

Chapter 13

COVERAGE OF THE PUBLIC CONTRACTS ACT

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Chapter 13

COVERAGE OF THE PUBLIC CONTRACTS ACT

13a GENERAL CONSIDERATIONS

13a00 General basis for coverage.

- (a) Coverage under the PCA is explained in Part I of R&I No. 3.
- (b) While it has not been authoritatively settled that there is no coverage under the PCA if the PCA stipulations are not included in the contract, either directly or by reference, coverage is not asserted for a contractor who has no notice by stipulation or otherwise of the application of the Act, and administrative enforcement action is not taken. If the invitation to bid on a contract within the scope of the Act includes the stipulations either directly or by reference, coverage would result since the invitation to bid becomes a part of the contract.
- (c) The obligation of a contractor arises on the date when notice of award is sent to him and not on the date the contract is executed. The necessity of compliance with the representations and stipulations of the Act is confined to the period in which the contractor is actually engaged in the performance of work on the contract, including activities immediately preparatory thereto, provided the records of the contractor adequately disclose the period during which Government work is being performed.

13a01 Coverage of secondary contractors.

- (a) Secondary contractors are covered under the following circumstances:
 - (1) Where the secondary contractor substitutes for the prime contractor in performing any of the work which the latter has contracted to do for the Government, as by (a) manufacturing or furnishing any of the contract items which the prime contractor has agreed to manufacture or furnish for the Government, or by (b) producing or supplying any parts, materials, or services to be used in manufacturing an end product that the prime contractor has agreed to manufacture for the Government, which parts, materials, or services it is the regular practice in the industry manufacturing such end product for the manufacturers to produce or supply themselves rather than to procure from others; or
 - (2) Where the secondary contractor is a manufacturer of materials, supplies, articles, or equipment which the Government has contracted with a regular dealer to furnish, and the dealer causes the manufacturer to deliver the items directly to the Government either by a direct shipment to the Government agency as consignee or to the prime contractor's warehouse or other designated place where they will be held for the Government and not placed in regular stock; or
 - (3) Where the secondary contractor, pursuant to a contract in excess of \$10,000 in amount with a Government prime contractor, is engaged in the manufacture or furnishing of materials, supplies, articles, or equipment which the Government agency has contracted with the prime contractor to procure for and on behalf of the Government from suppliers thereof, the cost of which the Government has agreed to pay or reimburse from Government funds; or

- (4) Where the secondary transports the end product called for by a covered contract to the Government or where he performs any operation on the end product, such as weatherproofing or painting; or
- (5) a. Where it is the regular practice for manufacturers of the end product to perform the function assigned to the secondary. Under this principle, depending on the regular practice in the industry, the Act may be applicable to a secondary for the manufacture of parts to be incorporated in the end product, tools and dies to be used in its manufacture, materials used in packaging the end product, and production-related services, such as engineering and drafting.
- b. If coverage of a secondary turns on regular practice in an industry, the RD will submit the question to the AA for OWDR for a ruling, furnishing the following information:
1. Name and address of primary contractor.
 2. Contract number and contracting agency.
 3. Product called for in prime contract.
 4. Name and address of secondary contractor.
 5. A description of the product supplied or operation performed by the secondary contractor.

13a02 Aircraft manufacturers and assemblers.

- (a) Regular practice determinations have not been made in this industry. Accordingly, until further notice all secondary contractors supplying parts or materials to airplane manufacturers or aircraft assemblers will continue to be considered as "subcontractors" and not subject to the provisions of the PCA under the regular practice rule.

13a03 PCA place of performance chart.

The PCA place of performance chart shown below may be used as a guide to readily determine the geographic areas in which the PCA and PCA MW determinations apply. As provided in Reg 50-201.603(b) and R&I No. 3, Sec 4, this law does not apply to "contracts for materials, supplies, articles, or equipment no part of which will be manufactured or furnished within the geographic limits of the States of the United States of America, Puerto Rico, the Virgin Islands, or the District of Columbia".

PCA PLACE OF PERFORMANCE CHART

Place of Performance	Coverage	MW Determinations
All States and D.C.	Yes	No
American Samoa	No	No
Canal Zone	No	No
Foreign Countries	No	No
Guam	No	No
Puerto Rico	Yes	<u>1/</u>
Virgin Islands	Yes	<u>1/</u>
Wake Island	No	No

1/ Under existing policy, MW determinations are not enforced in Puerto Rico or the Virgin Islands; all other provisions of the PCA are enforced.

13a04 Contracts between U.S. Government agencies.

Contracts entered into between one agency of the U.S. or the D.C. and another such agency are not subject to the PCA.

13a05 Contracts between the Federal Government and State agencies.

