

FOREWORD

An increasing number of studies have focused on the growth of service contracting within the government. In March, 2001, the Department of Defense reported that compensation to contractor employees performing on DOD contracts totaled more than \$71 billion. Not surprisingly, therefore, the efficient administration of service contracts is deemed essential to the success of the unique and varied missions performed by the U.S. Army Corps of Engineers (USACE).

This pamphlet is intended to provide guidance to all USACE elements involved in service contracting. The pamphlet provides information relating to the applicability of the Service Contract Act of 1965 as well as the procedures by which the Act is implemented in USACE service contracting activities.

A handwritten signature in black ink, reading "Robert Crear". The signature is fluid and cursive, with a large initial "R" and "C".

ROBERT CREAR
Colonel, Corps of Engineers
Chief of Staff

Contracts
SERVICE CONTRACT ACT LABOR RELATIONS

Table of Contents

Chapter 1.	<u>GENERAL PROVISIONS</u>	Para.....	Page
	Purpose	1-1	1-1
	Applicability	1-2.....	1-1
	Distribution	1-3.....	1-1
	References	1-4.....	1-1
	Policy	1-5.....	1-2
	Background	1-6.....	1-2
	Responsibilities 1-7	1-3	
Chapter 2.	<u>LABOR LAWS, REGULATIONS AND CONTRACT PROVISIONS</u>		
	General	2-1	2-1
	The Davis-Bacon Act.....	2-2.....	2-1
	The Walsh-Healey Act.....	2-3.....	2-1
	The Fair Labor Standards Act.....	2-4.....	2-1
	The Copeland Act.....	2-5.....	2-1
	The Contract Work Hours and Safety Standards Act.....	2-6.....	2-2
	The McNamara-O’Hara Service Contract Act	2-7	2-2
	The Brooks Act	2-8.....	2-2
	Executive Orders	2-9.....	2-2
	Contract Clauses.....	2-10.....	2-2
Chapter 3.	<u>APPLICABILITY AND COVERAGE</u>		

This Pamphlet supersedes EP 1180-1-1 dated 30 October 1998

General	3-1	3-1
Principal Purpose	3-2	3-1
Service Employee	3-3	3-2
Geographic Scope of the Act	3-4	3-2
Department of Labor Authority.....	3-5	3-3
Contracts of \$2,500 or Less.....	3-6	3-3
Exempt Contracts	3-7	3-4
Federal Information Processing Resources Contracts.....	3-8	3-5
Carpet Installation.....	3-9	3-6
Overhaul and Modification of Aircraft and Other Equipment.....	3-10	3-7
Shipbuilding, Alteration and Repair	3-11	3-7
Mapping and Surveying Services	3-12	3-8
Architect-Engineer (A-E) Services.....	3-13	3-9
Park/Gate Attendant Services.....	3-14	3-9
Demolition, Dismantling and Removal of Improvements.....	3-15	3-10
Mixed or Hybrid Contracts	3-16	3-11
Installation Support Contracts.....	3-17	3-11
Environmental Restoration Contracts	3-18	3-12
Exploratory Drilling	3-19	3-14
Work Performed by Contractor Alone	3-20	3-14
State and Municipal Employees	3-21	3-14
USACE Law Enforcement Contracts Under the Water Resources Development Act	3-22	3-14
Contracts With the National Guard.....	3-23	3-15
Contracts Between a Federal or District of Columbia Agency and Another Such Agency.....	3-24	3-15
Civilian Non-Appropriated Fund Contracts	3-25	3-15
Carriage of Freight or Personnel.....	3-26	3-16
Exemption for Certain Commercial Service Contracts	3-27	3-16
Application of Commercial Service Contract Exemption.....	3-28	3-18

Chapter 4. PRE-SOLICITATION ADMINISTRATION AND DETERMINATION

General	4-1	4-1
Standard Form 98/98a, Notice of Intention to Make		

A Service Contract and Response to Notice.....	4-2.....	4-1
Notice Requirements and Timing of the Request.....	4-3.....	4-2
Content of the SF 98.....	4-4.....	4-2
Content of the SF 98a.....	4-5.....	4-5
Service Contract Administration Issues.....	4-6.....	4-6
Certified Listing of Employee Anniversary Dates.....	4-7.....	4-6
Successor Contractor Obligations.....	4-8.....	4-6
Substantial Variance.....	4-9.....	4-7
DOL Responsiveness.....	4-10.....	4-7

Chapter 5. THE WAGE DETERMINATION ON-LINE (WDOL) PROGRAM

General.....	5-1.....	5-1
WDOL Program Requirements.....	5-2.....	5-1
Restrictions on the Use of the WDOL Program.....	5-3.....	5-2
Obtaining WDs Using the WDOL Program.....	5-4.....	5-3
When to Submit an SF 98 to DOL		
Under the WDOL Program.....	5-5.....	5-4
Monitoring the WDOL Program for WD Revisions.....	5-6.....	5-4
Timely Receipt of SCA WD Revisions.....	5-7.....	5-4
Selecting the Appropriate SCA WD.....	5-8.....	5-5
Guidelines for Selecting the H & W Benefit Levels.....	5-9.....	5-5
Essential WDOL Program Elements.....	5-10.....	5-6
Preparation of the WDOL SF 98/98a.....	5-11.....	5-6

Chapter 6. BLANKET WAGE DETERMINATIONS

General.....	6-1.....	6-1
Contracting Agency Blanket Wage Determination		
Requirements.....	6-2.....	6-1

Chapter 7. PRE-AWARD SERVICE CONTRACT LABOR ACTIONS

General.....	7-1.....	7-1
Assuring Prospective Contractor's Compliance with		

EP 1180-1-1
1 Aug 01

VETS-100 Reporting Requirement	7-2	7-1
Pre-Award Clearance From the Office of Federal Contract Compliance Programs	7-3	7-1

Chapter 8. CONTRACT ADMINISTRATION AND SERVICE
CONTRACT ACT ISSUES

General	8-1	8-1
Conformance Actions.....	8-2	8-1
Disposition of the Conformance Proposal	8-3	8-2
Conformance Appeals.....	8-4	8-3
Complaints	8-5	8-3
Cooperation with the DOL.....	8-6	8-4
Withholding of Contract Payments.....	8-7	8-4
Enforcement	8-8	8-5
Overtime	8-9	8-5

Chapter 9. SERVICE CONTRACT ACT PRICE ADJUSTMENTS

General	9-1	9-1
Requests for Price Adjustments	9-2	9-1
Price Adjustment Methods	9-3	9-1
Required Documentation for SCA Price Adjustments.....	9-4	9-2
Applicable Contract Work Hours.....	9-5	9-2
Wage Adjustment Computation.....	9-6	9-3
Fringe Benefit Adjustments.....	9-7	9-6
Wage Determinations Based on Collective Bargaining Agreements (CBAs).....	9-8	9-9
CBA Wage Determination Revisions	9-9	9-10
CBA Provisions Subject to Adjustments.....	9-10	9-11
Equivalent Fringe Benefits.....	9-11	9-12
Unlisted Classifications	9-12	9-13
Fair Labor Standards Act (FLSA) Adjustments.....	9-13	9-14

APPENDICES

- APPENDIX A.....McNamara-O'Hara Service Contract Act, as Amended
- APPENDIX B.....U.S. DOL All-Agency Memorandum No. 149
- APPENDIX C.....U.S. DOL All-Agency Memorandum No. 153
- APPENDIX D.....Labor Standards Decision Tree for Hybrid Environmental
Restoration Contracts
- APPENDIX E.....Standard Form 98 and Standard Form 98a
- APPENDIX F.....Memorandum of Understanding
- APPENDIX G.....Standard Form 1444
- APPENDIX H.....Processing of Contracting Officer Reports Relating to Contractor
Violations of the Contract Work Hours and Safety Standards Act

CHAPTER 1 - GENERAL PROVISIONS

1-1. Purpose. This pamphlet is designed to provide basic guidelines for all Corps employees tasked with the administration of Service Contract Act responsibilities. Its primary aim is to effect a uniform and consistent program of administration of labor standards responsibilities throughout the Corps. With the exception of very complex and unusual problems, this pamphlet attempts to provide answers to questions that most generally arise in connection with service contract labor standards. Official acquisition policy is found in the Federal Acquisition Regulation, and its supplements. If there is any conflict between the FAR system requirements and this pamphlet, the current FAR system rules apply.

1-2. Applicability. This pamphlet is applicable to all USACE commands and HQUSACE elements under the jurisdiction of the Commander, USACE.

1-3. Distribution. Approved for public release; distribution is unlimited.

1-4. References.

- a. McNamara-O'Hara Service Contract Act of 1965, as amended (41 USC 351, et. seq.)
- b. Brooks Act, as amended (40 USC 541, et. seq.)
- c. Brooks Act, as amended (40 USC 759)
- d. The Bankruptcy Reform Act of 1978 (11 USC 1 et. seq.)
- e. The Office of Federal Procurement Policy Act, as amended (41 USC 401 et. seq.)
- f. The Communications Act of 1934, as amended (47 USC 151 et. seq.)
- g. The Water Resources Development Act of 1976, as amended (42 USC 1962d-5d)
- h. Code of Federal Regulations, Title 29, Parts 4 and 541
- i. Code of Federal Regulations, Title 41, Chapter 201

EP 1180-1-1
1 Aug 01

- j. Federal Acquisition Regulation, Subpart 22.10, 52.222
- k. Defense Federal Acquisition Regulation Supplement, Part 222
- l. Army Regulation 215-7
- m. Opinions of the Attorney General, Vol. 38, Page 412
- n. Comptroller General Decision Numbers A-90983, B-109257, B-221203, and B-227036
- o. Department of Labor All Agency Memoranda Nos. 149, 153, 159, 166, and 188
- p. Department of Labor Opinion Letter 512

1-5 Policy. The development and maintenance of good relations between management, labor, and the Corps of Engineers are essential to the efficient and expeditious conduct of the Corps service contract mission. Accomplishment of this objective requires a continuous effort on the part of all members¹ assigned to service contract activities. The proper administration of these requirements must be given the same consideration as all other requirements of the contract and specifications.

