

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



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MEMORANDUM NO. 136

TO: ALL CONTRACTING AGENCIES OF THE
FEDERAL GOVERNMENT AND THE DISTRICT
OF COLUMBIA

FROM: WILLIAM M. OTTER
Administrator

A handwritten signature in cursive script that reads "William M. Otter".

SUBJECT: Revision of Service Contract Act
Regulations, 29 CFR Part 4

On October 27, 1983, the Department of Labor published revised final regulations on Labor Standards for Federal Service Contracts, 29 CFR Part 4, issued under the Service Contract Act (SCA). A copy of the revised regulations, which includes a discussion in the preamble outlining the major changes, is attached.

The purpose of this memorandum is to highlight these major changes and to supplement the information contained in the regulatory text and preamble sections, in order to assure that contracting agencies will be aware of their responsibilities and DOL operating policies under the SCA. In this regard, agencies are reminded of the need to make appropriate changes in their procurement regulations and contract documents to reflect in full the revised contract clauses contained in these regulations. For convenience, we have noted below the effective dates of applicability of the revisions and summarized the major regulatory changes in sequential order, with explanatory information where necessary.

Dates of Applicability

Many of the provisions contained in these regulations reflect existing policies and interpretations of the Act or are procedural in nature. However, significant changes have been made with respect to contract clauses, contract coverage, exemptions from coverage, and provisions relating to wage determinations, including those issued pursuant to section 4(c) of the Act. Because existing contracts contain SCA provisions and wage determinations issued under the regulations and policies in existence when the contracts were awarded, the substantive revisions relating to the above-mentioned matters are prospective only. Accordingly, the revisions to sections

4.1b (Payment of minimum compensation based on collectively bargained wage rates and fringe benefits applicable to employment under predecessor contract), 4.4 (Notice of intention to make a service contract), 4.5 (Contract specification of determined minimum wages and fringe benefits), and 4.6 (Labor standards clauses for Federal service contracts exceeding \$2,500) of Subpart A; sections 4.116 (Contracts for construction activity), 4.117 (Work subject to requirements of Walsh-Healey Act), 4.123(e) (Administrative limitations, variations, tolerances, and exemptions), 4.132 (Services and other items to be furnished under a single contract), and 4.133 (Beneficiary of contract services) of Subpart C; and sections 4.163(g) and (i) (Section 4(c) of the Act), and 4.168(b) (Cost of maintaining and furnishing uniforms) of Subpart D of Part 4 are applicable only to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after December 27, 1983. None of the revisions noted above shall be applicable to any contract entered into prior to that date. The remaining provisions of Subparts A, B, C, D, and E are effective on December 27, 1983.

It should also be noted that these regulations incorporate some of the regulatory changes which were to have been codified in the final rules previously published in January 1981 and subsequently deferred, as well as other changes resulting from the Department's reexamination of the deferred rules. In addition, the attached document incorporates corrections which appeared in the Federal Register of November 2, 1983, as well as other minor typographical corrections.

Section 4.1b(b) - Limitation on Section 4(c) of the Act

This section has been revised to provide that the rates contained in new or changed collective bargaining agreements (CBAs) consummated during the period of performance of the predecessor contract will not be effective for purposes of the successorship requirements of section 4(c) of the Act, if notification of the terms of the new CBA is received by the contracting agency (1) in the case of a competitively advertised procurement, less than 10 days before the date of bid opening, provided the agency makes an affirmative finding that there is not a reasonable time still available to notify bidders; or (2) in the case of a negotiated procurement or execution of a renewal option or extension, after award, provided contract start of performance is within 30 days after the award, option, or extension -- otherwise, the former "10 days before commencement" rule would apply. See also the discussion in section 4.163 below.