The PCA applies in the normal manner to contracts between municipalities, States, or State agencies, as for example State schools, and the Federal Government. The fact that the contracted labor is performed by State or municipal employees does not remove the contract from the purview of the Act.

13b COVERAGE IN SPECIAL CASES

13b00 Post exchanges and Navy exchanges.

Purchases by Army and Air Force post exchanges and Navy exchanges for a variety of reasons are considered as "open market" purchases under PCA Sec 9, and are, therefore, not subject to the PCA.

13b01 Foreign aid contracts.

Coverage under the PCA is not affected by the fact that the materials, articles, supplies, or equipment are later transferred by the Government to a foreign nation. Purchases by a foreign nation are not covered under the PCA, even though the purchases are financed by United States loans.

13b02 Coal dealers.

Coal dealers need not show compliance in making sporadic deliveries where the extent and timing of such deliveries are unpredictable, insofar as their yard, dock, and subsequent operations, including delivery, are concerned.

13b03 Petroleum dealers and refiners.(a) General.

Contracts in the petroleum industry may be awarded to a refiner who also operates his own distribution facilities and makes deliveries pursuant to a PCA contract from these facilities. In such cases, it is the position of Wage-Hour that the question of whether such a contractor is a "manufacturer" or "regular dealer" should be determined upon a realistic evaluation of all pertinent factors such as the contract itself, the contractor's operations and the obligations actually assumed for the fulfillment of the contract requirements. Thus, for example, where such a refiner is awarded a contract and makes deliveries to the Government from a central distributing plant of products obtained from his own refineries, he will be considered to have been awarded the contract as a refiner and the rules in (b) below will apply to the contract. On the other hand, if such a refiner makes deliveries to the Government through his own distribution facilities, but the products are actually received from other refineries, he will generally be considered to have been awarded the contract as a dealer and the rules in (c) below will apply. If there is any question as to whether the refiner is operating as a "manufacturer" or as a "regular dealer" with respect to a particular contract, and compliance depends on this issue, the facts shall be obtained and submitted through channels to the RS for opinion.

(b) Refiners.

If a refiner is awarded a contract as a manufacturer, only the employees at the refinery are covered by the PCA. (See R&I No. 3, Sec 40(d).) Consequently, in such cases truck drivers making deliveries to the Government from bulk stations rather than from the refinery itself and other bulk station employees performing work in connection with the delivery of products to the Government are not covered by the PCA.

(c) Dealers.

- (1) As provided in R&I No. 3, Sec 40(e)(1), where the contractor is a dealer the PCA applies to employees at the "central distributing plant" of the dealer who are employed in connection with the storage and handling of petroleum products prior to delivery to the Government. A central distributing plant within the meaning of Sec 40(e)(1) is a dealer's place or places of business where he initially receives products from his suppliers which are to be furnished to the Government, where his distribution operations thereon commence and from which the products are delivered either directly to the Government or to other plants for such delivery.
- (2) Depending upon the size and scope of his operations a dealer may have at least one and sometimes more than one central distributing plant. For example, where a dealer has only a single establishment and products are received from suppliers for delivery to the Government from such establishment, the single establishment constitutes the employer's central distributing plant. Similarly, where an employer has two or more establishments at which he initially receives products from his suppliers for delivery either directly to the Government or to other plants for delivery to the Government, such establishments at which the products are initially received constitute central distribution plants. Where products are delivered from such a central distributing plant to other plants of the employer for delivery to the Government, the latter plants represent "bulk stations" as that term is defined in R&I No. 3, Sec 40(e)(1).

(d) Service station employees.

R&I No. 3, Sec 40(b)(1) provides that although the PCA stipulations are included in the contract, such stipulations are inapplicable to employees working at service stations. As used in this section the term "service stations" includes establishments, whether owned or operated by the contractor or some other person, engaged in selling fuel to operators of automotive vehicles, aircraft and watercraft and is not the same as "gasoline service establishment" as used in FLSA Sec 3(s)(5) or "gasoline service station" as used in old Sec 13(b)(8).

(e) Oil production on Government property.

Employees of a firm who are engaged in the production of crude oil from wells on property which is wholly or partially owned by the Government, as in the instance of the Naval Petroleum Reserve, are producing goods rather than furnishing services and therefore covered by the PCA.

13b04 Contracts for meals for Armed Services personnel.

Contracts awarded by the Department of Defense for the furnishing and serving of meals to Armed Services personnel are not subject to the PCA.

13b05 Department of Defense commissaries.

Since Department of Defense Commissaries do not have express statutory authority to purchase on the open market, the exemption under Sec 9 of the PCA is not applicable to their purchases.

13b06 Multiple contracts.