1-6. Background.

a. The administration of statutory labor standards within the Corps of Engineers contracts is governed by the basic labor policy of the Department of Defense in Part 22 of the Federal Acquisition Regulation (FAR). This program has been further implemented by Part 222 of the Defense Federal Acquisition Regulation Supplement (DFARS) and various circulars and regulations issued by the Commander, USACE. Additionally, the Secretary of Labor has issued regulations implementing the labor statutes which are published in Title 29, Subpart A, Code of Federal Regulations.

b. The various labor standards statutes were enacted by Congress to prevent exploitation of labor on government contracts. Enacted in 1965, the McNamara-O'Hara Service Contract Act was the

¹Whenever, the word 'man', 'men', or their related pronouns appear, either as words or as parts of words (other than when referring to a specific individual), they have been used for literary purposes and are meant in their generic sense to include both female and male sexes.

culmination of an effort to extend the same protections enjoyed by contractor employees performing under Federal construction and supply contracts who are covered by the Davis-Bacon and Walsh-Healey Acts, respectively. Common to each of these labor standards statutes is a recognition of the consequences of certain procurement regulations. Due to the procurement requirement that the government award contracts to the lowest bid of any responsible bidder, low bidding can result in downward wage pressure. These pressures are particularly acute under service contracts which are more labor intensive than either construction or supply contracts. An examination of the legislative history of the Service Contract Act discloses a congressional intent to relieve the pressures to depress wages in the competition for Government service contracts. Further, it was deemed essential as a matter of public policy to afford such protection to service workers who are primarily low-paid, low-skilled, least likely to be organized, and thus most likely to benefit from the establishment of a "floor" below which wages should not fall.

c. Many labor relations problems involve interpretation of law, and for this reason, questions will arise in the field that are not covered in this pamphlet. Such problems should be brought to the immediate attention of the District Counsel and the District Labor Advisor or Contractor Industrial Relations Specialist (CIRS).

1-7. Responsibilities.

a. Contracting Officer (CO). The administration of labor standards provisions is the responsibility of the CO and adequate means of assuring compliance are provided by the contract and regulations of the Secretary of Labor. The CO may assign specific duties as he deems appropriate for program objectives. The COs staff shall be responsible for:

(1) The timely submission of a Notice of Intention to Make a Service Contract, Standard Forms 98/98a to the Administrator, Wage and Hour Division of the Employment Standards Administration, Department of Labor for each covered service contract.

(2) The incorporation of the appropriate wage determinations and contract clauses in corresponding Invitation-For-Bid (IFB) and Requests-For-Proposal (RFP). These clauses are set forth at FAR 52.222.

(3) The review and evaluation of all contractor requests for authorization of additional classification and rate when such classifications are not provided in the applicable contract wage determination and the

EP 1180-1-1
1 Aug 01

subsequent submission of such actions to the Administrator, Wage and Hour Division.

(4) The prompt notification to the DOL of any SCA violation or receipt of SCA complaints alleging non-compliance with the Act.

(5) The expeditious compliance with all DOL requests for withholding of contract payments to cover back wages resulting from non-compliance with the Act.

b. District Labor Advisor. The District Labor Advisor or CIRS is responsible for the administration of all labor standards programs within the district. The CIRS advises, assists, and instructs USACE personnel on labor standards matters during all phases of the service contract mission. Based on public expectations, statutory obligations, regulatory requirements, and organizational demands, the CIRS are essential to the success of the district's mission. In other words, the CIRS is responsible for "preventive industrial relations." That is, through pro-active measures, the CIRS seeks to prevent contractor non-compliance as well as disruption of the overall district mission. The Labor Advisor also serves as the point of contact for any DOL-initiated investigations. The Labor Advisor will maintain a liaison with the appropriate DOL representatives and apprise USACE personnel of the status and findings of these investigations.

c. Contractors. The contract labor standards provisions apply to all contractors and subcontractors regardless of their employment policies. The contractor is responsible for: procurement, supervision, and management of all labor required for the completion of the work; compliance with Federal labor standards applicable to his contract and regulations pertaining thereto; and subcontractors' compliance with the contract labor standards provisions.

CHAPTER 2 - LABOR LAWS, REGULATIONS AND CONTRACT PROVISIONS

2-1. General. Each of the statutes and their implementing regulations discussed below reflect the Federal Government's commitment to a policy of labor protection. Enacted at different times and under different administrations, these statutes seek to eliminate two destabilizing tendencies in the Federal procurement process. First, the impetus toward wage-cutting is generally unavoidable in a system predicated upon the award of contracts through competitive bidding to the lowest responsible, responsive bidder. Second, while monopsonist (monopsony is defined as the domination of a market by a single buyer) pressures are not as pervasive as they perhaps once were, they are nonetheless a consideration at many of the remote facilities where the Corps performs. In other words, a single buyer of service, e.g., janitorial services, may be in a position of depressing bids and, by extension, wages. These statutes, therefore, are designed to remove the wage-depressing tendencies noted above by establishing a floor below which the wage rate may not fall.

2-2. The Davis-Bacon Act (40 USC 276a-a(7)). This Act applies to construction contracts in excess of \$2,000 to which the Federal Government or the District of Columbia is a party. It specifies that not less than minimum wages be paid to the various classes of laborers and mechanics employed on a particular project based on the wages prevailing in the area as determined by the Secretary of Labor. PL 88-349 amended the Act as of July 2, 1964, to include fringe benefits in the "prevailing rate."

2-3. The Walsh-Healey Act (41 USC 35-45). This Act prescribes minimum wages to be paid contractor's employees on contracts in excess of \$10,000 for the manufacture or furnishing of supplies. The Department of Labor has not issued wage determinations under the Act for many years. Accordingly, the Fair Labor Standards Act minimum wage generally applies. Enforcement responsibility rests with the DOL.

2-4. The Fair Labor Standards Act of 1938 (29 USC 201). This Act provides for the establishment of minimum wage and maximum hour standards, creates a Wage and Hour Division within the DOL for purposes of interpretation and enforcement (including investigations and inspections of government contractors), and prohibits oppressive child labor. The Act applies to all employees, unless otherwise exempted, who are engaged in: (1) interstate commerce or foreign commerce; (2) the production of goods for such commerce; or (3) any closely related process or occupation essential to such production. Enforcement responsibilities lie with the DOL.

2-5. The Copeland Act (40 USC 276c and 18 USC 874). This Act makes it unlawful to induce, by

EP 1180-1-1

1 Aug 01

force or otherwise, any person employed within the United States in the construction or repair of public works (including those financed in whole or in part by loans or grants from the United States) to give up any part of the compensation to which he is entitled under his contract of employment.

2-6. The Contract Work Hours and Safety Standards Act (40 USC 327-333). This Act applies to both service and construction contracts and requires employees to be paid time and one-half for all hours worked in excess of 40 per week. The Act also contains certain health and safety standards.

2-7. The McNamara-O'Hara Service Contract Act (41 USC 351-358). This Act applies to Federal contracts for services in the United States in excess of \$2,500 through the use of service employees. Service employees include all employees working under a contract except those in executive, administrative or professional capacities as those terms are defined in 29 CFR 541. This definition therefore includes many "white collar" employees formerly excluded prior to the 1976 amendment to the Act. The Act requires minimum wages and fringe benefits as determined to be prevailing by the Secretary of Labor. The DOL has primary enforcement responsibility for this law.

2-8. The Brooks Act (40 USC 541 - 544). This Act sets forth mandatory procedures for contracting for architect-engineer (A-E) services. The Act requires that the Federal Government "publicly announce all requirements" for A-E services, "select firms on the basis of demonstrated competence and qualifications," and "negotiate a contract with the highest qualified firm" at a fair and reasonable price.

2-9. Executive Orders. Federal contract standards are also established by the President through the promulgation of Executive Orders. Generally, these Executive Orders require each agency of the Federal Government to incorporate certain clauses in Federal contracts. Among the most relevant Executive Orders are those noted below.

a. Executive Orders 11246, 11375 and 12086 provide that contractors and subcontractors will act affirmatively to ensure that applicants are employed, and that employees are treated equally during employment, without regard to race, color, religion, sex or national origin.

b. Executive Order 13201 requires contractors to post notices in their plants, offices and work sites apprising affected workers of their right to seek a refund of their union dues if the subject union expends their payments on administrative activities unrelated to collective bargaining, contract administration, or grievance adjustment.

2-10. Contract Clauses. Each of the above-noted labor protective statutes are incorporated within particular contracts depending upon the nature construction/ service/supply) of the contract. To illustrate, listed below are those which are generally required for contracts subject to the Service Contract Act. These clauses are further identified by the accompanying Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS) references.

- a. Notice to the Government of Labor Disputes (FAR 52.222-1) Convict Labor (FAR 52.222-3)
- c. Contract Work Hours and Safety Standards Act-Overtime Compensation (FAR 52.222-4)
- d. Certification Regarding Knowledge of Child Labor for Listed End Products (FAR 52.222-18)
- e. Certification of Nonsegregated Facilities (FAR 52.222-21)
- f. Previous Contracts and Compliance Reports (FAR 52.222-22)
- f. Affirmative Action Compliance (FAR 52.222-25)
- g. Equal Opportunity (FAR 52.222-26)
- h. Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (FAR 52.222-35)
- i. Affirmative Action for Workers with Disabilities (FAR 52.222-36)
- j. Employment Reports on Disabled Veterans and Veterans of the Vietnam Era (FAR 52.222-37)
- k. Service Contract Act of 1965, as Amended (FAR 52.222-41)
- l. Statement of Equivalent Rates for Federal Hires (FAR 52.222-42)
- m. Fair Labor Standards Act and Service Contract Act---Price Adjustment (Multiple Year and Option Contracts) (FAR 52.222-43)
- n. Fair Labor Standards Act and Service Contract Act---Price Adjustment (FAR 52.222-44)
- o. Evaluation of Compensation for Professional Employees (FAR 52.222-46)
- p. SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA) (FAR 52.222-47)
- q. Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain ADP, Scientific and Medical, and/or Office and Business Equipment---Contractor Certification (FAR 52.222-48)

EP 1180-1-1

1 Aug 01

- r. Service Contract Act---Place of Performance Unknown (FAR 52.222-49)
- s. Restrictions on Employment of Personnel (DFARS 252.222-7000)
- t. Right of First Refusal of Employment--Closure of Military Installations (DFARS 252.222-7001)

Guidance as to which clauses are to be incorporated within service contracts is set forth at FAR 22.1005, 22.1006 and DFARS 222).

