Federal Register

Friday,
August 26, 2005

Part IV

Department of Labor

Employment Standards Administration

Wage and Hour Division

29 CFR Parts 1 and 4

Service Contract Act Wage Determination OnLine Request Process; Final Rule

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

29 CFR Parts 1 and 4

[RIN 1215–AB47]

Service Contract Act Wage Determination OnLine Request Process

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL) is amending two regulations to allow for full implementation of the Wage Determinations OnLine (WDOL) Internet Web site (*http://www.wdol.gov*) as the source for federal contracting agencies to use when obtaining wage determinations issued by the DOL for service contracts subject to the McNamara-O'Hara Service Contract Act (SCA) and for construction contracts subject to the Davis-Bacon Act and Related Acts (DBRA).

DATES: These rules are effective on September 26, 2005.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3028, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693–0062. This is not a toll-free number.

You may direct questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice to the nearest Wage and Hour Division District Office. Locate the nearest office by calling the WHD toll-free help line at 1–866–4US-WAGE (1–866–487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the agency Web site for a nationwide listing of WHD District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation is not subject to the Paperwork Reduction Act, because it contains no new information collection requirements and does not modify any existing requirements.

II. Section 508 of the Rehabilitation Act

The Wage Determinations OnLine (WDOL) Internet Web site (*http://www.wdol.gov*), an electronic information resource, is subject to and will be developed and maintained in accordance with the accessibility requirements of Section 508 of the Rehabilitation Act, 29 U.S.C. 794d.

III. Summary of Changes

The SCA requires contractors and subcontractors performing services on prime contracts in excess of $2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by the Secretary of Labor (or authorized representative), or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement.

SCA section 4, 41 U.S.C. 353, authorizes the Secretary of Labor to enforce the Act, make rules and regulations, issue orders, hold hearings, make decisions based upon findings of fact and take other appropriate action. The DOL rules relating to SCA administration are contained in Regulations, 29 CFR part 4.

Section 1 of the Davis-Bacon Act (DBA), as amended, 40 U.S.C. 3141 *et seq.*, requires that each contract over $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. The DBA requires contractors or their subcontractors to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character as determined by the Secretary of Labor.

Regulations, 29 CFR part 1, contain the procedures for making and applying determinations of prevailing wage rates and fringe benefits pursuant to the DBA and any other Federal statute providing for determinations of such wages (the Davis-Bacon Related Acts) by the DOL in accordance with the provisions of the DBA.

The DOL published a Notice of Proposed Rulemaking in the **Federal Register** on December 16, 2004 (69 FR 75408), proposing to update its regulations to have contracting agencies use the WDOL Internet website to meet their obligation to obtain DBA general wage determinations from the Wage and Hour Division (WHD). The DOL proposed to publish wage determinations solely through WDOL and to discontinue publishing notice of changes in the **Federal Register** and to no longer publish paper copies of general wage determinations through the Government Printing Office (GPO). WDOL offers users the opportunity to request e-mail notice of future revisions to a wage determination they have selected for a specific period of time, or until a specific date.

For SCA wage determinations, the DOL proposed to eliminate the paper Form SF–98 and replace it with an electronic e98 process by which contracting agencies may continue to request SCA wage determinations from the WHD. The DOL also proposed to allow use of WDOL as an alternative means of obtaining SCA wage determinations. The DOL further proposed to update pertinent statutory citations for applicable laws to reflect amendments to Title 40 of the U.S. Code and to make other minor editorial revisions and updates to its regulations.

The development of WDOL required an update of the existing regulations, which now also provides a basis for updating related information in the Federal Acquisition Regulations (FAR) to be compatible with the DOL rule. WDOL does not affect how the WHD determines prevailing wages under either the SCA or DBA.

29 CFR Part 1

The proposed rule adopted the WDOL website as the single source for obtaining DBA general wage determinations and eliminated publication of notices in the **Federal Register**. Notice of future modifications and supersedeas general wage determinations will be posted on WDOL. The proposed rule also eliminated references to GPO publication of general wage determinations, although GPO may continue, at its discretion, to publish general wage determinations. The proposed rule retained the requirement in the current regulations under 29 CFR 1.5 that Federal contracting agencies request a wage determination by preparing and mailing Form SF–308 to the Department of Labor, for those infrequent situations when a DBA general wage determination is not available through WDOL. The DOL processed fewer than 100 Forms SF–308 in FY 2004, and did not believe providing Federal agencies with an electronic submission option in these rare cases justified the considerable expense that developing such a system would require.

29 CFR Part 4

The proposal drew upon technological advances of recent years and the wide use of electronic communication and information sharing. It replaced the paper Standard

Form SF–98 request and response process for obtaining SCA wage determinations with an electronic e98 process and enabled contracting agencies alternatively to use the WDOL website to obtain SCA wage determinations.

The DOL has been working with contracting agencies to develop better and more efficient mechanisms for agencies to obtain SCA wage determinations. With the advent and expansion of the Internet in the mid-1990s, several contracting agencies approached the WHD seeking the ability to access and download SCA wage determinations. The vast majority of the covered service contracts awarded by these agencies were either options or renewals, and the applicable SCA wage determinations for these contracts were well established. By this time, the WHD had developed a standard set of SCA wage determinations that applied to most of these contracts. The National Technical Information Service (NTIS) had posted these wage determinations on the Internet for information purposes, and the agencies requested the ability to download and use these standard wage determinations in appropriate situations. This led to the WHD entering into Memoranda of Understanding (MOUs) with several agencies to allow them to use these standard wage determinations without first submitting an SF–98. Under the MOUs, the agencies agreed to train their personnel in the proper selection and use of SCA wage determinations. The agencies also agreed to monitor the SCA wage determinations database and to use any subsequent revisions of the applicable wage determinations that were issued before the applicable procurement dates specified in the SCA regulations. After the agency selected an applicable SCA wage determination, it would notify the WHD of its selection by the submission of a Form SF–98 after the fact.

This MOU program further implemented the remedial purpose of the SCA by requiring that participating agencies monitor the SCA wage determination database and use the latest revisions published in a timely manner before award or commencement of the contract. With the paper Form SF–98, the WHD had no mechanism to follow-up and advise contracting agencies when wage determinations were revised or updated. Because the MOU program proved to be quite successful, it subsequently was expanded to numerous other agencies.

An interagency work group composed of representatives from the Office of Management and Budget, Department of the Army, Department of the Air Force, Department of the Navy, Army Corps of Engineers, General Services Administration, NTIS and the Department of Energy began development of a new online system designed to consolidate the best practices of agencies operating under the MOU program. The work group also looked at adding non-standard wage determinations to the online system. Principal objectives of the work group were the elimination of the paper Form SF–98 and the availability of wage determinations electronically.