All bids from the same person, as such term is defined in the PCA, pursuant to a single invitation for bids constitute a single offer of sale within the meaning of the Act. The total procurement from such person on such single invitation constitutes a single award within the meaning of R&I No. 3, Sec 3(e)(3), regardless of whether one or more formal contracts are involved in such procurement. Where such total procurement exceeds \$10,000, the PCA applies to all work (subsequent to the first date of award) in performance of the initial and all subsequent contracts although each individual contract may not exceed \$10,000.

13b07 Air carrier contracts.

Any contracts between the Department of the Air Force and air carriers subject to Title II of the Railway Labor Act, made in furtherance of the Civil Reserve Air Fleet Programs, are exempt from the requirements of the PCA Sec 1(a) and, with respect to their employees, from the requirements of PCA Sec 1(b) and (c).

13b08 Purchase Notice Agreements.

- (a) A Purchase Notice Agreement (PNA) is a written contract between a supplier and a Government agency under which the supplier lists his products and offers to sell them to the Government at certain prices. As needs develop, the agency in turn submits a purchase order to one or another of the suppliers with whom it has executed such an agreement. Upon receipt of the order, the supplier fills it either from his existing stocks, by producing the goods, by purchase from other sources, or by some combination of means. This type of contract is often used by the Department of Defense to procure perishable and nonperishable subsistence items, such as dairy products, bakery products, and canned foods.
- (b) Purchase Notice Agreements are "contracts" for purpose of the PCA and the PCA applies as in the case of any other indefinite amount contract if the aggregate total of purchases (excluding perishables, R&I No. 3, Sec 11) pursuant to the agreement may exceed \$10,000, even though no single purchase may exceed this amount. Further the "open market" exemption does not apply in such cases (R&I No. 3, Sec 13).
- (c) Where, under the PNA, the contractor is providing the Government with goods which are identifiable as to the time the work on them is performed, the stock-on-hand rule in Sec 24(a) of R&I No. 3 rather than the stockpile rule in Sec 24(b) governs. The stock-on-hand rule permits the contractor to fill the Government order, if he can, from goods produced or procured prior to the award of his contract. Under it, while the Act does not apply retroactively to work performed prior to the award of the PNA contract, it does apply as stated in paragraph (d) following, to work performed after the date of the award of the PNA contract on the materials or articles supplied to the Government.
- (d) All work performed after the Government gives notice to the contractor of award of the PNA, on goods which the contractor knows or can anticipate with reasonable certainty at the time the work is done will be supplied to the Government under the PNA, must be performed in compliance with the representations and stipulations contained in the Act and incorporated in the PNA. However, as stated in Sec 22 of R&I No. 3, the necessity of compliance with the representations and stipulations is confined to the period of actual engagement in work on the contract, "provided the records of the contractor adequately disclose the period during which Government work is being performed". Thus, if, after notice by the Government of award of a PNA, the contractor performs work on goods embraced within its terms which the contractor knows will not be used

to fill purchase orders thereunder, the contractor may perform the work on such goods without the necessity of compliance with the Act's stipulations and representations, provided his or her records are adequate to segregate such work from Government work. But with respect to work on any goods which, at the time of performance of such work, the contractor knows or has reason to believe will be furnished to the Government in response to purchase orders issued under the PNA, compliance during the period while such goods are being worked on is required without regard to whether the purchase order under which the goods will actually be furnished to the Government has been issued.

- (e) It will be noted that under paragraph (d) the date of award for purposes of the stock-on-hand rule is the date of award of the PNA rather than of the particular purchase order under it. As provided in Sec 22 of R&I No. 3, compliance with the representations and stipulations of the Act and regulations is required during all of "the period in which the contractor is actually engaged in the performance of work on the contract". The period in which the contractor is so engaged will necessarily include any period after issuance of a purchase order under the PNA during which work is performed on the specific goods supplied under that purchase order. The reason for this, however, is not because the date of the purchase order, rather than the date of the PNA, is the date of the award of the contract. The controlling factor is that at such time there can be no room for doubt that the contractor is actually engaged in the performance of work "on the contract" embodied in the PNA. With respect to work done on goods after notice of the PNA but before issuance of the purchase order which is filled with such goods, a careful evaluation of all the facts should be made to determine whether the contractor actually knew or could anticipate with reasonable certainty at the time such work was performed that the goods worked on would be supplied to the Government under the PNA.
- (f) In any case when the application of this instruction is not clear, the matter shall be submitted through channels to the RS for opinion. Because of the complex issues, the Field should proceed very carefully in cases involving PNA's.

13b09 Trucking of coal.

The trucking of coal, destined for the Federal Government under a prime contract subject to PCA, is covered by the PCA regardless of whether the trucking is performed by employees of the primary contractor or by employees of an independent secondary contractor. Since the coal being transported is destined for the Government, an independent secondary contractor is engaged in the manufacturing or furnishing of the very items which the prime contractor has agreed to manufacture or furnish. (See also R&I No. 3, Sec 15.)