Sections 4.3, 4.4, and 4.53 - Locality Basis of Wage Determinations When Place of Contract Performance is Unknown at Time of Bid Solicitation

These sections have been revised to establish a new "two-step" procurement procedure for issuing separate wage determinations, to the extent feasible, for each of the various localities where the particular contract work might be performed in instances when the place of contract performance cannot be determined at the time of bid solicitation. In the first step, the contracting agency will issue an initial solicitation with no wage determination, from which it identifies all interested bidders and their possible places of performance and then transmits this information to DOL with the SF-98, Notice of Intention to Make a Service Contract and Response to Notice. In the second step, DOL will issue separate wage determinations for the various localities identified in the first step, to be incorporated in the solicitation prior to the submission of final bids. The appropriate wage determination applicable to the geographic location of the successful bidder shall be incorporated in the resultant contract and shall be observed, regardless of whether the contractor subsequently changes the place(s) of contract performance. In unusual situations where this "two-step" procedure is deemed impracticable by DOL in consultation with the contracting agency, DOL may use a modified procedure which may result in the issuance of wage determinations for one or more composite localities.

Section 4.4(a) - Notice of Intention to Make a Service Contract (SF-98)

This revised section provides that contracting agencies must file SF-98s not less than 60 days (nor more than 120 days without approval) prior to invitations for bids, requests for proposals, commencement of negotiations, exercise of options or extensions, etc., in the case of recurring, known procurements, and not later than 30 days prior to such contracting actions for unplanned and/or emergency procurement actions. As provided in section 4.4(g), the contracting agency must recontact DOL if a solicitation is delayed more than 60 days beyond the date indicated on the submitted SF-98 to determine whether the wage determination initially issued is still current.

Section 4.5(a)(2) - Incorporation of Revised Wage Determinations

This section provides that revisions of a wage determination received by the contracting agency later than 10 days prior

to the date of bid opening (in the case of competitively advertised procurements) are not effective if the agency makes an affirmative finding that there is not reasonable time still available to notify bidders of the revision. In the case of negotiated procurements (or options or extensions of the initial contract term), revisions received after award (or execution, as appropriate) are not effective provided that contract start of performance is within 30 days of the award (or option or extension); if the contract does not specify a start of performance within 30 days and/or performance does not commence within the 30-day period, DOL is to be notified by the agency and any subsequent notice of a revision received by the agency not less than 10 days before commencement of the contract will be effective.

Section 4.5(c)(2) - Erroneous Contracting Agency Determinations of Noncoverage

This new subsection requires that when DOL finds that the contracting agency made an erroneous determination that the SCA did not apply and/or failed to include an appropriate wage determination in a covered contract, the agency must include the SCA contract stipulations and any applicable wage determination in such contract within 30 days of notification by DOL.

Section 4.6(b)(2) - Conformance of Wage Rates for Classifications of Employees Not Listed in a Wage Determination

Revisions in the conformance procedures in this contract clause provide for an "indexing" procedure which allows a contractor to apply a specified mathematical formula to a previously conformed rate in establishing a new conformed rate, without requiring DOL approval. The "indexed" conformance is based upon the average percentage change between the rates listed in the current wage determination for all classifications to be used on the contract and those rates specified for the corresponding classifications in the previously applicable wage determination.

In addition, the revised procedures require that a contractor initiate the conformance action before an unlisted class of employees performs any contract work, so that the contractor can complete its part of the conformance and submit a report of the proposed action to the contracting agency no later than 30 days thereafter. Furthermore, except where the indexing procedure is utilized, the revised regulations require that the contractor submit information regarding the agreement or disagreement of the affected employees to the conformed rate and also require the contracting officer to promptly submit

all conformance actions to DOL for review and approval. Conformed wage rates and/or fringe benefits must be paid to all employees in the conformed classification retroactive to the date such class of employees commenced any contract work.

Section 4.6(1)(2) - Seniority List

In cases of a contract performed at a Federal facility where employees may be hired/retained by a succeeding contractor, this new subsection requires the incumbent prime contractor to furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with anniversary dates of employment, to the contracting officer no later than 10 days before contract completion. A copy of the list is to be provided to the successor contractor for determining employee eligibility for vacation fringe benefits which are based on length of service with predecessor contractors (where such benefit is required by an applicable wage determination).

Section 4.6(n) Certification of Eligibility

This section provides a new requirement that the contractor certify it is not a debarred person or firm and thus not ineligible to be awarded the contract, and also prohibits subcontracting to debarred persons.

Sections 4.6(r) and 4.187 - Disputes Concerning Labor Standards

For clarification, a new paragraph (r) has been added to the contract clauses in section 4.6 specifying that disputes involving the labor standards provisions of the contract are resolved by DOL under its regulations (29 CFR Parts 4, 6, and 8) and are not subject to the general disputes clause of the contract.