CHAPTER 3 - APPLICABILITY AND COVERAGE

3-1. General. The Service Contract Act (SCA) (Appendix A) applies to all Federal and District of Columbia contracts in excess of \$2,500 and all subcontracts thereunder, the principal purpose of which is to furnish services in the United States through the use of service employees. In order to assist Contracting Officers in their determinations as to whether prospective solicitations are subject to the provisions of the SCA, the following criteria must be considered:

- a. Will the principal purpose of the contract, as a whole, be to furnish services?
- b. Will service employees be used in providing such services?
- c. Will such services be furnished in the United States?

Each of these criteria will be outlined in further detail below.

3-2. Principal Purpose. As was noted in paragraph 1-5 of this pamphlet, the SCA was enacted after the passage of both the Davis-Bacon Act and the Walsh-Healey Act, and was intended to fill a void in labor standards protection for government contracts. The Act therefore defines a service contract as those which have as their principal purpose the procurement of something other than construction activity (as defined in the Davis-Bacon Act) or materials, supplies, articles, and equipment (as defined in the Walsh-Healey Act). The DOL has provided guidance as well as illustrative examples with respect to the term, "principal purpose" at Sections 4.131 and 4.132 of 29 CFR Part 4.

- a. A procurement that requires tangible items (e.g., vehicles or equipment) be supplied as part of the services being furnished is covered by the SCA, provided that the use of such non-labor items is of secondary importance to the contract's principal purpose of furnishing services.
- b. A single contract which combines both specifications for services and specifications for other different or unrelated work (i.e., covered by the Davis-Bacon Act or Walsh-Healey) is covered by the SCA if the contract as a whole is principally to furnish services. Only the specifications which pertain to services, however, are covered by the SCA. One of the other acts may apply to the non-service specifications.
- c. The proportion of the labor cost to the total cost of the contract and the necessity of furnishing or receiving tangible non-labor items in performing the contract obligations will be considered but are not

EP 1180-1-1
1 Aug 01

necessarily determinative.

3-3. Service Employee.

a. The Act covers service contracts only where "service employees" will be used in performing the services to be procured through the contract. Section 8(b) of the Act defines "service employee" as follows:

The term service employee means any person engaged in the performance of a contract entered into by the United States and not exempted under Section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

b. The Act's coverage does not extend to contracts for services to be performed exclusively by persons who are bona fide executive, administrative, or professional personnel as defined by 29 CFR 541. For example, a contract for medical services furnished exclusively by professional personnel is not an SCA-covered contract. Regulatory guidance in section 4.113 of 29 CFR Part 4 further states that service contracts to be performed essentially by such exempt personnel with the use of service employees being only a minor factor in the contract's performance are not covered by the SCA (see, for example, discussion in paragraphs 3-12 and 3-13 of this pamphlet).

c. In contrast, service contracts involving a significant or substantial use of service employees with some use of bona fide executive, administrative, or professional personnel in the contract's performance are SCA-covered contracts. For example, contracts for drafting or data processing services are often performed by drafters, computer operators, or other service employees and are subject to the Act even though the work of such employees may be performed under the direction and supervision of bona fide executive, professional, or administrative personnel.

3-4. Geographic Scope of the Act.

a. The Act covers contract services furnished in the United States, which is defined as any of the 50

states, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands (as defined in the Outer Continental Shelf Lands Act), American Samoa, Wake Island, Commonwealth of the Northern Mariana Islands, and Johnston Island. This definition specifically excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country.

b. Contracts wherein some services are performed inside, and some are performed outside of the United States, as defined in paragraph a above, are covered by the Act. The Act's provisions, however, are applied to only those services performed within the statutory geographic scope.

3-5. Department of Labor Authority. In addressing the applicability of the SCA to prospective or even existing contracts, it must be noted that Section 4 of the Act authorizes the Secretary of Labor to "enforce the Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder." This authority is outlined in greater detail within Section 101(b) of 29 CFR, Part 4. Particularly noteworthy is the Department of Labor's authority to require contracting agencies to modify existing contracts that have erroneously omitted the applicable SCA provisions and wage rates (see 29 CFR 4.5(c)(2)). Further, it should be noted that DOL determinations as to whether or not a particular contract is subject to the Act are not judicially reviewable (Curtiss-Wright Corp. v. McLucas, 381 F. Supp. 657; Brinks, Inc. v. Board of Governors of the Federal Reserve System, 466 F. Supp 112). In this regard, see also the decision of the General Accounting Office in B-221203, dated 12 Dec 85.

3-6. Contracts of \$2,500 or Less.

a. Every contract with the Federal Government which is not in excess of \$2,500 but has as its principal purpose the furnishing of services through the use of service employees shall contain the following clause:

Except to the extent that an exemption, variation or tolerance would apply if this were a contract in excess of \$2,500, the contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under Section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. Regulations and interpretations of the Service Contract Act of 1965, as amended, are contained in 29 CFR, Part 4.

b. It is also noted that recurring services procured on a monthly rather than annual basis are generally subject to the Act even if the monthly do not equal or exceed the \$2,500 contract threshold for SCA application. The DOL's regulations provide, in relevant part:

...if an agency procures continuing services through the issuance of monthly purchase orders, the amount of the contract for purposes of application of the Act is not measured by the amount of an individual purchase order. In such cases, if the continuing services were procured through formal advertising, the contract term would typically be for one year, and the monthly purchase orders must be grouped together to determine whether the yearly amount may exceed \$2,500. However, a purchase order for services which are not continuing but are performed on a one-time or sporadic basis and which are not performed under a requirements contract or under the terms of a basic ordering agreement or similar agreement need not be equated to a yearly amount. (See 4.142(b).)

3-7. Exempt Contracts. The Act provides for both specific statutory exemptions as well as procedures under which the Secretary of Labor may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to, and from, any and all provisions of the Act.

a. Section 7 of the Act specifically excludes from SCA coverage the following types of contracts:

(1) Any contract for construction, alteration, and/or repair, including painting and decorating of public buildings or public works (i.e., contracts for the procurement of construction activity covered by the Davis-Bacon Act).

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (i.e., specifications or requirements for the procurement of materials, supplies, articles, and/or equipment).

(3) Any contracts for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect.

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934.

(5) Any contract for public utility services, including electric light and power, water, steam, and gas.

(6) Any employment contract providing for direct services to a Federal Agency by an individual or individuals.

(7) Any contract with the Post Office Department (now the U.S. Postal Service), the principal purpose of which is the operation of postal contract stations.

The DOL's regulations at 29 CFR, Part 4, Sections 4.116 through 4.122 provide further explanation of these statutory exemptions.

b. In addition, Section 4(b) of the Act grants the Secretary of Labor the authority to issue limitations, tolerances and exemptions. Thus, the Secretary of Labor has exempted from SCA coverage certain contracts as set forth at 29 CFR 4.123. While the list of exemptions listed therein is extensive, there are many instances where the applicability of the Act is not clear. The sections that follow, therefore, detail certain exemptions as well as applicability determinations of particular interest to USACE.

3-8. Federal Information Processing Resources Contracts.

a. Contracts for Federal Information Processing (FIP) resources (automatic data processing equipment, software services, support services, maintenance, related supplies, and systems) which require the use of service employees are generally subject to the provisions of the SCA, except as noted in paragraphs b and c below.

b. Contracts for Maintenance or Repair of Automated Data Processing Equipment. The Secretary of Labor has set forth an exemption from the Act's coverage contracts principally for the maintenance, calibration and/or repair of certain automated data processing (ADP), scientific and medical, and office business equipment. This exemption may be found within the regulations at 29 CFR 4.123(e). However, since that regulation neither defines nor lists the types of ADP equipment excluded from SCA coverage, the Department of Labor issued further guidance in its All Agency Memorandum No. 149, dated 21 March 1989 (Appendix B). Therein, the DOL indicates that it has adopted the functional definition of ADP equipment within the Brooks Act, 40 USC 759. However, since neither 29 CFR 4.123(e) nor All Agency Memorandum No. 149 contain the Definition of ADP equipment within the Brooks Act, it is set forth below:

"...(T)he term 'automatic data processing equipment' means any equipment or

EP 1180-1-1

1 Aug 01

interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information ---

- (i) by a Federal agency, or
- (ii) under a contract with a Federal agency which---
 - (I) requires the use of such equipment, or
 - (II) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

...(S)uch term includes ---

- (i) computers;
- (ii) ancillary equipment;
- (iii) software, firmware, and similar procedures;
- (iv) services, including support services; and
- (v) related services as defined by regulations issued by the Administrator for General Services.

This exemption is limited to the servicing of only such listed items of equipment furnished to the government which are also furnished commercially, the contract services must be furnished at catalog or market prices, and the contractor must utilize the same compensation plan for all service employees performing on both government and commercial work. The contractor must certify to all of these conditions in the contract. These requirements, as well as the contractor certification, are contained in the contract clause set forth at FAR 52.222-48. In addition, the CO is required to make an affirmative determination that the conditions of the exemption have been met prior to contract award. In this regard, the General Services Board of Contract Appeals (GSBCA), in the Electronic Genie, Inc. case, 90-3 BCA 23,045, held that a push-button telephone is "ADP equipment" under the Brooks Act. Therefore, under the GSBCA's ruling, contracts for the maintenance, calibration and/or repair of push-button telephone equipment would qualify for the SCA exemption.

c. Work Performed by Computer Programmers, Systems Analysts and "Other Skilled Professional Workers". In 1990, Congress amended the Fair Labor Standards Act (see Section 2 of Public Law No. 101-583) to provide that "computer systems analysts, computer programmers, software engineers and other similarly skilled professional employees" are to be exempt as "executive, administrative or professional employees under Section 13(a)(1) of the Fair Labor Standards Act." It further provided that such employees would be exempt even if they are paid on an hourly basis if their hourly rate of pay is at

least 6.5 times greater than the applicable minimum wage rate under Section 6 of the Act. As a result of this exemption under the FLSA, such workers would also be exempt from the SCA. (See 29 CFR 541.3(e))

3-9. Carpet Installation. As noted in Section 3-7, the SCA exempts from coverage contracts for construction, alteration, and/or repair including painting or decorating of public buildings or public works which are subject to the Davis-Bacon Act. Where carpet laying is performed as an integral part of, or in conjunction with, "new" construction, alteration, or reconstruction of a public building or public work, as opposed to routine maintenance, the Davis-Bacon Act would apply. However, where the installation of carpeting is performed as a separate contract and is not an integral part of either a construction project or incidental to a supply contract, the installation work would be subject to the SCA.

