the addition of products or services being considered by the procurement committee for inclusion in the JWOD program. The law firm alleged that the addition of certain products or services would have an adverse impact upon the current supplier of the item. Two district court decisions, the most recent on March 16, 1987, dismissed these complaints.

affirmative action by Federal contractors, and the Fair Labor Standards Act governs wages paid to handicapped workers in sheltered workshops.

1. Affirmative Action Requirements

Although the JWOD statute does not specifically require the advancement of qualified blind or severely handicapped persons within the sheltered employment program, such advancement is required under section 503 of the Rehabilitation Act. 6/ Section 503 requires every employer doing business with the Federal Government under a contract of more than \$2,500 to take affirmative action to employ and advance in employment qualified persons with handicaps. Section 503 applies to all levels of employment, not only direct labor as defined in under JWOD.

The regulation implementing section 503 specifies that Federal contractors are required to undertake affirmative action on behalf of handicapped persons at all levels of employment, including the executive level. (41 C.F.R. 60-741) Employment practices covered by section 503 include hiring, upgrading, transfer, recruitment, rates of pay, and selection for training. One provision of the regulation especially relevant to the JWOD program states that contractors should determine the availability of promotable qualified handicapped persons already employed to ascertain whether these persons' present and potential skills are being fully developed and utilized.

Under section 503, a person with a handicap may file a complaint with the Department of Labor if such person believes a contractor has not complied with the provisions of section 503. The Department of Labor is responsible for:

- 1) investigating complaints against employers with Federal contracts of more

6/ Rehabilitation Act of 1973, P.L. 93-112, as amended.

than \$2,500, and 2) conducting compliance reviews of employers with 50 or more employees and Federal contracts of \$50,000 or more.

2. Requirements Regarding Determination of Wages Paid in Sheltered Workshops

The JWOD program is also governed by section 14(c) of the Fair Labor Standards Act (FLSA). Under this provision, sheltered workshops are certified by the Department of Labor to pay subminimum wages to persons with handicaps employed in these workshops. The FLSA requires handicapped employees of sheltered workshops to be paid a wage based on individual productivity that is commensurate with wages paid to nonhandicapped workers in the same vicinity for the same type, quantity, and quality of work. That is, if a worker with a handicap produces 60 percent of the output of a nondisabled worker earning minimum wage, the sheltered worker would be required to be paid 60 percent of minimum wage. Handicapped workers in sheltered workshops producing at a level above minimum wage are also required to be paid according to individual productivity. The Department of Labor is responsible for monitoring wages and enforcing compliance with the provisions of the FLSA.

Under the FLSA, the workshop is required to provide written assurances that the hourly wage rate paid to each sheltered worker will be 1) reviewed at least every 6 months to determine the productivity of the worker, and 2) adjusted at least once a year to reflect changes in the prevailing wages paid to experienced nonhandicapped workers for the same type of work. The sheltered worker (or the parent or guardian) may petition the Secretary of Labor to obtain a review of the wage rate paid to a handicapped worker. An administrative law judge is to conduct a hearing regarding each complaint. The sheltered workshop has the burden of justifying that the wage rate has been determined appropriately.

II. ISSUES REGARDING THE SPECIAL PROCUREMENT PROGRAM

On May 21, 1987, the Employment and Housing Subcommittee of the House Committee on Government Operations held a hearing on the JWOD program. ^{7/} The hearings focused on promotion opportunities for blind and other severely handicapped persons working in sheltered workshops under the JWOD program. The major issues that emerged from the hearings are discussed below.

A. Promotion from Direct Labor to Management, Administrative, or Supervisory Positions

The major question raised at the hearing was the extent to which job opportunities for blind and severely handicapped persons under the JWOD program include opportunities for promotion, especially promotion from direct labor to nondirect labor jobs in management, administration, and supervision. Some witnesses alleged that there were insufficient opportunities for promotion to nondirect labor jobs for qualified blind or handicapped persons and that some workshops were discriminating against sheltered workers in this regard. It was alleged that able-bodied persons were often hired to fill nondirect labor jobs that could have been filled by qualified blind or severely handicapped persons promoted from direct labor jobs. This allegation was stated primarily with regard to the promotion of blind persons.

^{7/} U.S. Congress. House. Committee on Government Operations. Subcommittee on Employment and Housing. Promotion Opportunities for Blind and Handicapped Workers in Sheltered Workshops Under the Javits-Wagner-O'Day Act. Hearings, May 21, 1987.

The statute requires that workshops participating in the JWOD program employ blind or severely handicapped persons for not less than 75 percent of the man-hours of direct labor involved in the production of goods or rendering of a service, but the statute specifically excludes supervision, administration, inspection and shipping from the definition of direct labor. Therefore, there is no minimum requirement regarding the percentage of blind or handicapped persons a participating workshop must employ in nondirect labor functions. Also, blind or severely handicapped persons working in administrative, supervisory, or other nondirect labor jobs are not counted in the 75 percent direct labor requirement and therefore do not help the workshop meet this requirement. Some witnesses stated that workshops had no incentive to promote qualified direct labor personnel into nondirect labor jobs because of this statutory definition.