At the same time, the WHD was developing an electronic request and response system to replace Form SF–98. The WHD began live tests of the e98 system in FY 2003. During FY 2003, the WHD received and responded to more than 12,000 e98 submissions. A computer responds to a significant number of the e98 requests immediately while the requester is online. The remaining requests are referred to an analyst and the response is usually sent later the same day or the next day. For all requests, the e98 system is designed to track individual requests by the procurement dates listed on the request, and when a wage determination that would affect a particular procurement is revised, an amended email response is sent to the contracting agency.

The site developed by the WDOL work group integrates the e98 process with the best practices developed under the MOU program. WDOL offers users a number of unique features in a web-based environment. The site includes: (1) guidance to contracting officers on selecting the appropriate wage determination for each contract action; (2) access to the most current SCA and DBA wage determinations, as well as an alert service for notification of future revisions to particular wage determinations; and, (3) access to databases containing archived wage determinations under both the SCA and DBA.

To facilitate contracting officers selecting the appropriate SCA wage determination, the WDOL site leads the requester through a ''decision tree'' consisting of a series of questions. Based upon the responses to these questions, the WDOL site will either identify an SCA wage determination or direct the requester to submit an e98. A link to the e98 site is provided. In addition, the WDOL site gives the requester the option of going directly to the e98 site without having to go through the ''decision tree'' selection process. If a contracting officer has any question regarding the selection of the proper SCA wage determination, the WDOL site directs the contracting officer to the e98.

As clearly indicated on the WDOL Web site, compliance with the decision tree selection process and the guidance provided by the User's Guide does not relieve the contracting officer or other program user of the requirement to carefully review the contract or solicitation, the FAR and its Supplements, other Federal agency acquisition regulations or the DOL regulations related to these actions. If the DOL discovers and determines, whether before or after contract award, that the correct SCA wage determination was not included in a covered contract, the contracting officer, within 30 days of notification by the DOL, is required to include in the contract the applicable wage determination issued by the DOL. (See 29 CFR 4.5(c)(2).)

III. Summary of Comments

DOL received five comments in response to the Notice of Proposed Rulemaking, discussed further below, from the: Office of the Under Secretary of Defense (DOD); Army Corps of Engineers (Army); Department of the Navy, Office of the Assistant Secretary for Research, Development and Acquisition (Navy); Contract Services Association (CSA); and International Association of Machinists and Aerospace Workers. All comments generally support the automated environment for obtaining wage determinations that underlies the proposed rule; however, several comments recommend minor revisions. Some of the recommendations address issues that are beyond the scope of the proposed rule.

The CSA urges removing the references in proposed §§ 1.2(e) and 4.1a(i) that ''the term WDOL will apply to any other Internet Web site or electronic means that the Department of Labor may approve for these purposes,'' in addition to *http://www.wdol.gov.* The CSA believes the definition may cause potential confusion among contractors and contracting agencies. These sections define the term, ''WDOL.'' The proposed rule allows more flexibility and accommodates future technological advances without the delays that might otherwise be associated with procedural regulatory changes. The final rule retains the references.

The Navy urges revising or eliminating the current requirement in § 1.4 for contracting agencies to provide the DOL with an annual summary of their construction plans for the coming year. The final rule retains the requirement. The Navy believes much of the information provided in these

reports could be extracted from various reports used for other purposes. These construction reports are not related to the process for obtaining wage determinations and are not part of the proposed rule. In the past, the WHD has used these reports to identify localities with the greatest need for new Davis-Bacon wage surveys. Although the WHD is testing new processes that might allow regularly scheduled Davis-Bacon wage surveys of all areas of the country, it is not yet clear that such processes will totally eliminate the need for some targeted surveys. In addition, it is not clear that the other sources identified by the Navy would provide the same level of detail and information as called for under § 1.4 of the Regulations. The DOL does not believe that further action on this recommendation is warranted at this time and that the suggestion would necessitate reopening the notice and comment process. The DOL will give careful consideration to the Navy's recommendation, if it undertakes further rulemaking regarding the Davis-Bacon Act in the future.

The DOD and Navy recommend replacing the detailed discussion in § 1.5(b) regarding the requirements for completing Form SF–308 with a more general statement and provide for an electronic submission option. The final rule retains the existing provision, because the DOL does not believe providing Federal agencies with an electronic submission option for the rare instances in which an agency files Form SF–308 justifies the considerable expense that developing such a system would require. The DOL processed fewer than 100 Forms SF–308 in FY 2004.

The CSA recommends amending the definition of ''wage determination'' in § 4.1a(h) to clarify the effective date and applicability of wage determinations. This definition is not part of the proposed regulatory changes. The Administrative Procedure Act (APA), 5 U.S.C. 553, normally requires notice and an opportunity for public comment when an agency amends a substantive rule. The APA, however, contains exceptions to the notice and comment provisions for (1) ''interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice'' and (2) rules where the agency for good cause finds that notice and public comment are ''impracticable, unnecessary, or contrary to the public interest.'' Agencies may immediately adopt rules subject to the exceptions. The suggested change regarding the date on which a wage determination becomes effective, without including a reference to the applicability of the determination, helps to clarify the WDOL process and augments § 4.4(c)(1) of the proposed rule. The section makes clear that a contracting agency using the WDOL process bears full responsibility for selecting the correct wage determination. The rule, however, also requires the contracting agency to amend a contract if the DOL subsequently determines the contracting agency applied an incorrect wage determination to a specific contract; thus, an inapplicable wage determination does not become applicable because the contracting agency has inserted it into the contracting action. The final rule incorporates the suggestion to include when a wage determination becomes effective by adding a new sentence to the existing definition for wage determination in § 4.1a(h) to read, ''A wage determination is effective upon its publication on the WDOL website or when a Federal agency receives a response from the Department of Labor to an e98.'' The DOL hereby finds, pursuant to 5 U.S.C. 553(b)(3)(B), that notice and public comment procedures on this clarification of the definition of ''wage determination'' in § 4.1a(h) are impracticable and unnecessary and would not further the public interest.

The DOD and Navy want the definition for the term, ''e98,'' in § 4.1a(j) to include the Internet address for WDOL. The agencies believe such a change would help clarify how to locate the e98. The DOL agrees this could improve access to the e98. The final rule includes the Web site.

The CSA believes proposed § 4.3(c) requires minor clarification by adding the word, ''revision,'' to the discussion of methods by which an existing wage determination may become obsolete in the last sentence. The CSA points out that the remainder of the section discusses ''revisions'' of wage determinations. The DOL agrees the change may help in understanding the requirement, and the final rule incorporates this change. The CSA also recommends relocating the proposed description in § 4.3(c) of what a wage determination includes and its significance to the definitions found in § 4.1a. The final rule retains the description in its present location, because the DOL believes the overall discussion of wage determinations in § 4.3 remains a more appropriate context for information found in a wage determination and its significance.