3-10. Overhaul and Modification of Aircraft and Other Equipment.

a. As noted in paragraph 3-7, the SCA exempts from its provisions "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act." DOL regulations set forth at 29 CFR 4.117 provide detailed guidelines for delineating when contracts for major overhaul of equipment would be considered "remanufacturing" subject to the Walsh-Healey Act rather than the SCA. Complete or substantial tear down 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 normally be considered "remanufacturing" subject to the Walsh-Healey Act. Additional guidance distinguishing remanufacturing from repair of equipment is set forth at FAR 22.1103-6.

b. Contracts for routine maintenance or repair, inspection, etc. are subject to the SCA.

3-11. Shipbuilding, Alteration and Repair.

a. Subpart 36.102 of the FAR states in part that the term "construction contract" does not apply to construction of "vessels." The above FAR guidance is apparently based on certain legislative enactments (52 Stat. 403; 72 Stat. 839) providing that each contract for the construction, alteration, furnishing or equipping of a naval vessel is subject to the Walsh-Healey Act. However, the Secretary of Labor, who is tasked with the administration of both the Davis-Bacon and Walsh-Healey Acts, has interpreted the aforementioned references to Walsh-Healey Act as applying only to the construction of naval (U.S. Navy and U.S. Coast Guard) vessels. Thus, Corps of Engineers contracts calling for the construction,

EP 1180-1-1
1 Aug 01

alteration or repair of vessels are subject to the Davis-Bacon Act, except as noted in the next paragraph.

b. Where a project involving construction or alteration is advertised and the site of work is known, wage rates must be requested in accordance with FAR 22.404-3. The labor standards provisions required for construction contracts must be included in the specifications. However, where the contract is advertised and the site of work is not known, the contract will be exempt from the requirements of the Davis-Bacon Act. In this regard, refer to 38 Attorney General 412-424; 17 Comp. Gen. 585; and FAR 22.402 (a)(1)(I). Thus, for example, the Davis-Bacon Act would apply to the construction of Corps vessels under the following conditions: (1) the construction services can only be procured from only one responsible source, and (2) the services must be performed at a government specified site. These examples are not intended to be all-inclusive.

c. A contract which calls for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract within the meaning of the SCA. Thus, for example, where mechanical components are removed from vessels and sent to a contractor's plant to be overhauled, such work is subject to the SCA.

d. Prospective contracts relating to the above where there is uncertainty as to labor standards coverage may be referred to the Office of the Chief Counsel, Attn: CECC-C, for coordination with the DOL.

3-12. Mapping and Surveying Services.

a. The issue of SCA coverage of mapping and surveying services was recently raised in connection with Office of Federal Procurement Policy Act Amendments of 1988 (Public Law 100-679). The DOL has advised that the Act applies to any contract for services which may involve the use of service employees to a significant or substantial extent, even though there is some use of bona fide executive, administrative, or professional employees (see 29 CFR 4.113). Unfortunately, there are neither statutory nor regulatory criteria (i.e., percentage of contract cost) available to assist Contracting Officers in determining significant or substantial extent. Thus, the CO should request SCA wage rates whenever "service employees" are required.

b. The request process described below does not represent a change in the DOL's SCA regulations (29 CFR, Part 4); rather, it reflects a revision in the SCA request and response policy relating to surveying and mapping services procured by the Corps through Brooks Act selection procedures (40

U.S.C. 541-544). This change is predicated upon the unique characteristics of the surveying and mapping procurement process as well as the unique characteristics of employment within this industry sector. As provided by applicable statute (33 U.S.C. 569b), the Corps is required to procure surveying and mapping services by means of the qualification-based selection process of the Brooks Architect-Engineer Act (40 U.S.C. 541 - 544). The Brooks Act requires the selection of the most highly qualified firms based on demonstrated competence and professional qualifications, and negotiation of a fair and reasonable price, starting with the most highly qualified firm. Surveying crews are generally permanent employees who operate out of a certain branch or home office. These workers are seldom hired on a local basis for a specific project. Their compensation is primarily determined by the location of their base office, and not the location of their work assignments which may cross various counties on a daily or even hourly basis. This, in combination with the indefinite nature of surveying and mapping contracts, has created an administrative burden for both the Corps and contractors in attempting to reconcile such features with a SCA wage determination keyed solely to the exact place of performance.

c. In response to the above concerns, the DOL has agreed to the following revision in their SCA wage determination issuances for surveying and mapping service contracts. Once the most highly qualified firms have been identified and the home or base office from which the affected personnel will be dispatched can also be identified, the Contracting Officer should then submit the required SF 98, *Notice of Intention to Make A Service Contract* to the DOL. The DOL's new policy requires Contracting Officers to annotate the SF 98 to reflect the unique features of surveying and mapping services procurement based on the Brooks Act procedures. For example, Box 5, *Place of Performance*, will indicate the firm's home or base office. The wage determination furnished will therefore be based on this location. Box 6, *Services To Be Performed*, should indicate that the procurement is an indefinite delivery contract for the acquisition of surveying and mapping services through the Brooks Act.

3-13. Architect-Engineer (A-E) Services. The DOL has also indicated that A-E contracts substantially performed through the use of service employees may also be subject to the SCA. The DOL has previously advised USACE that A-E contracts may be subject to the SCA. In this regard, the DOL has published a list of illustrative services which are subject to the SCA at 29 CFR 4.130. (A less detailed listing is set forth at FAR 22.1003-5). Although A-E services are not specifically cited by DOL, the list does include computer services, drafting and illustrating, exploratory drilling (other than part of construction), surveying and mapping (not directly related to construction). COs are therefore advised to be cognizant of the extent and nature of non-professional service employees required under A-E contracts.

3-14. Park/Gate Attendant Services.

a. With respect to the applicability of the SCA to park/gate attendant services performed by family-owned businesses under Operation & Maintenance contracts, the DOL has also determined that such services are covered by the Act. Section 8(b) of the Act defines service employee as:

"any person engaged in the performance of a service contract, except those persons who are employed in a bona fide executive, administrative, or professional capacity as those terms are defined in Regulations, 29 CFR 541, regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such person."

b. Park/gate attendants would therefore be service employees within the meaning of the Act, and any subcontract entered into for such services would be a covered service contract, regardless of whether or not the contractor is a family-owned business such as those euphemistically referred to as "Ma-and-Pa" type enterprises. Similarly, the DOL has indicated that the opening and locking of gates appears to be "watchmen or guard" type activities for purposes of the Contract Work Hours and Safety Standards Act (CWHSSA). To the extent that park/gate attendants perform CWHSSA covered activities in excess of 40 hours per week, they would also be entitled to receive CWHSSA premium compensation.

c. SCA coverage of "Ma-and-Pa" park/gate attendant subcontracts noted above may be distinguished from prime contracts with "Ma-and-Pa" enterprises for park/gate attendant services. The Act specifically exempts any employment contract providing for direct services to a Federal Agency by an individual or individuals (see 41 USC 356; 29 CFR 4.121; FAR 22.1003-2(f)).

3-15. Demolition, Dismantling, and Removal of Improvements

a. Property demolition, dismantling and removal contracts which involve demolition of buildings or other structures are subject to the SCA when their principal purpose is the furnishing of dismantling or removal services, and no further construction at the site is contemplated. If further construction is contemplated, even by separate contract, then the contract would be subject to the Davis Bacon Act (see 29 CFR 4.116(b) and FAR 37.301).

b. However, these regulations appear to address those situations where both the specific location and exact nature of subsequent construction activities are intended. Such situations can be distinguished

from the debris removal activities required in the aftermath of emergencies such as Hurricanes Andrew and Inike or the 1993 floods. Typically, the cleanup and debris removal following such disasters are performed on an immediate basis and are not procured by fixed-price type contracts. Rather, due to the urgent nature of the services to be procured, initial USACE activities are generally comprised of cost-reimbursable contracting efforts. In addition, these cleanup and debris removal efforts would be performed prior to, and independent of, survey and engineering studies which would identify the location and extent of necessary repairs. In view of these circumstances, the DOL has concurred in the determination that USACE disaster relief efforts, including debris removal, and subsequent efforts, such as levee repairs may be viewed as discrete activities. Thus, emergency cleanup and debris removal activities would generally be subject to the provisions of the SCA.

c. The DOL, in All Agency Memorandum No. 153 (Appendix C), provided guidance on the application of the DBA to contracts for asbestos and/or paint removal. The DOL advises that the removal of asbestos or paint from public buildings or public works constitutes building alteration within the statutory language of the DBA. Such asbestos or paint removal clearly alters those buildings or works, regardless of whether subsequent re-insulating or repainting is being considered. This view is consistent with previous determinations that contracts for sandblasting or hydrostatic cleaning of public works are subject to the DBA. The subject All Agency Memorandum thus applies to contracts for construction, alteration, and/or repair of public buildings or works. However, if asbestos is being removed as part of an overall demolition contract, then such asbestos removal would be subject to the SCA.

3-16. Mixed or Hybrid Contracts.

a. One of the more troublesome issues in determinations of SCA applicability and coverage relates to mixed or hybrid contracts, those that are comprised of separate service, construction or manufacturing elements. DOL regulations in this regard indicate that where such hybrid elements are present, the SCA will apply only if the principal purpose of the contract is principally for services. If the principal purpose of the contract is for the furnishing of items other than service, then the SCA would not apply.

b. If it is determined that the principal purpose of a contract is the procurement of services, there are circumstances where the CO must also incorporate other labor standards provisions. The regulatory criteria by which such determinations are made is set forth at FAR 22.402(b); 29 CFR 116(c)). Generally, the CO must also incorporate DBA clauses to non-service construction work if:

- (1) the service contract includes a substantial and segregable amount of construction, alteration,

EP 1180-1-1
1 Aug 01

renovation, painting, or repair work; and

(2) the aggregate of such work exceeds or is expected to exceed \$2,000.

c. While there are an indefinite number of possible hybrid contracts, two areas are discussed in the paragraphs that follow insofar as they have generated significant concern within USACE: (1) installation support service contracts and (2) certain environmental restoration projects.

3-17. Installation Support Contracts. Certain installation support contract requirements such as custodial work or snow removal may be easily identified as being subject to the SCA. Certain other installation requirements such as roof shingling, building structural or paving repairs may also be easily identified as being subject to the DBA. Certain other work items may not be so easily identifiable. For example, replacing broken windows, spot painting, or minor patching of a wall could be subject to either the DBA or the SCA. In order to distinguish whether work required under a contract or work order is SCA maintenance or DBA painting/repairs, the Army Labor Advisor, in conjunction with the DOD FAR Labor Committee, developed specific thresholds which are set forth at DFARS 222.402-70(d).

a. Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA.

b. Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be repair work subject to the SCA.

c. Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required.

d. The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where the requirements can be identified. Otherwise, the determination shall be made at the time the service call or order is placed against the contract. The service call or order shall identify the labor standards law and contract wage determination which will apply to the work required.