The CNAs testified that the severity of disability of most persons working in the JWOD program prevents them from entering administrative and other nondirect labor jobs. Also, there are very few administrative and other nondirect labor jobs compared to the number of direct labor jobs in sheltered workshops, according to this testimony. The statutory definition of "other severely handicapped" precludes participation in the JWOD program of persons able to engage in competitive employment. Approximately 80 percent of these persons are mentally retarded and many have multiple disabilities, according to this testimony. The statutory definition of "blind" is based on visual acuity only, but half of the blind persons in the JWOD have another disability in addition to blindness.

In explaining current practices, the spokesperson for the National Industries for the Blind stated that blind persons employed in the JWOD program are typically those blind persons who are less educated, more likely to be multiply handicapped, and more likely to be older than blind people in

competitive employment. 8/ According to this witness, additional disabilities of blind persons in the JWOD program include mental retardation, severe hearing loss, and mental illness. Fifty-three percent of the blind persons in JWOD direct labor jobs had less than a high school education and 24 percent were over age 55, according to this witness.

In spite of the handicaps to upward mobility experienced by many persons in the JWOD program, some were promoted from direct labor to indirect labor jobs. Of the 4,522 blind persons working on JWOD contracts in FY 1987, 29 were promoted to supervisory and management positions in the workshop and another 46 were promoted to other indirect labor positions. Of the 11,490 persons with other severe handicaps working under JWOD contracts, 126 were promoted to administrative, management or supervisory positions within the workshops. As shown on table 1, some sheltered workers were placed in competitive employment outside the workshops, and some were promoted to other direct labor jobs within the workshops. Average hourly wages paid in the JWOD program (over \$4 per hour in FY 1987) were above the statutory minimum wage of \$3.35 per hour. This indicates that although some of the sheltered workers earned less than minimum wage, many earned above this level.

8/ Ibid., p. 96.

**TABLE 1. Blind and Other Severely Handicapped Workers
in the Javits-Wagner-O'Day Program: FY 1987**

	Blind workers	Other severely handicapped workers
Total Workers.....	4,522	11,490
Average hourly wage.....	\$4.13	\$4.24
Upward mobility		
Promoted from direct labor to indirect labor positions.....	75 (1.7%)	<u>a/</u>
Placed in competitive employment.....	165 (4%)	1,132 (9%) <u>b/</u>
Promoted within direct labor classification.....	590 (13%)	1,609 (14%)

a/ Data are not available on the number of persons promoted into indirect labor positions that were not administrative, management, or supervisory positions.

b/ According to the Acting Director of the procurement committee, it is easier to place severely handicapped persons in competitive employment because they can be more readily trained for janitorial work than can blind persons.

Source: Alley, Richard; Acting Executive Director, Committee for Purchase from the Blind and Other Severely Handicapped. Telephone communication.

A 1987 survey of blind sheltered workers indicated that two-thirds of the workers considered themselves to be unemployable outside the workshop and tended to prefer the workshop over private industry because it provided them with employment in an understanding and supportive environment. 9/ However, 10 percent of the workers were dissatisfied with employment in the sheltered workshop. These tended to be younger persons with relatively more education and with prior job experience outside the workshop.

9/ National Industries for the Blind. A Survey of Blind Direct Labor Workers Employed in "Industries for the Blind" Associated with National Industries for the Blind. A Report of Findings, November 1987.

B. Affirmative Action Enforcement in the JWOD Program

Section 503 of the Rehabilitation Act requires contractors with the Federal Government to take affirmative action to employ and advance in employment qualified persons with handicaps. At the May 1987 hearing, a representative of a major national organization of blind persons stated that there was a general failure of the Federal Government to enforce affirmative action in sheltered workshops. This witness provided examples of allegedly qualified blind persons who were not offered the administrative and supervisory jobs for which they had applied. Although these complaints were brought to the attention of the Federal enforcement agency, the response was inadequate, according to this witness.

The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor has responsibility for enforcement of section 503 of the Rehabilitation Act. According to correspondence from OFCCP, eight complaint investigations were initiated in sheltered workshops in FY 1987. ^{10/} The OFCCP is unable to identify whether these complaint investigations involved the JWOD program.

At a June 1988 meeting of representatives of the OFCCP and staff of the House subcommittee with oversight responsibility for the JWOD program, the representatives of OFCCP said they would review their operations to increase inspections of sheltered workshops and provide training to inspectors regarding the special needs of persons employed in the workshops.

^{10/} U.S. Department of Labor. Office of Federal Contract Compliance Programs. Letter to Mary F. Smith. August 30, 1988.