The CSA also urges revising proposed § 4.3(e) to (1) make all effective SCA wage determinations and any underlying collective bargaining agreements and locality wage determinations available for public inspection at all WHD District Offices and (2) clarify the availability of archived wage determinations through WDOL. The proposed regulation provides for the DOL to make wage determinations available for public inspection through the National and five Regional Offices of the WHD during regular business hours and through WDOL. The proposed WDOL rule parallels the ''public inspection'' provisions that exist in the current rule geared for review of only paper documents and, adds an on-line viewing feature available through WDOL. The final rule does not provide for public inspection of wage determinations at WHD District Offices but does highlight the availability of archived copies of wage determinations through WDOL. WHD District Offices are not staffed in a way that would allow public inspections of wage determinations in the District Offices. In addition, the proposed change would require the agency to either maintain a supply of printed copies of all wage determinations available or a computer available for public use at each District Office. Adoption of the recommendation would impose a regulatory requirement to make staff available and print copies of all wage determinations in each District Office and could impose a new demand for resources not presently available. Persons in outlying areas may access wage determinations through the Internet and facilities to access the Internet are available at public libraries. Availability of a DOL computer for public inspection could also present potential security concerns for DOL's information technology systems. The WDOL website does have a capability to allow the viewing of archival copies of wage determinations that are not current, and the final rule makes that availability clear. The DOL has also incorporated this suggestion in § 1.6(c)(3)(v), with respect to Davis-Bacon wage determinations.

The DOL has received several suggestions regarding § 4.4, Obtaining a wage determination. The CSA urges inserting ''applicable,'' when referring to wage determinations in effect for a particular contracting action in § 4.4(a). The CSA wants this change since the FAR SCA price adjustment clause uses ''applicable'' to describe the basis for changing pricing when a new wage determination takes effect, tribunals use ''applicable'' when determining which wage determination is appropriate for price adjustment, and DOL uses the term for enforcement purposes. The final rule does not include the reference.

The DOL believes the proposed regulation sufficiently outlines the relevant applicable requirements and the reasons for not adopting a similar suggestion discussed in relation to § 4.1a(h) also apply to this situation.

The CSA also suggests adding the issuance of any task order issued pursuant to a GSA Schedule contract or blanket purchase agreement for commercial services to the illustrative list of contracting actions for which a contracting agency must obtain a wage determination in § 4.4(a)(1). The CSA believes adding the reference may be prudent, given the continuing growth of GSA Schedule and commercial service contracting. The final rule does not add the example. The DOL believes naming GSA schedule contracts and blanket purchase agreements may cause some confusion, because no individual task or purchase order determines the amount of the contract. The existing provisions of § 4.142 provides guidance by stating these contracts would ordinarily constitute contracts within the intent of the Act under judicially established principles.

A third CSA recommendation encourages adding a statement in § 4.4(a)(3)(i) highlighting that a contracting agency may select a wage determination through WDOL, in addition to obtaining it from DOL. The final rule does not include the additional statement. The proposed rule requires a contracting agency to obtain a wage determination for each location in which work may be performed, if the place of performance is unknown at the time of solicitation. In addition to the e98 process, contracting agencies may obtain wage determinations from DOL through WDOL. Section 4.4 (a)(2) provides a general discussion of the methods and § 4.4(b) and (c) provide specific discussions of the different ways in which a contracting agency may obtain a wage determination. In a related recommendation, the CSA suggests removing the provision in this section that requires use of the wage determination incorporated in the contract documents. The CSA believes the wage determinations apply to service employees in specific localities, not to contractors. The CSA also presents a view that, when a contractor relocates work, contracting agencies should use the WDOL or e98 process to obtain a new wage determination for the location in which the work performance actually takes place. The final rule retains the provision. The DOL does not believe that further action on this recommendation is warranted at this time and it would necessitate reopening the notice and comment process.

The DOD and Navy recommend revising § 4.4(b)(1) to have WDOL use the applicable solicitation or contract number for tracking purposes, instead of the WDOL system assigning a unique number. The final rule does not incorporate this recommendation, because it would require redesign of the WDOL system and how it interfaces with internal DOL programs, as well as considerable additional resources that are presently not available.

The DOD and Navy also recommend changing the proposed requirement in § 4.4(b)(3) for a contracting agency to monitor email addresses to having contracting agencies resubmit an e98 with a new email address each time an email address changes. These agencies also believe the DOL should establish an internal policy of requesting electronic delivery and read receipts. The final rule retains the monitoring requirement and does not establish a policy of requesting electronic delivery and read receipts. The proposed rule makes clear that contracting agencies obtaining wage determinations through WDOL bear the responsibility for insuring they incorporate the correct wage determination into any contracting action. The rule also provides flexibility to contracting agencies in how they accomplish that standard. The ''email monitoring provision'' of proposed § 4.4(b)(3) is similar to the proposed § 4.4(c)(3) requirement for contracting agencies to monitor the WDOL website to determine whether the applicable wage determination has been revised. There may also be situations, such as periods of leave (*e.g.*, 2-week vacation), during which contracting agencies may not believe it practical to update email addresses; thus, to require resubmission of an e98 in all cases could be unduly burdensome. The WDOL website provides a method for contracting agencies to contact the Division. The DOL believes the WDOL contact process is sufficient.

The DOD and Navy recommend replacing the phrase ''geographic area'' in §§ 4.4(b)(5) and (c)(4) with ''locality,'' to make the wording consistent with § 4.163(i). The DOL agrees and the final rule reflects the modification.

The DOD and Navy also seek to revise § 4.4(b)(5) and 4.5(d) to have the contracting officer follow up with the DOL, if the contracting agency has not received a response within 10 business days of the submission of the original e98 notice or within 15 business days of the submission of the collective bargaining agreement. They further suggest the regulation specify an email address and a telephone number where such follow up should be made. The DOL has not adopted the suggested changes in the final rule. Proposed § 4.4(b)(1) provides for the requester to receive a response indicating the request has been referred to an analyst, if the DOL does not provide a final response to an e98 while the requester is online. The e98 will be assigned a unique serial number to facilitate follow-up should that become necessary. Although the regulations do not provide specific timeframes for a further response by an analyst, the initial e98 response states that a further response will be provided within five days. The additional response is usually provided on the same day or the next day; however some cases may require additional time. When the DOL requires additional time or information, the analyst working on the request will provide an interim reply informing the requestor of the need and that further response will come from the email address of the analyst working on the e98 request. If the contracting officer needs to follow-up on his/her e98, it would be more efficient to address such follow-up directly to the analyst working on the e98. In those rare instances where the contracting officer does not receive at least an interim response from an analyst within five days of submission, the instructions for the e98 provide both an email address and a telephone number where requests for assistance or a status report may be sent. The DOL believes including telephone numbers and email addresses in the regulations is not the most efficient way to ensure contracting officers have access to the current address and telephone number, because such information may change. The DOL also believes contracting officers accustomed to using the internet for submitting e98s will most likely return to the e98 website, rather than turn to the DOL regulations to seek an email address or telephone number to follow-up on their e98 submission. The DOL believes that these matters are adequately addressed within the e98 system and the proposed regulations.