3-18. Environmental Restoration Contracts.

a. As a result of USACE's increasing mission in the area of environmental restoration through the Defense Environmental Restoration Program (DERP) as well as work for others (i.e., EPA Superfund),

evolving remediation methodologies and innovative contracting strategies (i.e., Rapid Response, Total Environmental Restoration Contracts), much of USACE's experience with respect to the application of appropriate labor standards has been developed incrementally. Such determinations have proven particularly difficult where elements of both construction and service are required. USACE's Rapid Response contracts, for example, are deemed to be contracts principally for service with provision for construction activities that may be both substantial and segregable (see 29 CFR 4.116).

b. Typical construction activities at an environmental restoration site may include:

(1) Construction of either temporary or permanent water treatment system.

(2) Excavation, consolidation, capping of contaminated soil, backfilling, regrading, and reseeded of excavated areas.

(3) Construction of a water distribution system.

(4) Installation of a security fence/warning signs.

c. A service activity can be performed by either professional or non-professional personnel. Typical service activities at environmental restoration sites may include:

(1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.

(2) Engineering and technical services.

(3) Operation of government-owned equipment, facilities, and systems.

(4) Transportation and related services.

(5) Research and development.

(6) Chemical testing and analysis.

(7) Data collection and analysis.

EP 1180-1-1

1 Aug 01

(8) Geological field surveys and testing.

(9) Laboratory analysis.

(10) Landscaping (other than as part of construction).

(11) Solid waste removal.

(12) Operation and maintenance of treatment units (i.e., incinerator units, pugmill systems, water treatment plants).

d. Three examples serve to illustrate the substantial and segregable standard for incorporation of DBA provisions.

(1) In an action that calls for the removal and disposal of drums of hazardous waste, the contract/delivery order is principally for service (removal/disposal). However, site set-up requires some incidental construction activities such as electrical hook-up, construction of stairs for project offices, clearing and construction of access roads, etc. These activities are not substantial relative to the overall scope of the action.

(2) In an action that calls for excavation and off-site disposal of contaminated soil, the principal purpose of the contract/delivery order is service (removal of soil through transportation and disposal). The excavation and staging of the soil is an activity which is substantial, and can be functionally separated from the transportation and disposal.

(3) In an action that calls for the excavation and on-site incineration of the contaminated soil, the principal purpose of the contract/delivery order is still service (treatment of the contaminated soil). In this case, excavation is substantial, but as a practical matter may not be segregable from the incineration of the soil if the activity is continuous and is to be performed by the same contractor employees. However, if the two activities are phased, or if the excavated material is to be temporarily contained, the incineration is then capable of being segregated from the excavation and should be treated accordingly. Appendix D provides a summary view of the above decision-making process.

3-19. Exploratory Drilling. Contracts for subsurface exploration, which have as their principal purpose

the furnishing of technical information, together with soil samples and rock cores, and/or a record to the government of what was encountered during subsurface drilling, are subject to the SCA if such drilling operations are not directly connected with the construction of a public work. The DOL has ruled that contracts for drilling are covered by the DBA when they are directly related and incidental to, or an integral part of the actual construction process. Further, contracts for the digging of test holes which may later become public works or permit conversion to water wells are covered by the DBA.

3-20. Work Performed by the Contractor Alone. The SCA does not apply where the CO knows in advance that the contractor alone will perform the services, since no service employees are utilized in such case. (Wage & Hour Opinion Letter 512, September 23, 1966).

3-21. State and Municipal Employees. States and their political subdivisions may obtain a Federal service contract and undertake to perform it with state or municipal employees (e.g., police, fire, or trash removal services). The SCA does not contain an exemption for contracts performed by state or municipal employees. Thus, the SCA will apply to contracts with states or political subdivisions in the same manner as to contracts with private contractors (see 29 CFR 4.110).

3-22. USACE Law Enforcement Contracts Under the Water Resources Development Act. Section 120 of the WRDA (P.L. 94-587, 90 Stat. 29240 as amended by Section 101 of Public Law 96-536 (94 Stat. 3168)) provides authority for the Secretary of the Army, acting through the Commander, USACE, to contract with states and their political subdivisions for the purpose of obtaining increased law enforcement services at water resources development projects under the jurisdiction of the Secretary of the Army. The DOL has advised the Corps that they view Section 2(a) of the SCA as applicable to such services. The DOL maintains that the statutory language is clear. The Act applies to "every contract entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in Section 7 of this Act...the principal purpose of which is to furnish services in the United States through the use of service employees..." (Emphasis added.) In this regard, there is no limitation in the Act regarding the beneficiary of contract services, nor is there any indication in the legislative history that only contracts for services of direct benefit to the government, as distinguished from the general public, are subject to the Act. (see 29 CFR 4.133 (a)). Further, the provisions of the CWHSSA are to be incorporated within these contracts. Covered employees are entitled to the required overtime premium to the extent that they perform contract work in excess of 40 hours. In submitting SCA wage rate requests to the DOL, COs are advised to clearly indicate that the subject solicitation will be a sole-source type procurement. The DOL has recommended that such information be furnished within Block 6, Services to Be Performed, of the Standard Form SF 98, Notice of Intention to Make a Service Contract.

3-23. Contracts with the National Guard. Contracts for the operation and maintenance of state National Guard training and logistical facilities are generally not subject to the SCA. While the National Guard Bureau provides full or partial funding for these contracts, services are provided directly to the states and not the U.S. Government. The states independently obtain services to support training and logistical facilities for each state National Guard unit. Contracts are signed by state officials and are administered by the individual states according to state contracting procedures. However, contracts entered into between the National Guard Bureau, DOD, and state National Guard units which provide for the acquisition of services for the direct benefit or use of the National Guard Bureau and which are signed by a U.S. Property and Fiscal Officer would be subject to SCA.

3-24. Contracts Between a Federal or District of Columbia Agency and Another Such Agency. Prime contracts between a Federal or District of Columbia agency and another such agency are not subject to the SCA. However, "subcontracts" awarded under "prime contracts" between the Small Business Administration and another Federal agency pursuant to various small business/minority set-aside programs, such as the 8(a) program, are covered by the SCA. For further information in this matter, refer to 29 CFR 4.110.

3-25. Civilian Non-Appropriated Fund Contracts. The SCA applies to all labor intensive contracts that provide services to civilian non-appropriated fund instrumentalities (NAFI). Cafeterias, restaurants, food services, and vending services are examples of civilian NAFI contracts to which the SCA applies. (See AR 215-7, paragraph 2-30).

3-26. Carriage of Freight or Personnel. Administrative Contracting Officers (ACOs) should be aware of actions which have affected the applicability of the SCA to certain contracts relating to the carriage of freight or personnel by motor carriers where published tariff rates are in effect. By way of background, it is noted that Section 7(3) of the Act had provided for an exemption of the Act's coverage for these and similar services. However, the DOL has re-examined this application of this exemption and the implementing regulations (29 CFR 4.118) in light of two recent legislative actions relating to the de-regulation of the transportation industry. As a result of the Trucking Industry Regulatory Reform Act of 1994 (P.L. 103-311) and the Federal Aviation Administration Authorization Act of 1994 (P.L. 103-305), interstate and intrastate motor common carriers providing transportation of property, other than household goods, are no longer required to file tariff rates with the Interstate Commerce Commission or any state. Accordingly, motor carriers, with the very limited exceptions noted within the subject Memorandum, no longer qualify for the exemption set forth at Section 7(3) of the Service Contract Act.

3-27. Exemption for Certain Commercial Service Contracts. Based on a request from the Office of Federal Procurement Policy to the Secretary of Labor, the Secretary has determined that certain contracts for commercial services meeting specific criteria may be exempt from the Act's coverage. Proponents of such exemptions have maintained that in certain situations, an employee's work on a government contract represents a small portion of his or her time and the balance of the time is spent on commercial work. The Office of Federal Procurement Policy reasoned that in such cases the Government loses the full benefits of competition for its service contracts because some contractors decline to compete for Government work due to specific government requirements. In recognition of such situations, the Secretary of Labor has developed an exemption framework that would protect prevailing labor standards and avoid the undercutting of such standards by contractors. These criteria are intended to limit the exemption to those procurements where the services being procured are such that it would be more efficient and practical for an offeror to perform the services with a workforce that is not primarily assigned to the performance of government work. Thus, contracts for base support services where an on-site dedicated workforce performs the work would not meet the exemption criteria. Also, contracts where the services have been performed by a dedicated group of federal employees (A-76 procurements) would be unlikely to meet the exemption criteria since the nature of the services would not meet the requirement that the workers perform only a small part of their time on the contract. However, it is possible that some subcontracts for a portion of those services might meet the criteria for exemption. The paragraphs below summarize the Secretary of Labor's Final Rule with respect to "commercial item" exemptions. The rule, published in the Federal Register on 18 January 2001, amending 29 CFR 4.123, became effective on 19 March 2001. Each of the criteria must be satisfied and the Secretary of Labor has reserved the right to review such determinations.

a. The services under the contract are commercial--i.e., they are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

b. The prime contract or subcontract will be awarded on a sole source basis or the contractor will be selected for award on the basis of other factors in addition to price. In such cases, price must be equal to or less important than the combination of other non-price or cost factors in selecting the contractor.

c. The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices. An established price is a price included in a catalog, price list,

EP 1180-1-1

1 Aug 01

schedule, or other form that is regularly maintained by the contractor or subcontractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

d. Each service employee who will perform services under the Government contract or subcontract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the 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 a month) servicing the Government contract or subcontract.

e. The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract or subcontract as the contractor uses for these employees and for equivalent employees servicing commercial customers.

f. The contracting officer (or prime contractor with respect to a subcontract) determines in advance, based on the nature of the contract 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 contract, the contracting officer or prime contractor shall consider the practices of the existing contractor in making a determination regarding the above requirements.

g. The contractor certifies in the prime contract or subcontract, as applicable, to the provisions in paragraphs (1), and (3) through (5). The contracting officer or prime contractor, as appropriate, shall review available information concerning the contractor or subcontractor and the manner in which the contract will be performed. If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the contract or subcontract.

