



Homeland  
Security

February 23, 2004

**MEMORANDUM FOR:** All Heads of Contracting Activities (HCAs)

**FROM:**

Gregory D. Rothwell  
Chief Procurement Officer

A handwritten signature in black ink that reads "Gregory D. Rothwell". The signature is written in a cursive style and is positioned to the right of the typed name and title.

**SUBJECT:**

Class Deviation from FAR 12.504, 22.1003-4 and 52.212-5  
regarding the Applicability of the Service Contract Act (SCA)  
to subcontracts for the acquisition of commercial services.

**Purpose:** To issue a class deviation from the requirements of Federal Acquisition Regulation (FAR) concerning the applicability of the Service Contract Act (SCA) to subcontracts for the acquisition of commercial services.

**Effective Date:** Immediately

**Reference:**

- On Aug 22, 2000, the CAAC Chairman issued CAAC Letter 2000-01, which authorized civilian agencies to issue a class deviation regarding the Applicability of the Service Contract Act (SCA) and subcontracts for the acquisition of commercial services. CAAC Letter 2000-01 remained in effect until July 26, 2001.
- On Aug 16, 2002, the CAAC Chairman issued CAAC Letter 2002-02, which extended the class deviation thru July 26, 2002.
- On Aug 16, 2002, the CAAC Chairman issued CAAC Letter 2002-02, which extended the class deviation thru July 26, 2003.
- On Jul 28, 2003, the CAAC Chairman issued CAAC Letter 2003-01, which extended the class deviation thru July 26, 2004.

**Background:**

On July 26, 2000, the FAR and the DoL regulations were amended concerning the SCA and subcontracts for commercial services. The effective date of the FAR amendment was

Aug 25, 2000 and was applicable to solicitations issued on or after the effective date.

Section 8003(b) of the Federal Acquisition Streamlining Act (FASA) required that the FAR include a list of the provisions of law that are inapplicable to subcontracts for commercial items. In implementing this section of FASA, the SCA was included on the list of laws inapplicable to commercial subcontracts. The FAR Council, in consultation with DoL, has concluded that it is not in the best interest of the Government to continue to exclude all subcontracts for commercial items. The FAR Council removed the SCA from the list of laws inapplicable to subcontracts for commercial items and the FAR was amended.

Pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), DoL issued a temporary exemption from coverage for certain subcontracts for commercial services. DoL also issued a proposed rule proposing a similar exemption for both prime contracts and subcontracts. The exemption is limited solely to those subcontracts that:

- (1) Were or would have been exempt under the previous FAR and
- (2) Would be exempt under the DoL proposed rule if that rule becomes final in its current form.

Attached is a determination and findings for this class deviation.

**Expiration Date:** The DoL exemption will remain in effect for one year or until final action is taken on the proposed rule, whichever occurs first. Consultation and approval for this class deviation is granted under CAAC Letter 2003-01. This class deviation shall remain in effect until Jul 26, 2004, or upon the effective date of a pertinent FAR change, whichever occurs first.

**Exempt Subcontracts:**

The Secretary of Labor has exempted subcontracts for maintenance, calibration, repair and /or installation of ADP from all provisions of the SCA if the following conditions are met:

- (i) If the subcontract includes installation services, the installation services are not subject to the Davis-Bacon Act as provided in 29 CFR 4.116(c)(2).
- (ii) The items of equipment are commercial items.
- (iii) The subcontract services are furnished at prices that are, or are based on, established catalog prices for the maintenance, calibration, repair, and/or installation of such commercial items.
- (iv) The subcontractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the subcontractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.
- (v) The subcontractor certifies in the subcontract that the conditions of (ii) through (iv) above are met.
- (vi) Prior to subcontract award, the contractor determines that this exemption applies to the subcontract. In making a judgment that the exemption applies, the clause FAR 52.215-5(c)(1) requires the contractor to consider all factors and make an affirmative determination that the conditions in paragraphs (c)(2)(ii) through (iv) of this subsection have been met, and that the condition at paragraph (c)(2)(v) of this subsection will be met.

If DoL determines that any of the above requirements for exemption have not been met with

respect to a subcontract, the exemption will be deemed inapplicable and the contractor may be responsible for compliance with the Act, effective as of the date of contract award.

The Secretary of Labor has exempted the following commercial item services from all provisions of the Act (see below):

- (i) Automated data processing (ADP) and telecommunications services excluding ADP data entry services and ADP optical scanning services. This category includes the following:
  - (A) ADP facility operation and maintenance services provided at the subcontractor's facility.
  - (B) ADP telecommunications and transmission services.
  - (C) ADP teleprocessing and timesharing services.
  - (D) ADP systems analysis services.
  - (E) Information and data broadcasting or data distribution services.
  - (F) ADP backup and security services.
  - (G) ADP data conversion services.
  - (H) Computer aided design/computer aided manufacturing services.
  - (I) Digitizing services (including cartographic and geographic information).
  - (J) Telecommunications network management services.
  - (K) Automated news services.
  - (L) Data services or other information services (e.g., buying data, the electronic equivalent of books, periodicals, newspapers, etc.)
  - (M) Data storage on tapes, compact disks, etc.
- (ii) Automobile or other vehicles (e.g., aircraft) maintenance services (other than subcontracts to operate Government motor pool or similar facility).
- (iii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).
- (iv) Lodging at hotels/motels and contracts with hotels/motels for conferences, including lodging and meals, that are part of the subcontract for the conference.
- (v) Maintenance services for all types of specialized building of facility equipment, such as elevators, escalators, temperature control systems, security systems, smoke and/or heat detection equipment.
- (vi) Maintenance, calibrations, repair or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment.
- (vii) Transportation of persons by air, motor vehicle, rail or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).
- (viii) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.
- (ix) Relation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes.