Section 4.8 - Notice of Awards

DOL is now receiving data identifying contract awards subject to the SCA directly from the Federal Procurement Data System (FPDS), and, as a result, plans to discontinue the use of Standard Form 99, Notice of Award of Contract. Section 4.8 therefore provides that a Standard Form 99 need not be submitted to DOL for contract awards subject to the SCA if the contracting agency submits Standard Form 279, FPDS Individual Contract Action Report (or its equivalent) to the FPDS, or if the contracting agency makes other arrangements

with the Wage and Hour Division for notification of such contract awards. In order to reduce Government paperwork and reporting burdens further, revised section 4.8 requires the submission of Standard Form 99 under the conditions described only for contracts exceeding \$10,000. However, this action does not alter the statutory requirement that contracting agencies incorporate the proper stipulations in all contracts exceeding \$2,500. Agencies which do not submit contract award data to FPDS are encouraged to contact the Wage and Hour Division for making such other notification arrangements so that the use of Standard Form 99 may ultimately be discontinued in its entirety.

Section 4.10 - Substantial Variance Proceedings Under Section 4(c) of the Act

This section provides revised procedures relative to requests for hearings under section 4(c) of the Act to determine whether the collectively bargained wages and/or fringe benefits otherwise required to be paid are "substantially at variance" with those which prevail for similar services in the locality. Rules of practice, including time limitations regarding such hearings, are provided in revised 29 CFR Part 6 and new 29 CFR Part 18 (48 FR 32538, July 15, 1983).

Section 4.11 - Arm's Length Proceedings

This section, in conjunction with revised 29 CFR Part 6, provides new hearing procedures relative to questions as to whether the wages and fringe benefits contained in a predecessor contractor's collective bargaining agreement were reached as a result of "arm's length negotiations" in accordance with the provisions of section 4(c) of the Act.

Section 4.12 - Substantial Interest Proceedings

This section, in conjunction with revised 29 CFR Part 6, provides new hearing procedures relative to determinations of whether persons or firms whose names appear on the ineligible bidders list pursuant to section 5 of the Act have a "substantial interest" in any firm, corporation, partnership, or association other than those appearing on the ineligible list. Policies and interpretations concerning substantial interest in and affiliation with debarred persons or firms are provided in revised section 4.188 of the regulations.

Subpart B - Wage Determination Procedures

This new Subpart explains DOL's overall policies and procedures concerning the issuance and review of wage determinations. Former Subpart B, which dealt with computations of cash equivalent payments in lieu of providing fringe benefits, has been revised and placed in various sections in new Subpart D, entitled "Compensation Standards."

Section 4.55 - Review and Reconsideration of Wage Determinations

This section provides that interested parties affected by a wage determination may obtain review and reconsideration by the Wage and Hour Administrator of the wage determination upon request. Such request must be supported by evidence that the wage determination issued is inaccurate. Requests are deemed untimely and will not be considered after bid opening for competitively advertised procurements, or later than 10 days before commencement of a negotiated procurement, exercise of a contract option or extension. The Administrator's decision upon reconsideration is appealable within 20 days to the Board of Service Contract Appeals in accordance with the provisions of new 29 CFR Part 8.

Sections 4.110 through 4.113 - Interpretation of Statutory "Principal Purpose" Test for SCA Coverage

These sections provide continuation of the single principal purpose test contained in the previous regulations under which the provisions of the Act are applied to every contract principally for services (as distinguished from construction or manufacturing or some other purpose) if it is performed through the use of a significant or substantial number of service employees. (However, see the discussion concerning the related issue of coverage of separate specifications at section 4.132.) Thus, as explained in section 4.113(a)(3), contracts which are principally for services but which involve only a minor or incidental use of service employees would not be covered. Similarly, regarding the geographic scope of the Act's coverage, section 4.112(b)(2) provides that contracts under which only a minor or incidental portion of the contract services are performed within the United States as defined in section 8(d) of the Act would not be covered. In close cases involving a decision as to whether a contract will involve a significant use of service employees, or whether a significant portion of a contract will be performed within the United States, DOL should be consulted for guidance.