3-28. Application of Commercial Service Contract Exemption. The DOL has set forth a listing of service contracts that where the above criteria are satisfied will be exempt from the applicability of the SCA. While these services are briefly noted below, Contracting Officers are encouraged to carefully review the conditions under which the exemptions are effective.

a. Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts to operate a Government motor pool or similar facility).

- b. Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).
- c. Contracts with hotels/motels for conferences, including lodging and/or meals which are part of the contract for the conference (which shall not include ongoing contracts for lodging on an as needed or continuing basis).
- d. Maintenance, calibration, repair and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in § 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.
- e. Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).
- f. Real estate services, including real property appraisal services, related to housing federal agencies or disposing of real property owned by the Federal Government.
- g. Relocation services, including services of real estate brokers and appraisers, to assist federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

CHAPTER 4 - PRE-SOLICITATION ADMINISTRATION AND DETERMINATION

4-1. General. (29 CFR, Part 4; FAR 22.1008). It is essential that all prospective procurements be assessed in terms of the potential applicability of the various labor standards statutes referenced in Chapter 2 of this pamphlet. Further, it is recommended that such determinations be undertaken as early in the procurement planning process as may be practicable. Experience has indicated that where the determination of the appropriate labor standards statutes and provisions are an addendum rather than an integral element within the procurement planning process, the potential for disruption of solicitations and contract schedules is significantly increased. This is particularly true with respect to service contracts where the timing and content of SCA wage determination request procedures differ from those arising under the DBA.

4-2. Standard Form 98/98a, Notice of Intention to Make a Service Contract and Response to Notice.

a. For any contract exceeding \$2,500 which may be subject to the SCA, the contracting agency is required to submit The Notice of Intention to Make a Service Contract -- Standard Form 98 (Appendix E). The individual SF 98 consists of two forms, the SF 98 and SF 98a, and any supporting documentation required. The request is sent to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. Supplies of the SF 98 and 98a are available in all GSA (General Services Administration) supply depots under stock numbers 7540-926-8972 and 7540-118-1008, respectively. Alternatively, the DOL has authorized the use of a computer-generated SF 98 and SF 98a, provided such forms continue to maintain separate and unique notice numbers for each request. Towards this end, the DOL has authorized the Corps to use the prefix "C" for each request and the first two numbers representing the Corps district from which such request originates. (For example, C2598001 would represent a request from the Corps of Engineers Rock Island District). It should be noted that such format is merely an option with each district and districts may elect to continue to use the GSA supplied forms.

b. There are three types of SF 98/98a Notices sent to DOL:

(1) Individual Requests for Area, or locally prevailing, WDs: Area WDs reflect wages and benefits which DOL determines to be prevailing for a specific locality (usually determined from Bureau of Labor Statistic surveys and other data). Individual requests are also submitted when the incumbent or predecessor contractor employees are subject to a CBA, and that CBA is forwarded to DOL requesting a WD reflecting the CBA rates and benefits.

(2) **WDOL Program Requests:** Under the new program, described in greater detail in Chapter 5, the contracting agency selects the appropriate Area WD for a contract action from an on-line subscription service, and then submits an SF 98/98a Notice to DOL informing DOL of the contract action and WD selection. A separate SF 98 Notice must be submitted to DOL for each contract action. Proper use of the WDOL Program SF 98 requirement satisfies the regulatory notice requirement under 29 CFR 4.4 and FAR 22.1008.

(3) **Blanket WD Program Requests:** One annual SF 98 is submitted to DOL for all one-time or recurring, continuous or multi-year services for a specific contracting activity. DOL responds to this request with "Area WDs" (also known as "Blanket WDs"). This program is detailed in Chapter 6. If a contracting activity requests authorization to participate in the WDOL Program, they should no longer participate in DOL's Blanket Program.

4-3. Notice Requirements and Timing of the Request. (29 CFR 4.4, FAR 22.1008-7) For all SCA request actions other than those under the WDOL program (see Chapter 5), the SF 98/98a and any required supporting documentation must be submitted to the Wage and Hour Division for recurring or known procurement needs not less than 60 days (nor more than 120 days except with the prior approval of the Wage and Hour Division) prior to any invitation for bids; requests for proposals; commencement of contract negotiations; exercise of options or contract extensions; annual anniversary date of multiple-year contracts subject to annual appropriations of the U.S. Congress; or biennial anniversary date of multiple-year contracts not subject to annual appropriations of the U.S. Congress, unless otherwise advised by the Wage and Hour Division. For unplanned or non-recurring procurement needs, individual SF 98 requests must be submitted as soon as possible, but not later than 30 days prior to the above listed contractual actions. (See 29 CFR 4.4) There may be, of course, situations where exceptional circumstances prevent the submission of the request within the time periods noted above. In an emergency situation requiring an immediate wage determination response from the DOL, the CO shall coordinate such request with the HQUSACE Labor Advisor (CECC-C), as provided by DFARS 222.1008-7(d).

4-4. Content of the SF 98. The SF 98 specifies the relevant procurement dates, the geographic location of the work to be performed, the type of services to be covered by the contract, and provides information on incumbent contractors, previous wage determinations, and collective bargaining agreements that may apply. The SF 98a identifies the occupations (classes) of service employees to be

employed under the SCA-covered contract, the number to be employed, and the hourly wage rates that would be paid if such workers were Federal direct hires. The SF 98 includes instructions for proper completion. While all requested information is important for the proper issuance of the wage determination, certain items are critical, as noted in paragraphs a through e below.

a. Procurement Dates (SF 98, Blocks 2,3,4). Procurement dates are important for evaluating the timeliness of requests and the Wage Determination (WD) response issued by the DOL. In addition, these dates are important to the evaluation of the currency of data sources to be used in developing the WD and the proper tracking of annual vs. multi-year service contracts. It is noted that for multi-year contracts not subject to annual appropriations, a written statement describing the type of funding and anticipated term of the proposed contract must be attached to the SF 98 request. As discussed in paragraph 4-3, this type of multi-year service contract requires a new wage determination issuance at least every two years.

b. Place(s) of Performance (SF 98, Block 5). Listing the city, county, and state of the location(s) where the services called for will be performed is important to the development of the WD. It is particularly important to list the county inasmuch as the DOL indexes its wage determinations by county. The failure to include the county may delay the DOL's response. Prevailing, area-wide WDs are based on wage rates and fringe benefits determined to be prevailing within the locality of the place of performance. The place of performance could be the contractor's site, a government installation, or elsewhere. Where the place(s) of performance of an SCA- covered contract is unknown at the time of solicitation, bid specifications may be issued without a WD. Under these circumstances, a two-step solicitation process may be used. In the first step, the contracting agency will issue an initial solicitation with no WD, from which it identifies all interested bidders or offerors and their possible places of performance and then transmits this information to DOL with the SF 98. In the second step, DOL will issue separate WDs for the various localities identified in the first step, to be incorporated in the solicitation prior to the submission of final bids or offers. The appropriate WD 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. For unusual situations where this two-step procedure may not be practical, the matter should be brought to the attention of the District Labor Advisor for coordination with CECC-C and the DOL.

c. Services to be Performed (SF 98, Block 6). A clear and complete description of the type or

types of services called for by the procurement is essential to the DOL staff in addressing the request. If the services to be provided are unusual in any way, a detailed description may be necessary. Inadequate or an incomplete description of services to be performed may result in delays in the furnishing of wage rates by the DOL.

d. Information about Performance (SF 98, Block 7). Identification of the status of the procurement provides information relating to several important considerations that affect the DOL response. These considerations include the following.

(1) Box A - Services Now Performed By a Contractor: Checking this box indicates that the procurement is recurring. Depending upon the procurement dates, the contract may be an annual, recurring contract or a continuous, multi-year contract. Also, a contract that is currently being performed by a contractor will have a previously issued WD on file that will be evaluated by the DOL as part of the WD development process.

(2) Box B - Services Now Performed By Federal Employees: Checking this box indicates that the contracting agency is considering whether to contract out for services currently being performed by Federal workers in accordance with Federal policy established by OMB Circular No. A-76. This policy establishes the principles and procedures used by agencies in determining whether a given Federal Government service is better provided by a commercial source in order to achieve economy and enhance productivity. A decision to contract with a commercial source may result in a displacement of Federal workers which is taken into account as part of the WD development process. Checking this box also indicates that there does not currently exist a previously issued WD for the procurement action.

(3) Box C - Services Not Presently Being Performed: Checking this box indicates that the procurement is a completely new service not currently performed by Federal workers or contractors. A previously issued WD will therefore not exist.

e. Collective Bargaining Agreement (SF 98, Block 8). Under the Act, the DOL is required to issue two types of wage rate determinations. "Prevailing Rate" wage determinations are issued for contracts where there was no predecessor contractor or where the predecessor contractor's wage rates were not governed by a collective-bargaining agreement (CBA) during the term of the contract. However, the Act has specific protections for employees performing service contracts under CBA's. Section 4{c} of the Act provides that a contractor performing substantially similar services in the same location as a

predecessor contractor must pay at least the same rates as the predecessor contractor was obligated to pay under his CBA. Under these conditions, therefore, the DOL will issue "Collectively Bargained Rate" wage determinations. In every recurring procurement of services, the contracting officer must determine whether some or all of the incumbent contractor's employees have their wages and fringe benefits set in a CBA (see FAR 22.1008-3). If a CBA applies to the incumbent contractor's workforce, the CBA sets the minimum rates for the successor contract period by operation of law (41 USC 353(c); 29 CFR 4.163(b)). The CO must obtain a copy of the applicable CBA and submit it to the DOL as an attachment to the SF 98/98a for the successor procurement. Further the contracting officer must give the union and the contractor written notice of the relevant procurement dates (see FAR 22.1010).