The CSA recommends adding a reference to the ''changes'' clause in an SCA contract to the requirement in § 4.4(c)(1) for contracting agencies to amend contracts by incorporating the correct wage determination as determined by DOL. The CSA believes the change is appropriate, because the proposed regulations (1) affect Federal agency procurement procedures and (2) are for contracting agencies. The final rule does not contain such a provision. The DOL believes the proposed rule adequately states the obligations contracting agencies have when a

contracting agency incorporates an incorrect wage determination and that the FAR is the appropriate vehicle to address the concern raised by the CSA.

The CSA suggests the DOL refer to ''information,'' instead of ''document,'' in § 4.5(a)(1), and the final rule reflects this recommendation. The CSA believes the change would make the regulation more consistent with the purpose of the regulation, to take advantage of wide use of electronic communication and information sharing. The types of ''documents'' contemplated by the proposed rule are the wage determination, including revisions received timely, for the contracting action. The DOL believes contracting agencies currently routinely use paper copies of wage determinations for insertion into contracting actions; however, the proposed rule would not preclude use of electronic documents. DOL, however, believes the more common use of ''documents'' as referring to paper and the broader use of ''information'' and ''data'' for information technology purposes make a sufficiently compelling case to adopt the suggestion.

The CSA urges the DOL to divide § 4.5(a)(2) into a general introductory statement and two subsections pertaining to special circumstances. The final rule incorporates this recommendation, because the DOL agrees this may increase understanding of the regulatory requirements. The CSA also recommends the DOL reduce the 10-day time frame discussed in the second sentence of § 4.5(a)(2). The CSA believes a 5-day period would still allow contracting agencies time to provide electronic notification to offerors of the amended solicitation and still allow offerors sufficient time to amend their proposals. The final rule does not include this second change. The current and proposed rule allow agencies to make a determination that there is not a reasonable time to notify bidders of a revised wage determination, if the agency receives notice of the revision less than 10 days before the bid opening. The DOL believes use of electronic communication may cause contracting agencies to have fewer instances in which they will make a finding of insufficient time; however, it remains appropriate for contracting agencies to have an ability to exercise this discretion based on varying factual circumstances. The CSA further seeks to change this section by (1) making any revised wage determinations received after final proposal revisions inapplicable to negotiated procurements and (2) adding a provision requiring contracting agencies to make modifications within half the time currently allowed and (3) requiring corresponding adjustment in the contract price. The final rule does not include the requested changes, because they exceed the intended scope of the proposed rule, and the DOL believes further action on this recommendation would require reopening the notice and comment process. The DOD and Navy suggest removal of the fourth sentence of this proposed section, as initially drafted, which provides that, if (1) the contract does not specify a start of performance date which is within 30 days from the award and/or (2) performance of such procurement does not commence within this 30-day period, the DOL shall be notified and any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective. The agencies believe on-line access to wage determinations through WDOL and the e98 process make it unnecessary to continue the requirement for contracting agencies to submit blanket notifications to the DOL for all contracts specifying a start of performance date of more than 30 days, originally developed under the paper Form SF–98 process. The final rule does not include the notification requirement, but the remainder of the requirement has been retained.

The CSA urges that § 4.5(a)(3) highlight that a contracting agency has received an initial or a revised wage determination on the date the DOL (1) posts the determination to the WDOL Web site or (2) sends the determination through the e98 response process. The CSA believes it is critical to emphasize that a wage determination becomes effective when published on the WDOL Web site, and not only when the contracting agency receives an e98 response from DOL, since proposed § 4.4, Obtaining a wage determination, addresses identification of the initial wage determination (whether by the WDOL or e98 process). The final rule now includes references to the initial wage determination and e98 process in § 4.5(a)(3). The proposed rule only mentions the date of publication on WDOL or date on which an agency receives a revised determination from the DOL; however, the proposed rule does not indicate that contracting agencies may also receive initial wage determinations through the e98 process. The DOL agrees the clarification proposed by the CSA could reduce confusion over the date of receipt and make it more congruous with § 4.4.

The CSA recommends revising § 4.5(c) by referring to an ''applicable'' wage determination, changing the time frame for inserting the appropriate wage determination from 30 to 15 days from the date of the DOL notification and incorporating a reference to the changes clause of the contract. The final rule does not adopt these changes, for reasons previously explained.

The DOD and Navy recommend § 4.5(d) direct the contracting officer to incorporate a complete copy of the collective bargaining agreement into the contract action, if a timely response to the e98 has not been received and the e98 involves a collective bargaining agreement. The final rule does not include this prescription, because it may not be the most efficient approach in all cases and the existing proposal provides adequate guidance and greater flexibility in addressing the underlying concern. Proposed § 4.5(d) provides that the WHD should be contacted for guidance in cases where the contracting agency has filed an e98 and has not received a response. While it is possible that the guidance will be to include the entire collective bargaining agreement in the contract action, such action may not be necessary in all cases.

The DOD, Army and Navy also express a belief that the § 4.8 requirement regarding use of Form SF–99 (Notice of Award of Contract) is no longer needed and its continuation creates an unnecessary duplication of contract reporting, in view of the enhanced reporting capabilities of the Federal Procurement Data System (FPDS). The agencies ask the DOL to eliminate the reporting requirement. The proposed rule does not include any changes in § 4.8 or this reporting requirement. The SCA coverage threshold for application of SCA wage determinations is $2,500; however, § 4.8 of the current rule requires that when a contract over $10,000 is awarded and the agency does not report the award to the FPDS via Form SF–279 (FPDS Individual Contract Action Report) or its equivalent, the agency is expected to furnish a Form SF–99 to the Wage and Hour Division unless it makes other arrangements for notifying the Division of such awards. The $10,000 reporting threshold was adopted in the SCA rules in 1983 to be consistent with the then-applicable small purchase threshold and reporting requirements of the FPDS. Prior to 1983, a Form SF–99 was required for all SCA contracts in excess of S2,500. This procedural rule, thus, originally established a reporting requirement between a federal contracting agency and the DOL only if the contract award data was not already being reported to the FPDS, thereby eliminating any duplication of reporting requirements and reducing existing

paperwork and reporting burdens on the agencies. The FPDS reporting threshold via Form SF–279, however, has since been increased to $25,000. The change in the FPDS reporting threshold, thus, has created the additional reporting burden. In any event, in the interest of eliminating any unanticipated paperwork and reporting burdens imposed by § 4.8, the DOL has decided to discontinue the use of Standard Form 99 and eliminate the reporting requirement entirely. The APA exception to the notice-and-comment procedures applies to this situation. The DOL finds, pursuant to 5 U.S.C. 553(b)(3)(B), that notice and public comment procedures on this procedural reporting rule are impracticable and unnecessary and would not further the public interest. Accordingly, the final rule removes and reserves § 4.8 and the DOL will discontinue using Form SF–99.