Section 4.114(b) - Liability of Prime Contractor for Violations by Subcontractors

This section provides that the prime contractor is liable in the event its subcontractors violate the Act by failing to pay the wages and fringe benefits required under the provisions of the prime contract. When appropriate in a particular case, enforcement sanctions may be invoked against both the prime contractor and the subcontractor for violations of the Act.

Sections 4.116(b) and 4.131(f) - Coverage of Contracts For Property Demolition, Dismantling, and Removal

As provided in these revised sections, where the facts show the principal purpose of a demolition contract is the furnishing of dismantling and removal services, and no further construction is contemplated (in which case the contract would be subject to the Davis-Bacon Act), such a contract is covered by the SCA even though the contractor receives salvaged materials. However, if the principal purpose of a demolition contract is the sale of material and the services provided thereunder are only incidental to the sale, then the contract would not be subject to the SCA.

Section 4.117 - Work Subject to the Walsh-Healey Act: Overhaul and Modification of Equipment

This new section provides detailed guidelines for delineating when contracts for major overhaul of equipment would be considered "remanufacturing" subject to the Walsh-Healey Public Contracts Act (PCA) rather than the SCA. Complete teardown and overhaul of heavy construction equipment, aircraft, engines, etc., where the Government receives a totally rebuilt end item with a new (or nearly new) life expectancy resulting from processes similar to original manufacturing will be considered "remanufacturing" subject to the PCA. Contracts for routine maintenance or repair, inspection, etc., continue to be subject to SCA. Contracting agencies are required to initially determine whether work to be performed under a proposed contract would involve principally "remanufacturing" work based on the guidelines, and incorporate the appropriate labor standards clauses (SCA or PCA) into the contract prior to soliciting bids. Application of SCA or PCA to any type of contract not discussed in the regulations will be decided on a case-by-case basis by the Wage and Hour Administrator.

Section 4.118 - Contracts for Carriage Subject to Published
Tariff Rates

This section discusses application of the statutory exemption in section 7(3) of the SCA for contracts for carriage of freight or personnel subject to published tariff rates, as well as the administrative exemption provided for certain contracts where such carriage is subject to and in accordance with applicable regulations governing rates covered by section 10721 of the Interstate Commerce Act (see revised section 4.123(d)(3) of the regulations). Only contracts principally for the carriage of "freight or personnel" are exempt. Thus, the exemption does not apply where the principal purpose of the contract is packing, crating, handling, loading, and/or storage of goods prior to or following line-haul transportation to the ultimate destination.

Section 4.123(e) - Exemptions from Coverage for Contracts
for Maintenance and Repair of Certain ADP, Scientific and
Medical, and Office/Business Equipment

An administrative exemption from the provisions of the Act has been granted for certain contracts for the maintenance, calibration and/or repair of: (1) automated data processing equipment and office information/word processing systems, (2) scientific equipment and medical apparatus or equipment where the application of microelectronic circuitry or similar technology is an essential element, and (3) office/business machines where the work is performed by the manufacturer or supplier of the equipment. The exemptions are limited to the servicing of only those items of equipment furnished to the government which are also furnished commercially, the contract services must be furnished at established catalog or market prices, and the contractor must utilize the same compensation plan for employees performing on both government and commercial work. The contractor must certify to these conditions in the contract.

The contracting officer initially must make an affirmative determination that all of the conditions of the exemption have been met prior to contract award. If, after contract award, it is determined that the exemption is inapplicable, the corrective procedures in section 4.5(c)(2) of the regulations shall be followed for inserting the required contract clauses and any wage determination issued into the contract.

Section 4.123(e)(4) - Research and Development (R&D) Contracts

An exemption from coverage was proposed for most contracts for R&D, which was defined to include systematic studies of all types, but did not include contracts for the operation and maintenance of government testing and other similar research facilities. It was concluded that the record did not contain sufficient evidence to find that the tests in section 4(b) of the statute necessary to grant an exemption were satisfied. Accordingly, the proposed R&D exemption is not being adopted at this time.

Section 4.130(a) and 4.131(f) - Coverage of Contracts for the Sale of Timber

The Department has reexamined the issue of the applicability of the SCA to timber sales contracts and has concluded that ordinarily the services provided under such contracts are only incidental to the principal purpose of these contracts, which is the sale of timber. However, certain contracts which in fact are principally for some purpose other than the sale of timber, such as clearing land or removal of diseased or dead timber, will continue to be subject to the SCA.