4-5. Content of the SF 98a.

a. Occupational Classes and Number of Employees (SF 98a, Blocks 12 and 13). The SF 98a must list the classes of service employees expected to perform the services called for by the proposed SCA-covered contract, and where applicable, any subcontracts. The listing of all occupational classes of service employees to be employed under the proposed contract must utilize job titles and corresponding code numbers found in the Directory of Service Contract Act Occupations, a U.S. Department of Labor, Employment Standards Administration publication. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.) Since payroll titles and work assignments vary among contractors and geographic areas, the directory serves as a standard means of communication among contractors, contracting agencies, and DOL wage determination staff. For any occupation not contained in the directory, an appropriate job title shall be given in Block 12 and a job description must be attached to the SF 98. The WD issued by the DOL will include the minimum wage rates and fringe benefits to be paid by the contractor for occupational classes listed in the SF 98a to be used in the performance of the SCA-covered contract. An occupational class is classified according to duties, skills, knowledge required to perform it. Such factors affect the job's relative rate of pay. Occupational classes vary considerably with regard to these factors. Wage rates therefore vary considerably by class. Thus, job descriptions are evaluated by DOL staff to determine appropriate classifications (and respective relative pay rates) for evaluation against survey or other related data used to develop the WD. The number of service employees expected to be employed in each occupational class or a statement that the total number for all classes will exceed five must also be included in the SF 98a.

b. Comparable Federal Rates (SF 98a, Block 14). The hourly wage rates or grade levels that would

be paid if workers were Federal direct-hires must be listed in the SF 98a. Wage rates for white-collar classes are established by the Federal General Schedule (GS rates and grades). Wage rates for blue-collar classes are established by the Federal Wage System Schedules (Wage Board or NAF rates and grades). These comparable pay rates or grade levels are used to apply the principles of due consideration required by section 2(a)(5) of the Act. Comparable Federal fringe benefits need not be in the SF 98a. All Federal employees, regardless of occupational class, receive the standard Federal fringe benefits package. The level of benefits so provided by law and regulations at the time of the procurement is used in the application of due consideration, if necessary.

4-6. Service Contract Administration Issues. Due to the complexity of the regulations implementing the Act, it would be impossible to consider all potential problems in the pre-solicitation and pre-award phase of service contract administration. However, noted below are some of the more problematic issues that have arisen in recent years.

4-7. Certified Listing of Employee Anniversary Dates. In the case of a contract performed at a Federal facility where employees may be retained by a succeeding contractor, DOL's regulations (29 CFR 4.6(1)(2)) provides that the incumbent prime contractor must furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract (with the incumbent as well as predecessor contractors) of each employee, to the contracting officer not less than 10 days before contract completion. A copy of this 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). Failure to obtain such employment data will not relieve a contractor from any obligation to provide vacation benefits (see also FAR 22.1020).

4-8. Successor Contractor Obligations. There are special requirements for both contractors and contracting agencies under the SCA in connection with recurring service contracts. Specifically, the Act requires a new contractor who replaces a contractor subject to a collective bargaining agreement with a union to pay its employees not less than the wage rates and fringe benefits that its predecessor would have had to pay under the most current collective bargaining agreement, including any prospective increases provided for in the agreement (see 41 USC 353(c); 29 CFR 4.163(b) and FAR 22,1002-3). This provision is self-executing and imposes an absolute duty on the successor contractor, regardless of the contractor's knowledge of the predecessor's collective bargaining agreement. There are certain conditions under which this requirement would not apply and they are set forth below:

a. If the successor contract is not to be performed in the same locality as the predecessor contract,
or

b. The DOL determines after a hearing that the wage rates and fringe benefits in the collective bargaining agreement are "substantially at variance" with those prevailing in the locality for similar services;
or

c. The DOL determines that the predecessor's wage rates were not agreed to in an "arm's length" transaction.

d. "Contingency Clause". The DOL has determined that CBAs which contain increased wage and fringe benefit provisions which are contingent on a number of factors (but principally, upon approval by the DOL's Wage and Hour Division) do not satisfy the criteria for the establishment of successor contractor obligations under section 4 (c). FAR subparts 22.1002-3, 22.1008-3, and 22.1021 have been revised to implement the guidance previously furnished by DOL on these issues within All Agency Memoranda 159 and 166. All Agency Memorandum No. 159, for example, provides that regardless of any contingency clauses contained within a predecessor contractor's CBA, a copy of the CBA must be submitted with the SF 98 wage determination request to the DOL. The determination as to whether the CBA has application for section 4{c} purposes is to be made by the DOL, and not the contracting agency.

COs and their representatives need to be aware of the above successor contractor obligation as well as the conditions which alter its applicability insofar as it may affect certain solicitations. The contracting agency or any other person affected or interested, including contractors, and employee representatives, may request a determination by the DOL on these issues. COs are reminded that FAR subparts 22.1012-3 and 22.1012-5 authorize the incorporation of the wage and fringe benefit terms of the CBA, or the CBA itself, in order to facilitate price adjustments for options in fixed-price type contracts.

4-9. Substantial Variance. Requests for a DOL "substantial variance" hearing or "arm's length" determination involve the use of Administrative Law Judges (ALJ) in accordance with the DOL's regulations. For either type of request, information must be submitted (in accordance with 29 CFR 4.10 and 4.11) as follows:

EP 1180-1-1
1 Aug 01

- a. Prior to 10 days before contract award, if an advertised contract; or
- b. Prior to the contract or option period start date, if a negotiated contract, or existing contract with an option or extension period.

Requests for DOL determinations under these regulations should be forwarded to the District Labor Advisor for coordination with CECC-C.

4-10. DOL Responsiveness. The issue of DOL responsiveness to contracting agency wage requests has received considerable attention in recent years. Information furnished by the DOL indicates that the Branch of Service Contract Act Wage Determination receives in excess of 55,000 requests for SCA wage determinations annually. These requests are processed by a DOL staff of less than 20 employees. Thus, there is a considerable demand upon the DOL to process these requests notwithstanding either the complexities or the urgency of such requests. In this regard, the DOL has furnished data which indicates that contracting agencies fail to comply with the time and notice requirements (see Section 4-3) for over 50% of all SCA wage requests. Moreover, delays in DOL responses are frequently the result of the failure to properly complete the SF 98/98a.

- a. DOL's Wage Determination Automated Tracking System. In order to track the status of its SCA wage request processing, the DOL established a Wage Determination Automated Tracking System (WD-ATS) which provides information with regard to the date the DOL has received the individual request, the date it is due back to the requesting contracting agency and its current status within the DOL's system. COs are encouraged to contact the DOL's status line (202-219-7096) in order to confirm that the request has been received. Such action is particularly appropriate in view of the notice requirements noted previously (see paragraph 4-3).

- b. The WD-ATS is operated and maintained by contract personnel rather than DOL staff. The WD-ATS contract personnel are not authorized to either answer questions with respect to the applicability of the Act or to expedite particular wage requests. All questions concerning the applicability of the Act, requests for immediate wage determination responses for emergency acquisitions and all notifications concerning solicitations adversely affected, i.e., delayed due to the lack of a DOL response, are to be coordinated with CECC-C (see FAR 22.1003-7, 22.1011-2, 22-1012 as well as DFARS 222.1003-7 and 222.1008). Inquiries may be directed to the HQUSACE Labor Advisor by means of e-mail (gregory.m.noonan@usace.army.mil) or by Fax (202-761-4123). Such inquiries should be

addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor and include the following information:

- (1) SF 98 Notice Number
- (2) Date submitted to the DOL
- (3) Services to be performed
- (4) County or Counties where services are to be performed
- (5) State
- (6) Date SF 98 was received by the DOL
- (7) Date indicated by DOL for response
- (8) Impact of delay upon procurement

Information provided in accordance with the above will be recorded by CECC-C for transmittal to the Chief, Service Contract Wage Determinations Branch, U.S. Department of Labor.

CHAPTER 5 - THE WAGE DETERMINATION ON LINE (WDOL) PROGRAM

5-1. General.

a. Under a Memorandum of Understanding (Appendix F) between the Department of Labor (DOL) and various services within the Department of Defense (DOD), the Corps is now able to obtain current area wage determinations (WDs) via an on-line DOD-wide subscription service known as "WDOL Program". The WDOL Program provides both Service Contract Act (SCA) WDs and Davis-Bacon Act (DBA) general wage decisions to all authorized users for official use in Federal contract actions. At present, the Departments of Air Force, Army, Navy and the Defense Logistics Agency are participants in this program.

b. Under the terms of the MOU, the participating DOD agencies must ensure that its personnel are appropriately trained in the implementation of SCA WD database. The DBA WD database is available for use immediately, and DBA WDs will continue to be incorporated into DBA-covered contract actions in accordance with existing regulations. This "User's Guide" provides the basic, required training and guidance in the use of the SCA WD database on the WDOL Program.

c. Use of the SCA WD database for official contract actions is limited to personnel within the participating DOD agencies (those which are signature to the MOU with DOL). Contracting activities desiring to use the WDOL Program for SCA WDs must certify to their Agency Labor Advisor that training has been completed. USACE members who have completed the on-line training may forward an e-mail notification to the HQUSACE Labor Advisor, CECC-C (gregory.m.noonan@usace.army.mil) advising that the training has been completed. No notification is necessary for use of the DBA WDs section of the WDOL program.

5-2. WDOL Program Requirements.

a. The WDOL Program, SCA Database, may be used when:

(1) The contracting office has received appropriate training;

(2) The Agency Labor Advisor has certified to DOL that the training has been received;

b. At the time authorization is approved, the contracting activity will no longer be authorized

EP 1180-1-1
1 Aug 01

to use the SCA Blanket WD Program.

5-3. Restrictions on the Use of the WDOL Program. As provided by the agreement with the DOL, the WDOL Program, SCA Database, may not be used if any of the following apply:

- a. In the preceding contract period there was an effective union CBA;
- b. The SCA Database does not contain an appropriate WD, or if the WD deemed applicable omits a principal occupation to be employed on the contract.
- c. The work to be performed relates to the following “non-standard SCA job classifications:
 - (1) Aircraft services (large multi-engine aircraft including/excluding CNET postal contracts).
 - (2) Air transportation
 - (3) Alcoholism drug abuse/compulsive overeating & counseling services
 - (4) Aerial photographers/seeding/spraying services
 - (5) Background investigators
 - (6) Beauty & barber
 - (7) Breath alcohol and/or drug testing services
 - (8) Broadcasting services
 - (9) Child/adolescent psychiatric services
 - (10) Deckhand
 - (11) Decontamination services
 - (12) Demolition
 - (13) Disaster Emergency clean-up and repair services
 - (14) Diving services
 - (15) Driller services
 - (16) Elevator maintenance
 - (17) Emergency incident services
 - (18) Equipment installation & services
 - (19) Fast foods
 - (20) Fire safety services
 - (21) Firewatch services
 - (22) Fish marketing

- (23) Fish & wildlife services
- (24) Food and lodging
- (25) Foreign language translator
- (26) Forestry and land management
- (27) Gage reading and water sampler collection
- (28) Hazardous waste pick-up and disposal services (material/oil spills & related clean-up services)
- (29) Health physics technician
- (30) Income tax preparation services
- (31) Inspection/appraisal services
- (32) Inspector
- (33) Interpreter (sign language)
- (34) Law enforcement
- (35) Maintenance & modifications of weapons systems
- (36) Moving and storage
- (37) Nursing home services
- (38) Occupational therapist
- (39) Oil and gas extraction/drilling
- (40) Psychiatric services
- (41) Quality assurance services
- (42) Radiology services
- (43) Relocation services
- (44) Removal of oil spills, hazardous waste materials
- (45) Residential & halfway house
- (46) Rock crushing & stockpiling
- (47) Small package delivery services (GSA contracts only)
- (48) Sampler collector
- (49) Telecommunication equipment installation & services
- (50) Transcribing machine specialist
- (51) Transportation & disposal of hazardous waste
- (52) Tugboats & coastal vessels
- (53) Urine collection services

d. If there is a question regarding the appropriate contract labor standards applicable to the solicitation (or contract action), contact the District Labor Advisor for guidance on these questions.