The exemption for services listed above in paragraphs (i) through (ix) apply if the following conditions are met:

- (a) The services under the subcontract are commercial.

- (b) The subcontract will be awarded on a sole-source basis or the subcontract will be selected for award based on other factors in addition of price. In such cases, price must be equal to or less important than the combination of other nonprice or cost factors in selecting the subcontractor.
- (c) The subcontract services are furnished at prices that are, or are based on established catalog or market prices.
- (d) All of the service employees who will perform the services under the subcontract spend only a small portion of their time (a monthly average of less than 20 percent of available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than month) servicing the Government subcontract.
- (e) The subcontractor utilizes the same compensation (wage and fringe benefits) plan for all services employees performing work under the subcontract as the subcontractor uses for these employees and for equivalent employees servicing commercial customers.
- (f) The contractor determines in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the above requirements. If the services are currently being performed under a contract or subcontract, the contractor is required by the clause at FAR 52.212-5(c)(1) to consider the practices of the existing contractor or subcontractor in making the determination regarding the above requirements.
- (g) The subcontractor certifies in the subcontract that the conditions in paragraphs (a), (b) and (e) of this section apply to the subcontract. The contractor is required by clause at FAR 52.212-5(c)(1) to review available information concerning the subcontractor and the manner in which the subcontract will be performed. If the contractor has reason to doubt the validity of the certification, SCA stipulations must be included in the subcontract.
- (h) The subcontract is not subject to Section 4(c) of the Service Contract Act.

If DoL determines that any of the above requirements for exemption have not been met with respect to a subcontract, the exemption will be deemed inapplicable for that subcontract, and the contractor might be responsible for compliance with the Act, effective as of the date of contract award.

**Class Deviation from the Federal Acquisition Regulation (FAR)  
12.504, 22.1003-4 and 52.212-5 regarding the Applicability of the Service Contract Act (SCA) to  
subcontracts for the acquisition of commercial services.**

**Determination and Findings**

Under the authority granted by the Civilian Agency Acquisition Council (CAAC) Letter 2003-01, the Department of Homeland Security is authorized a class deviation from the Federal Acquisition Requirement 12.504, 22.1003-4 and 52.212-5, concerning the applicability of the Service Contract Act (SCA) to subcontracts for the acquisition of commercial services.

**Findings**

The FAR was revised at 12.504(a)(7) and 52.212-5(e)(5) to remove the Service Contract Act from the list of laws inapplicable to subcontracts for commercial services. The FAR rule was published July 26, 2000. The effective date was Aug 25, 2000 (see 65 FR 46068). The rule is applicable to solicitations issued on or after the effective date. (see 65 FR 46053 and FAR 1.108(d)).

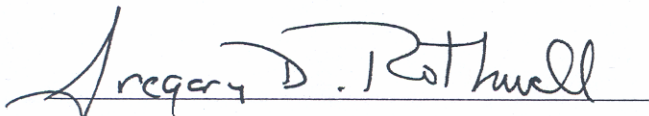
On the same day, the Department of Labor (DoL) pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), issued a final rule which recognizes a temporary exemption from SCA coverage for certain subcontracts for commercial services; and issued a proposed rule which proposes a similar exemption for both prime contracts and subcontracts.

The temporary exemption does not apply to all commercial subcontracts that may have been exempt under the now withdrawn FAR rule nor does it apply to any prime contracts. The exemption is limited solely to those subcontracts that (1) were or would have been exempt under the now withdrawn FAR rule and (2) would be exempt under the DoL proposed rule if that rule becomes final in its current form. The exemption will be in effect for one year or until final action is taken on the proposed rule, whichever occurs first.

This deviation was requested so that the Department of Homeland Security as an agency may implement the DoL's final rule of Jul 26, 2000, Service Contract Act; Labor Standards for Federal Service Contracts, which concerns the issuance of the temporary exemption referenced above. The exemption is considered necessary to prevent the disruption that could be caused by such changes, including the possible disruption of services if the current subcontractor does not agree to continue the subcontract services under the requirements of SCA.

**Determination**

In accordance with FAR 1.404, I have issued this class deviation. Consultation and approval for this class deviation is granted under CAAC Letter 2003-01. This class deviation shall remain in effect until Jul 26, 2004, or upon the effective date of a pertinent FAR change, whichever occurs first.



Gregory D. Rothwell  
Chief Procurement Officer  
Department of Homeland Security

2/26/2004

Date