Section 4.132 - Coverage of Separate Contract Specifications

Section 4.132 (and other appropriate sections) has been modified to eliminate coverage of separate bid specifications (i.e., line items for specific work in a contract) principally for services when the principal purpose of the entire contract is not for services. The Act, which states that "Every contract (and any bid specification therefor)..." meeting the coverage tests must contain a wage determination, has traditionally been interpreted to extend coverage to individual specifications which are principally for services regardless of the principal purpose of any other specifications or of the contract as a whole. Upon reconsideration the Department has concluded that the Act should apply only where a contract as a whole is principally for the furnishing of services, and that the Act's reference to "bid specification" refers to the advertised specifications in a solicitation for bids rather than a separate line item or work requirement within a contract.

Section 4.133 - Beneficiary of Contract Services

This revised section provides that where the principal purpose of a government contract is to provide services through the use of service employees, the contract is covered by the Act, regard-

less of the direct beneficiary of the services. However, an exemption is provided for certain kinds of concession contracts, such as those entered into by the National Park Service principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public. As a result of the decision in District Lodge No. 166, IAMAW v. TWA Services, Inc., et al., 25 WH Cases 208 (M.D. Fla. 1981), appeal pending on other issues, 11th Cir., No. 82-3159, visitor information center services have been deleted from the terms of the exemption.

Section 4.145 - Extended Term Contracts

This section, which contains provisions for applying updated wage determinations to extended term contracts exceeding one year, has been revised to clarify that for purposes of the SCA, where such contracts are subject to annual appropriations, they are deemed newly entered into upon the contract anniversary date which occurs in each new fiscal year, rather than at the beginning of each fiscal year, if those two dates are different.

Section 4.152(c) - Trainee Classifications

This section emphasizes that conformance procedures (section 4.6(b)(2)) may not be used to artificially subdivide classifications listed in the wage determination. Where the wage determination lists a series of classes within a job classification family (e.g., Technician Classes A, B, and C), the lowest level listed is considered to be the entry level and establishment of lower (or intermediate) levels through conformance is not permissible. Further, this section provides that trainee classifications cannot be conformed. In other words, conformance procedures may only be used if the work which an employee is to perform under the contract is not within the scope of any classification listed in the wage determination.

Subpart D - Compensation Standards (Sections 4.159 through 4.185)

These sections incorporate additional, updated policies regarding a contractor's compliance with the Act's minimum monetary wage and fringe benefit requirements including a definition of bona fide fringe benefits; standards for vacation, holiday, and health and welfare fringe benefit payments; payment of benefits to temporary and part-time employees; discharging fringe benefit obligations by equivalent means; overtime pay; notification to employees of the compensation required; and recordkeeping requirements.

Section 4.163 - Section 4(c) of the Act

Section 4(c) of the Act provides that a successor contractor furnishing substantially the same services as were furnished under a predecessor contract must pay its service employees no less than the wages and fringe benefits to which they would have been entitled under the predecessor contractor's collective bargaining agreement (CBA), unless it is found after a DOL hearing that such wages and fringe benefits vary substantially from those prevailing in the locality for similar services. As set forth in revised section 4.163 (i), this successorship provision applies only to successor contracts which are performed in the same locality as the predecessor contract. However, wage determinations issued pursuant to section 4(c) and included in a contract will continue to apply if the successor prime contractor subsequently changes the place(s) of contract performance or subcontracts any part of the contract work to a firm in a different locality.

As provided in revised section 4.163(g), where two or more previous contracts involving the same or similar work functions performed by substantially the same job classifications are combined into a single "reconfigured" contract, only the (one) predecessor contract which covers the greater portion of those work functions would be deemed applicable for purposes of section 4(c). Where different services are combined, all applicable predecessor collectively bargained rates would follow identifiable work requirements into the new contract.

Subpart E - Enforcement (Sections 4.187 through 4.191)

These sections provide additional information and guidance regarding enforcement procedures for the recovery of under-payments, including rules on the withholding of contract funds and the priority given to such action, determining the "party responsible" for violations, and criteria for establishing "unusual circumstances" and "substantial interest" in debarment cases.

Attachment