The CSA suggests removal of § 4.50(a)(2), in the absence of any correlation between the provision and the wide use of electronic communication and information sharing, or moving the discussion to § 4.56, Review and reconsideration of wage determinations. The final rule retains this provision as proposed without change. The section stresses that (1) various prevailing wage determinations may apply in a particular locality and (2) the application of these different prevailing wage determinations will depend upon the nature of the contracts to which they are applied. These differences and variations in wage determinations require that contracting agencies observe the proper protocol required by the WDOL processes when selecting the appropriate wage determination. The provisions of § 4.56 provide an appeal right for any interested party affected by a wage determination to request the Wage and Hour Administrator to review and reconsider it.

The CSA also urges revising the last sentence of § 4.54(b), to provide for the issuance of wage determinations for various localities identified by the contracting agency as set forth in § 4.4(a)(3)(i) ''using the e98 process or 4.4(c) using the WDOL process.'' The final rule does not adopt the suggested change. Section 4.54 discusses situations where services are to be performed for a Federal agency at the site of the successful bidder, in contrast to services to be performed at a specific Federal facility or installation, or in the locality of such installation. The location where the work will be performed often cannot be ascertained at the time of bid advertisement or solicitation. The § 4.4(a) introductory discussion of obtaining wage determinations applies equally to wage determinations obtained through either the e98 or WDOL processes, respectively explained in § 4.4 (b) and (c).

The CSA recommends inserting a requirement in § 4.55(a) for the WHD to review wage determinations no less often than once every two years and also seeks other changes, consistent with the recommendation for § 4.54. The final rule does not include these changes. The current and proposed regulations require periodic review of wage determinations but do not impose the maximum two-year interval between such reviews. The general requirement in SCA section 4(d) for the periodic update of wage determinations directs the contracting agencies to update wage determinations in awarded multi-year contracts. It is not a directive to DOL to update its wage determination database no less often than every two years. The DOL has not made these remaining changes, for the reasons discussed.

The CSA recommends adding a reference to the ''changes'' clause in an SCA contract to § 4.144(c)(1), pertaining to contract modifications affecting the amount of a contract. The final rule does not add the reference for the reasons previously stated. The proposed section merely conforms the provision to the e98 process and reflects the current regulation in all other respects.

The CSA makes a general recommendation to substitute ''website'' for ''Internet Web site'' and to remove quotation marks from e98. The final rule incorporates these plain language changes. The final rule does not adopt the CSA recommendation to replace ''Government'' with ''Department of Labor,'' because the DOL does not host the WDOL Web site.

IV. Regulatory Flexibility, Executive Order 12866; Small Business Regulatory Enforcement Fairness Act

This regulation affects Federal agency procurement procedures and will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The agency certified to this effect to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

This rule has been treated as a significant rulemaking, although not economically significant or major, and has, therefore, been reviewed by OMB.

V. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any Federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate or by the private sector.

VI. Executive Order 13132 (Federalism)

The rule does not have federalism implications as outlined in Executive Order 13132. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

VII. Executive Order 13175, Indian Tribal Governments

This rule does not have ''tribal implications'' under Executive Order 13175 and does not require a tribal summary impact statement. The rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

VIII. Effects on Families

The undersigned hereby certifies that the rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

IX. Executive Order 13045, Protection of Children

This rule has no environmental health risk or safety risk that may disproportionately affect children.

X. Environmental Impact Assessment

A review of this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates the rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XI. Executive Order 13211, Energy Supply

This rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

XII. Executive Order 12630, Constitutionally Protected Property Rights

This rule is not subject to Executive Order 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

XIII. Executive Order 12988, Civil Justice Reform Analysis

This rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects

29 CFR Part 1

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Recordkeeping requirements, Reporting requirements, Wages.

29 CFR Part 4

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

Signed at Washington, DC, this 18th day of August, 2005.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Alfred B. Robinson, Jr.,

Deputy Administrator, Wage and Hour Division.

■ For the reasons set forth above, title 29, parts 1 and 4, of the Code of Federal Regulations are amended as set forth below.

TITLE 29—LABOR

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

■ 1. The authority citation for part 1 is revised to read as follows:

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 *et seq.*; 40 U.S.C. 3145; 40 U.S.C. 3148; and the laws listed in appendix A of this part.

■ 2. Paragraph (e) is added to section 1.2 to read as follows:

§ 1.2 Definitions.[1]

* * * * *

(e) The term *Wage Determinations OnLine (WDOL)* shall mean the Government Internet Web site for both Davis-Bacon Act and Service Contract Act wage determinations available at *http://www.wdol.gov*. In addition, WDOL provides compliance assistance information. The term will also apply to any other Internet Web site or electronic means that the Department of Labor may approve for these purposes.

■ 3. Paragraphs (a) and (b) of § 1.5 are revised to read as follows:

§ 1.5 Procedure for requesting wage determinations.

(a) The Department of Labor publishes general wage determinations under the Davis-Bacon Act on the WDOL Internet Web site. If there is a general wage determination applicable to the project, the agency may use it without notifying the Department of Labor, *Provided,* That questions concerning its use shall be referred to the Department of Labor in accordance with § 1.6(b).

(b)(1) If a general wage determination is not available, the Federal agency shall request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting Form SF–308 to the Department of Labor at this address: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Branch of Construction Contract Wage Determination, Washington, DC 20210. In preparing Form SF–308, the agency shall check only those classifications that will be needed in the performance of the work. Inserting a note such as ''entire schedule'' or ''all applicable classifications'' is not sufficient. Additional classifications needed that are not on the form may be typed in the blank spaces or on a separate list and attached to the form.

(2) In completing SF–308, the agency shall furnish:

(i) A sufficiently detailed description of the work to indicate the type of construction involved. Additional description or separate attachment, if necessary for identification of type of project, shall be furnished.

(ii) The county (or other civil subdivision) and State in which the proposed project is located.

(3) Such request for a wage determination shall be accompanied by any pertinent wage payment information that may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency shall also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

* * * * *

■ 4. Paragraphs (a)(2), (c)(3)(iv) and (c)(3)(v) of § 1.6 are revised to read as follows:

§ 1.6 Use and effectiveness of wage determinations.

(a) * * *

(2) General wage determinations issued pursuant to § 1.5(a), notice of which is published on WDOL, shall contain no expiration date.

* * * * *

(c) * * *

(3) * * *

(iv) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, or if under paragraph (c)(3)(ii) or (iii) of this section construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any modification, notice of which is published on WDOL prior to award of the contract or the beginning of construction, as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator. Such request shall be supported by a written finding, which shall include a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(v) A modification to a general wage determination is ''published'' within the meaning of this section on the date notice of a modification or a supersedeas wage determination is published on WDOL or on the date the agency receives actual written notice of the modification from the Department of Labor, whichever occurs first. Archived versions of Davis-Bacon and Related Acts wage determinations that are no longer current may be accessed in the ''Archived DB WD'' database of WDOL for information purposes only. Contracting officers should not use an archived wage determination in a contract action without prior approval of the Department of Labor.