13b10 Job Corps facilities.

The PCA does not apply to primary contracts entered into by the Government with private firms for the operation of a job corps camp or facility. However, secondary contracts let by the contractor for those materials, supplies, etc., necessary to such facilities, and which the operator is authorized to procure for or on behalf of the Government, may be subject to the PCA if the tests for coverage are met. Such contracts awarded for or on behalf of the job corps camp or facility by its operating contractor will be subject to the Act to the same extent and under the same conditions as if they were awarded by the Government directly. (See also FOH 14a13.)

13b11 Contracts for the construction, alteration, furnishing, or equipping of naval vessels.

PCA coverage involving work performed on boats and ships is explained in Sec 7 of R&I No. 3. The status of a Coast Guard ship is considered to be that of a "naval vessel" for purposes of that Sec. (See FOH 14a19, 15c17 and 15e14.)

13c SPECIAL RULINGS AND INTERPRETATIONS

13c00 Convict labor - prospective parolees.

- (a) The term "convict labor", as used in Sec 1(d) of the PCA, does not preclude employment on a covered PCA contract of persons who are permitted to leave prison prior to the end of a sentence or prior to official parole and establish residence (including residence in a so-called "Half-Way House") and obtain employment in the open market at the regular wages for the work performed. This would be true even though residence and employment conditions are closely supervised under a State or Federally sponsored system. The employment must be voluntary (i.e., not "forced" employment in connection with rehabilitation) and earnings must be retained by the employee.
- (b) Where "convict labor" is used on covered PCA contracts which satisfies the provisions of Sec 1761(c) of Title 18, United States Code, the prohibition in Sec 1(d) of the PCA does not apply. Sec 1761(c) permits the employment of convicts or prisoners participating in a program of pilot projects designated by the Office of Justice Assistance, Research, and Statistics of the U.S. Department of Justice who:
- (1) receive wages at rates not less than that paid for work of a similar nature in the locality in which the work is to be performed. Such wages may be subject to deductions not to exceed 80% of gross wages and shall be limited to:
 - a. taxes (Federal, State, local);
 - b. reasonable charges for room and board as determined by regulations issued by the chief State correctional officer;
 - c. allocations for support of family pursuant to State law, court order, or agreement by the offender;
 - d. contribution to any fund established by law to compensate victims of crime of not more than 20% of gross wages but not less than 5% of gross wages;
 - (2) have not solely by their status as offenders, been deprived of the right to participate in benefits made available by Federal or State Government to other individuals on the basis of their employment, such as worker's compensation. However, such convicts or prisoners shall not be qualified to receive unemployment compensation while incarcerated;
 - (3) have participated in such employment voluntarily and agreed in advance to the above specific deductions from gross wages and all other financial arrangements as a result of participation in such employment.

- (c) Moreover, the term "convict labor" does not apply where Federal prisoners are released under the terms of the Prisoner Rehabilitation Act of 1965 (18 U.S.C. 4082) or under a comparable State rehabilitation program, to work in the community. Under this arrangement, prisoners are permitted to work in part of a day at regular employment and return to custody at the end of the workday, provided:
- (1) the prisoner is paid or is in an approved work training program on a voluntary basis;
 - (2) representatives of local union central bodies or similar labor union organizations have been consulted;
 - (3) such employment does not displace other workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and
 - (4) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality where the work is to be performed. The employment must meet the PCA MW and OT standards.
- (d) Executive Order 11755, dated December 29, 1973, also permits the employment of non-Federal prisoners under the same conditions set forth in subsection (c) above.
- (e) The Department of Justice is responsible for administering the provisions of 18 U.S.C. 1761(c), 18 U.S.C. 4082, and Executive Order 11755. Therefore, questions or complaints pertaining to the above provisions should be directed to the local U.S. Attorney's Office.

13c01 Use of the fluctuating w/w under PCA.

An employer may compensate employees who are subject to the PCA on the basis of the fluctuating w/w method of payment provided that all of the criteria set forth in IB 778.114 are met, which includes the requirement that additional half-time OT be paid for hours of work in excess of 40 per week. (Note: Work performed prior to 1/1/86, on contracts covered by PCA is subject to OT pay at time and one-half for all hours worked in excess of eight in a day or 40 per week, whichever are greater. PCA was amended by Public Law 99-145 effective 1/1/86, to eliminate the daily OT provisions. Thus, employees paid on a fluctuating w/w basis under PCA prior to 1/1/86, must receive OT pay for hours of work in excess of 8 per day rather than 40 per week if the hours over 8/day are greater than the hours over 40/week.)