* * * * *

■ 5. Items 19 and 20 in Appendix A of part 1 are revised to read as follows:

Appendix A to Part 1

* * * * *

19. National Visitors Center Facilities Act of 1968 (sec. 110, 82 Stat. 45; 40 U.S.C. 808).

Note: Section applying labor standards provisions of the Davis-Bacon Act repealed August 21, 2002, by 116 Stat. 1318, Pub. L. 107–217.

20. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. 14701).

* * * * *

■ 6. Appendix B of Part 1 is revised to read as follows:

Appendix B to Part 1

Northeast Region

For the States of Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, Virginia and West Virginia:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Curtis Center, 170 South Independence Mall West, Room 850 West, Philadelphia, PA 19106 (Telephone: 215–861–5800, FAX: 215–861–5840).

Southeast Region

For the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 61 Forsyth Street, SW., Room 7M40, Atlanta, GA 30303 (Telephone 404–893–4531, FAX: 404–893–4524).

Midwest Region

For the States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 230 South Dearborn Street, Room 530, Chicago, IL 60604–1591 (Telephone: 312–596–7180, FAX: 312–596–7205).

Southwest Region

For the States of Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 525 South Griffin Street, Suite 800, Dallas, TX 75202–5007 (Telephone: 972–850–2600, FAX: 972–850–2601).

Western Region

For the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon and Washington:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 71 Stevenson Street, Suite 930, San Francisco, CA 94105, (Telephone: 415–848–6600, FAX: 415–848–6655).

■ 7. Appendix C of part 1 is deleted.

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

■ 8. The authority citation for part 4 continues to read as follows:

Authority: 41 U.S.C. 351 *et seq.*; 41 U.S.C. 38 and 39; 5 U.S.C. 301.

Subpart A—Service Contract Labor Standards Provisions and Procedures

■ 9. In § 4.1a, paragraphs (b) and (h) are revised and paragraphs (i) and (j) are added, to read as follows:

§ 4.1a Definitions and use of terms.

(b) *Secretary* includes the Secretary of Labor, the Assistant Secretary for Employment Standards, and their authorized representatives.

* * * * *

(h) *Wage determination* includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of sections 2(a) and/or 4(c) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of $2,500 which is subject to the provisions of the Service Contract Act of 1965. A wage determination is effective upon its publication on the WDOL Web site or when a Federal agency receives a response from the Department of Labor to an e98.

(i) *Wage Determinations OnLine (WDOL)* means the Government Internet Web site for both Davis-Bacon Act and Service Contract Act wage determinations available at *http://www.wdol.gov.* In addition, WDOL provides compliance assistance information and a link to submit an e98 or any electronic means the Department of Labor may approve for this purpose. The term will also apply to any other Internet Web site or electronic means that the Department of Labor may approve for these purposes.

(j) The *e98* means a Department of Labor approved electronic application (*http://www.wdol.gov*), whereby a contracting officer submits pertinent information to the Department of Labor and requests a wage determination directly from the Wage and Hour Division. The term will also apply to any other process or system the Department of Labor may establish for this purpose.

■ 10. In § 4.3, paragraphs (b) through (d) are revised and paragraph (e) is added, to read as follows:

§ 4.3 Wage determinations.

* * * * *

(b) As described in subpart B of this part—Wage Determination Procedures, two types of wage determinations are issued under the Act: *Prevailing in the locality* or *Collective Bargaining Agreement (Successorship)* wage determinations. The facts related to a specific solicitation and contract will determine the type of wage determination applicable to that procurement. In addition, different types of prevailing wage determinations may be issued depending upon the nature of the contract. While prevailing wage determinations based upon cross-industry survey data are applicable to most contracts covered by the Act, in some cases the Department of Labor may issue industry specific wage determinations for application to specific types of service contracts. In addition, the geographic scope of contracts is often different and the geographic scope of the underlying survey data for the wage determinations applicable to those contracts may be different.

(c) Such wage determinations will set forth for the various classes of service employees to be employed in furnishing services under such contracts in the appropriate localities, minimum monetary wage rates to be paid and minimum fringe benefits to be furnished them during the periods when they are engaged in the performance of such contracts, including, where appropriate under the Act, provisions for adjustments in such minimum rates and benefits to be placed in effect under such contracts at specified future times. The wage rates and fringe benefits set forth in such wage determinations shall be determined in accordance with the provisions of sections 2(a)(1), (2), and (5), 4(c) and 4(d) of the Act from those prevailing in the locality for such employees, with due consideration of the rates that would be paid for direct Federal employment of any classes of such employees whose wages, if Federally employed, would be determined as provided in 5 U.S.C. 5341 or 5 U.S.C. 5332, or from pertinent collective bargaining agreements with respect to the implementation of section 4(c). The wage rates and fringe benefits so determined for any class of service employees to be engaged in furnishing covered contract services in a locality shall be made applicable by contract to all service employees of such class employed to perform such services in the locality under any contract subject to section 2(a) of the Act which is entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, revision, or supersedure.

(d) Generally, wage determinations issued for solicitations or negotiations for any contract where the place of

performance is unknown will contain minimum monetary wages and fringe benefits for the various geographic localities where the work may be performed which were identified in the initial solicitation. (See § 4.4(a)(3)(i).)

(e) Wage determinations will be available for public inspection during business hours at the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC, and copies will be made available on request at Regional Offices of the Wage and Hour Division. In addition, most prevailing wage determinations are available online from WDOL. Archived versions of SCA wage determinations that are no longer current may be accessed in the ''Archived SCA WD'' database of WDOL for information purposes only. Contracting officers should not use an archived wage determination in a contract action without prior approval of the Department of Labor.

■ 11. Section 4.4 is revised to read as follows:

§ 4.4 Obtaining a wage determination.

(a)(1) Sections 2(a)(1) and (2) of the Act require that every contract and any bid specification therefore in excess of $2,500 contain a wage determination specifying the minimum monetary wages and fringe benefits to be paid to service employees performing work on the contract. The contracting agency, therefore, must obtain a wage determination prior to:

(i) Any invitation for bids;

(ii) Request for proposals;

(iii) Commencement of negotiations;

(iv) Exercise of option or contract extension;

(v) Annual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress; or

(vi) Each biennial anniversary date of a multi-year contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division.

(2) As described in § 4.4(b), wage determinations may be obtained from the Department of Labor by electronically submitting an e98 describing the proposed contract and the occupations expected to be employed on the contract. Based upon the information provided on the e98, the Department of Labor will respond with the wage determination or wage determinations that the contracting agency may rely upon as the correct wage determination(s) for the contract described in the e98. Alternatively, contracting agencies may select and obtain a wage determination using WDOL. (See § 4.4(c).) Although the WDOL Web site provides assistance to the agency to select the correct wage determination for the contract, the agency remains responsible for the wage determination selected.

(3)(i) Where the place of performance of a contract for services subject to the Act is unknown at the time of solicitation, the solicitation need not initially contain a wage determination. The contracting agency, upon identification of firms participating in the procurement in response to an initial solicitation, shall obtain a wage determination for each location where the work may be performed as indicated by participating firms. An applicable wage determination must be obtained for each firm participating in the bidding for the location in which it would perform the contract. The appropriate wage determination shall be incorporated in the resultant contract documents and shall be applicable to all work performed thereunder (regardless of whether the successful contractor subsequently changes the place(s) of contract performance).

(ii) There may be unusual situations, as determined by the Department of Labor upon consultation with a contracting agency, where the procedure in paragraph (a)(3)(i) of this section is not practicable in a particular situation. In these situations, the Department may authorize a modified procedure that may result in the subsequent issuance of wage determinations for one or more composite localities.

(4) In no event may a contract subject to the Act on which more than five (5) service employees are contemplated to be employed be awarded without an appropriate wage determination. (See section 10 of the Act.)

(b) e98 process—

(1) The e98 is an electronic application used by contracting agencies to request wage determinations directly from the Wage and Hour Division. The Division uses computers to analyze information provided on the e98 and to provide a response while the requester is online, if the analysis determines that an existing wage determination is currently applicable to the procurement. The response will assign a unique serial number to the e98 and the response will provide a link to an electronic copy of the applicable wage determination(s). If the initial computer analysis cannot identify the applicable wage determination for the request, an online response will be provided indicating that the request has been referred to an analyst. Again, the online response will assign a unique serial number to the e98. After an analyst has reviewed the request, a further response will be sent to the email address identified on the e98. In most cases, the further response will provide an attachment with a copy of the applicable wage determination(s). In some cases, however, additional information may be required and the additional information will be requested via email. After an applicable wage determination is sent in response to an e98, the e98 system continues to monitor the request and if the applicable wage determination is revised in time to affect the procurement, an amended response will be sent to the email address identified on the e98.

(2) When completing an e98, it is important that all information requested be completed accurately and fully. However, several sections are particularly important. Since most responses are provided via email, a correct email address is critically important. Accurate procurement dates are essential for the follow-up response system to operate effectively. An accurate estimate of the number of service employees to be employed under the contract is also important because section 10 of the Act requires that a wage determination be issued for all contracts that involve more than five service employees.

(3) Since the e98 system automatically provides an amended response if the applicable wage determination is revised, the email address listed on the e98 must be monitored during the full solicitation stage of the procurement. Communications sent to the email address provided are deemed to be received by the contracting agency. A contracting agency must update the email address through the ''help'' process identified on the e98, if the agency no longer intends to monitor the email address.

(4) For invitations to bid, if the bid opening date is delayed by more than sixty (60) days, or if contract commencement is delayed by more than sixty (60) days for all other contract actions, the contracting agency shall submit a revised e98.

(5) If the services to be furnished under the proposed contract will be substantially the same as services being furnished in the same locality by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall reference the union and the collective bargaining agreement on the e98. The requester will receive an e-mail response giving instructions for

submitting a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. After receipt of the collective bargaining agreement, the Wage and Hour Division will provide a further e-mail response attaching a copy of the wage determination based upon the collective bargaining agreement. If the place of contract performance is unknown, the contracting agency will submit the collective bargaining agreement of the incumbent contractor for incorporation into a wage determination applicable to a potential bidder located in the same locality as the predecessor contractor. If such services are being furnished at more than one locality and the collectively bargained wage rates and fringe benefits are different at different localities or do not apply to one or more localities, the agency shall identify the localities to which such agreements have application. If the collective bargaining agreement does not apply to all service employees under the contract, the agency shall identify the employees and/or work subject to the collective bargaining agreement. In the event the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arm's-length negotiations, a full statement of the facts so indicating shall be transmitted with the copy of such agreement. (See § 4.11.) If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agency shall so advise the Wage and Hour Division and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to § 4.10 at the time of filing the e98.

(6) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall provide a statement in the comments section of the e98 concerning the type of funding and the contemplated term of the proposed contract. Unless otherwise advised by the Wage and Hour Division that a wage determination must be obtained on the annual anniversary date, a new wage determination shall be obtained on each biennial anniversary date of the proposed multi-year contract in the event its term is for a period in excess of two years.

(c) WDOL process—

(1) Contracting agencies may use the WDOL Web site to select the applicable prevailing wage determination for the procurement. The WDOL site provides assistance to the agency in the selection of the correct wage determination. The contracting agency, however, is fully responsible for selecting the correct wage determination. If the Department of Labor subsequently determines that an incorrect wage determination was applied to a specific contract, the contracting agency, in accordance with § 4.5, shall amend the contract to incorporate the correct wage determination as determined by the Department of Labor.

(2) If an applicable prevailing wage determination is not available on the WDOL site, the contracting agency must submit an e98 in accordance with § 4.4(b).

(3) The contracting agency shall monitor the WDOL site to determine whether the applicable wage determination has been revised. Revisions published on the WDOL site or otherwise communicated to the contracting officer within the timeframes prescribed in § 4.5(a)(2) are applicable and must be included in the resulting contract.

(4) If the services to be furnished under the proposed contract will be substantially the same as services being furnished in the same locality by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency may prepare a wage determination that references the collective bargaining agreement by incorporating that wage determination, with a complete copy of the collective bargaining agreement attached thereto, into the successor contract action. It need not submit a copy of the collective bargaining agreement to the Department of Labor unless requested to do so. If the place of contract performance is unknown, the contracting agency will prepare a wage determination on WDOL and attach the collective bargaining agreement of the incumbent contractor and make both the wage determination and collective bargaining agreement applicable to a potential bidder located in the same locality as the predecessor contractor. (See section 4.4(a)(3).) If such services are being furnished at more than one locality and the collectively bargained wage rates and fringe benefits are different at different localities or do not apply to one or more localities, the agency shall identify the localities to which such agreements have application. If the collective bargaining agreement does not apply to all service employees under the contract, the agency shall identify the employees and/or work subject to the collective bargaining agreement. In the event the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arm's-length negotiations, a full statement of the facts so indicating shall be transmitted to the Wage and Hour Division with the copy of such agreement. (See § 4.11.) If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agency shall so advise the Wage and Hour Division and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to § 4.10. A wage determination based upon the collective bargaining agreement must be included in the contract until a hearing or a final ruling of the Administrator determines that the collective bargaining agreement was not reached as the result of arm's-length negotiations or was substantially at variance with locally prevailing rates. Any questions regarding timeliness or applicability of collective bargaining agreements must be referred to the Department of Labor for resolution.

(5) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall, unless otherwise advised by the Wage and Hour Division, obtain a new wage determination on each biennial anniversary date of the proposed multi-year contract in the event its term is for a period in excess of two years.

■ 12. Section 4.5 is amended by revising paragraphs (a), (c), and (d) to read as follows:

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

(a) Any contract in excess of $2,500 shall contain, as an attachment, the applicable, currently effective wage determination specifying the minimum wages and fringe benefits for service employees to be employed thereunder, including any information referred to in paragraphs (a)(1) or (2) of this section;

(1) Any wage determination from the Wage and Hour Division, Employment Standards Administration, Department of Labor, responsive to the contracting agency's submission of an e98 or obtained through WDOL under § 4.4; or

(2) Any revision of a wage determination issued prior to the award of the contract or contracts which specifies minimum wage rates or fringe benefits for classes of service employees whose wages or fringe benefits were not previously covered by wage determinations, or which changes previously determined minimum wage rates and fringe benefits for service employees employed on covered contracts in the locality.

(i) However, revisions received by the Federal agency later than 10 days before the opening of bids, in the case of contracts entered into pursuant to competitive bidding procedures, shall not be effective if the Federal agency finds that there is not a reasonable time still available to notify bidders of the revision.

(ii) In the case of procurements entered into pursuant to negotiations (or in the case of the execution of an option or an extension of the initial contract term), revisions received by the agency after award (or execution of an option or extension of term, as the case may be) of the contract shall not be effective provided that the contract start of performance is within 30 days of such award (or execution of an option or extension of term). Any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective, if:

(A) The contract does not specify a start of performance date which is within 30 days from the award; and/or

(B) Performance of such procurement does not commence within this 30-day period.

(iii) In situations arising under section 4(c) of the Act, the provisions in § 4.1b(b) apply.

(3) For purposes of using WDOL databases containing prevailing wage determinations, the date of receipt by the contracting agency will be the date of publication on the WDOL Web site or on the date the agency receives actual notice of an initial or revised wage determination from the Department of Labor through the e98 process, whichever occurs first.

* * * * *

(c) Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by the Department of Labor, shall include in the contract the stipulations contained in § 4.6 and any applicable wage determination issued by the Administrator or his authorized representative through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). With respect to any contract subject to section 10 of the Act, the Administrator may require retroactive application of such wage determination. (See 53 Comp. Gen. 412, (1973); *Curtiss-Wright Corp.* v. *McLucas*, 381 F. Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2* v. *Military Sealift Command*, 86 CCH Labor Cases ¶33,782 (D DC 1979); *Brinks, Inc.* v. *Board of Governors of the Federal Reserve System*, 466 F. Supp. 112 (D DC 1979), 466 F. Supp. 116 (D DC 1979).) (See also 32 CFR 1–403.)

(d) In cases where the contracting agency has filed an e98 and has not received a response from the Department of Labor, the contracting agency shall, with respect to any contract for which section 10 to the Act and § 4.3 for this part mandate the inclusion of an applicable wage determination, contact the Wage and Hour Division by e-mail or telephone for guidance.

§ 4.8 [Removed and Reserved]

■ 13. Section 4.8 is removed and reserved.

Subpart B—Wage Determination Procedures

■ 14. Section 4.50 is revised to read as follows:

§ 4.50 Types of wage and fringe benefit determinations.

The Administrator specifies the minimum monetary wages and fringe benefits to be paid as required under the Act in two types of determinations:

(a) *Prevailing in the locality.* (1) Determinations that set forth minimum monetary wages and fringe benefits determined to be prevailing for various classes of service employees in the locality (sections 2(a)(1) and 2(a)(2) of the Act) after giving ''due consideration'' to the rates applicable to such service employees if directly hired by the Federal Government (section 2(a)(5) of the Act).

(2) The prevailing wage determinations applicable to most contracts covered by the Act are based upon cross-industry survey data. However, in some cases the Department of Labor may issue industry specific wage determinations for application to specific types of service contracts. In addition, the geographic scope of contracts is often different and the geographic scope of the underlying survey data for the wage determinations applicable to those contracts may be different. Therefore, a variety of different prevailing wage determinations may be applicable in a particular locality. The application of these different prevailing wage determinations will depend upon the nature of the contracts to which they are applied.

(b) *Collective Bargaining Agreement—(Successorship).* Determinations that set forth the wage rates and fringe benefits, including accrued and prospective increases, contained in a collective bargaining agreement applicable to the service employees who performed on a predecessor contract in the same locality. (See sections 2(a)(1) and (2) as well as 4(c) of the Act.)

■ 15. Paragraph (b) of § 4.54 is revised to read as follows:

§ 4.54 Locality basis of wage and fringe benefit determinations.

* * * * *

(b) Where the services are to be performed for a Federal agency at the site of the successful bidder, in contrast to services to be performed at a specific Federal facility or installation, or in the locality of such installation, the location where the work will be performed often cannot be ascertained at the time of bid advertisement or solicitation. In such instances, wage determinations will generally be issued for the various localities identified by the agency as set forth in § 4.4(a)(3)(i).

* * * * *

■ 16. Paragraphs (a) and (b) of § 4.55 are revised to read as follows:

§ 4.55 Issuance and revision of wage determinations.

(a) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in revised determinations. For example, in a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement(s) applicable in that locality, and such agreement(s) specifies increases in such rates to be effective on specific dates, the determinations would be revised to reflect such changes as they become effective. Revised determinations shall be applicable to contracts in accordance with the provisions of § 4.5(a) of subpart A.

(b) Determinations issued by the Wage and Hour Division with respect to particular contracts are required to be incorporated in the invitations for bids or requests for proposals or quotations issued by the contracting agencies, and are to be incorporated in the contract specifications in accordance with § 4.5 of subpart A. In this manner, prospective contractors and subcontractors are advised of the minimum monetary wages and fringe benefits required under the most recently applicable determination to be paid the service employees who perform the contract work. These requirements are the same for all bidders so none will be placed at a competitive disadvantage.

* * * * *

Subpart C—Application of the McNamara-O'Hara Service Contract Act

■ 17. Paragraphs (e)(1)(iv)(A) and (e)(2)(iii)(A) of § 4.123 are revised to read as follows:

§ 4.123 Administrative limitations, variances, tolerances and exemptions.

* * * * *

(e) * * *

(1) * * *

(iv)(A) If the Administrator determines after award of the prime contract that any of the requirements in paragraph (e)(1) of this section for exemption has not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Administrator's determination. In such case, the corrective procedures in § 4.5(c) shall be followed.

* * * * *

(2) * * *

(iii)(A) If the Administrator determines after award of the prime contract that any of the requirements in paragraph (e)(2) of this section for exemption has not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the corrective procedures in § 4.5(c) shall be followed.

* * * * *

■ 18. Section 4.144 is revised to read as follows:

§ 4.144 Contract modifications affecting amount.

Where a contract that was originally issued in an amount not in excess of $2,500 is later modified so that its amount may exceed that figure, all the provisions of section 2(a) of the Act, and the regulations thereunder, are applicable from the date of modification to the date of contract completion. In the event of such modification, the contracting officer shall immediately obtain a wage determination from the Department of Labor using the e98 application or directly from WDOL, and insert the required contract clauses and any wage determination issued into the contract. In the event that a contract for services subject to the Act in excess of $2,500 is modified so that it cannot exceed $2,500, compliance with the provisions of section 2(a) of the Act and the contract clauses required thereunder ceases to be an obligation of the contractor when such modification becomes effective.

[FR Doc. 05–16779 Filed 8–25–05; 8:45 am]

BILLING CODE 4510–27–P