5-4. Obtaining WDs Using the WDOL Program.

a. For all contract actions requiring new or revised SCA WDs, the contracting office shall obtain the appropriate WD by accessing the WDOL Program SCA Database no more than 15 days prior to the earlier of the following procurement actions:

- (1) issuing an invitation for bid or request for proposal;
- (2) start of negotiations;
- (3) modification to exercise an option or to extend, or to significantly change scope of work;
- (4) annual/biennial anniversary dates of multi-year contracts.

5-5. When to Submit an SF 98 to DOL Under the WDOL Program. On or before issuing the solicitation, or modification to exercise an option, to extend, or significantly change scope of work, the CO or his/her designee shall take the following actions. Prepare and send (by regular mail) to DOL a complete, signed, and dated SF 98 for each contract action. The SF 98 will note in Box 1 the letters "MOU"; and will note in "Response to Notice" the SCA WD number (including revision) selected from the SCA Database.

5-6. Monitoring the WDOL Program for WD Revisions.

- a. Effective WD Revisions are those WDs considered received timely by the contracting agency.
- b. Effective WDs are required to be incorporated into contracts.
- c. Under the WDOL Program, "receipt" date of a revised WD is the first date at which that WD appears on the WDOL Program SCA Database.
- d. Under the WDOL Program, DOL will publish all SCA WD revisions for a given week on the WDOL Program Database each Tuesday.
- e. The contracting office must monitor the WDOL Program SCA Database regularly to determine if a selected WD has been revised prior to the expiration of the "effective date" for that particular contract action.

5-7. Timely Receipt of SCA WD Revisions - FAR 22.1012.

a. For contract actions other than Sealed Bidding:

(1) A revised WD shall be effective if it is received by the contracting agency before date of award (or date of modification for option or extension).

(2) If a revised WD is received after award, it shall not be effective if contract performance starts less than 30 days from date of award or modification.

(3) If a revised WD is received after award and performance starts more than 30 days from award date, WD will be effective if received no later than 10 days prior to start of performance.

(4) Under the WDOL Program, "received" includes being published on the WDOL Program SCA Database.

b. For contract actions involving Sealed Bidding: A revised WD shall not be effective if received by the contracting agency less than 10 days prior to opening of bids, unless there is sufficient time to amend the solicitation and incorporate the late WD.

5-8. Selecting the Appropriate SCA WD.

a. Select the WD applicable to the locality (county) where the services are to be performed. If place of performance is unknown, list all possible or potential places based on bidders list information (reference FAR 22.1009), and provide appropriate WDs for each locality listed.

b. On June 1, 1997, DOL initiated a new methodology to determine an appropriate, single SCA H&W benefit rate for SCA WDs. The new, single rate was established at \$1.91 per hour, to be reached in stages over several years (each increase to be published annually on June 1st). On June 1, 2001, DOL published SCA WDs with an H&W rate of \$2.02 per hour. However, DOL will continue to publish SCA WDs listing the old, higher rate of \$2.56 per hour H&W rate because this rate will continue to be applicable to certain contract actions in accordance with DOL's "All Agency Memorandum #188" published in the *Federal Register* on December 30, 1996, (page 68647).

EP 1180-1-1
1 Aug 01

c. Contracting activities must determine the correct H&W rate to use for each contract action, at the time of selection of the WD from the WDOL Program Database.

5-9. Guidelines for Selecting the H&W Benefit Levels.

a. First Guideline: Were the services previously performed under a contract which incorporated the old, higher H&W benefit level of \$2.56? If yes, select the SCA WD containing the same H&W level of \$2.56 for all following contract periods and follow-on contracts for these services at this locality.

b. Second Guideline: Were the services previously performed under a contract using the H&W benefit level of \$.90, or were the services not performed under contract prior to this? If yes, select the SCA WD containing the H&W level of \$1.39/hour (or its successor rate as published by the DOL on or about the first of June each year).

c. Third Guideline: SCA H&W rates in Hawaii and Guam are different amounts, but the application of the levels is the same as noted in the above paragraphs. Questions regarding the appropriate H&W level to select for a particular contract action should be directed to CECC-C.

5-10. Essential WDOL Program Elements.

a. Prior to using the WDOL Program to obtain SCA WDs for specific contract actions, contracting offices must complete the on-line training and receive authorization from the Agency Labor Advisor.

b. The contracting office must select the appropriate SCA WD carefully, and will be responsible for retroactive corrections if the selection is in error.

c. If the preceding contract services were performed by employees subject to a union CBA, DO NOT USE THE WDOL PROGRAM to obtain SCA WDs.

d. Submit to DOL a separate, complete, signed and dated SF 98/98a for each contract action for which a WDOL Program WD is selected.

5-11. Preparation of the WDOL SF 98/98a.

a. Box 1 - Notice No. - Print or type in bold letters "**MOU**" on all SF 98s submitted to DOL under the WDOL Program.

b. Box 2 - Estimated Solicitation Date - The date on which the invitation for bid or request for proposals will be issued.

c. Box 3 - Estimated Date Bids or Proposals Are to be Opened or Negotiations Begun - Self-explanatory. (If other than solicitation, note in this box "Option" or "Extension").

d. Box 4 - Date Contract Performance to Begin - Self-explanatory.

e. Box 5 - Place(s) of Performance -

(1) Box 5a. County and State (2-letter abbreviation) where services are to be performed. This is a required entry.

(2) Box 5b. Installation or city name may be written below county and state.

(3) Box 5c. If place of performance is unknown, list all possible or potential places based on bidders list (reference FAR 22.1009).

(4) Box 5d. For multiple locations, note "Attachment A" in Box 5, and list all locations on a separate, attached sheet (include at the heading of that sheet and all other attachments the SF 98 number and the "**MOU**" notation).

f. Box 6 - Services to be Performed - Use specific, general terminology. Do not use acronyms. Terms such as "construction", "fabrication", or "demolition" prompt further questions regarding possible application of other labor laws. Add sufficient information to anticipate and answer those questions (i.e., "demolition - NOT followed by construction activity"). If the contract results from a reconfiguration or consolidation of several other contracts, Box 6 (or an attachment sheet) should contain a list of those previous contract services and applicable WDs.

g. Box 7 - Information About Contract Performance -

EP 1180-1-1
1 Aug 01

(1) Box 7a. Services Now Performed by a Contractor. If this box is checked, then Box 8 must be completed.

(2) Box 7b. Services Now Performed by Federal Employees. Check this box if work was previously performed by Federal Civil Service Employees. If work was previously performed exclusively by military personnel, check Box C.

(3) Box 7c. Services Not Presently Being Performed. Self-explanatory. If there are no services presently being performed due to a temporary interruption due to procurement procedures or otherwise, mark Box A instead.

h. Box 8 - Information About the Predecessor Contractor -

(1) Name and address of Incumbent or predecessor contractor.

(2) Wage Determination Number in previous contract.

(3) Name of Union(s) - The contracting office must inquire, at each service contract action, if the predecessor or incumbent contractor employees were performing work while covered by an effective CBA (reference FAR 22.1010). New or revised CBAs must be received by the contracting office within the time lines set forth in FAR 22.1012-3 to be effective. If there is no CBA applicable to any employee performing work on the predecessor contract, enter "NONE" in Box 8c. **DO NOT USE THE WDOL PROGRAM** to obtain SCA WDs if incumbent contractor employees were subject to a CBA. Submit a separate SF 98 to DOL (reference FAR 22.1008 and 22.1012). Questions regarding the applicability of a CBA to a particular contract action should be referred to the Agency Labor Advisor.

i. Box 9 - Official Submitting Notice - Indicate USACE commercial telephone numbers.

j. Box 10 - Name and Title of Person to Whom Response is to be Sent - Enter complete name, title, and address of contracting activity submitting Notice.

k. "Response to Notice" Box - Lower, right corner. Complete this Box only if the SF 98 is being

submitted to DOL under the WDOL Program. Note the number, including revision number and date, of the SCA WD selected from the WDOL Program SCA Database in the lower, right section, in Box A. Authorized contracting personnel will sign and date the SF 98 in the "Response to Notice" Box (mark through the "US Dept of Labor" line).

l. Box 11 (SF 98a) - Notice Number - List the same number as noted on the SF 98, and add the notation of "**MOU**".

m. Box 12 - Classes of Service Employees -

(1) List each class of service employee expected to be employed on the contract.

(2) Use the *Service Contract Act Directory of Occupations*, presently the Fourth Edition, Jan 1993, including Supplement Numbers 1 and 2; include the Directory's 5-digit identification number.

(3) For those situations where the Directory does not contain a classification required to perform contract work, list a generic classification title, and attach a brief position description of the duties and skills required by that classification. Note also, on the SF 98a in Box 14, the Federal Wage Equivalent for that classification (information may be obtained from the appropriate Human Resources office).

n. Box 13 - Number of Employees in Each Class - Self-explanatory.

o. Box 14 - Hourly Wage Rate That Would be Paid if Federally Employed - Self-explanatory. The Fourth Edition of the *Directory* provides Federal Wage Equivalents; therefore, this column may be left blank.

CHAPTER 6 - BLANKET WAGE DETERMINATIONS

6-1. General. The SCA Blanket Wage Determination Pilot Test Program was initiated in 1985 to test the development of a more efficient system for submission and processing of requests for WDs. Participation was initially limited to a few agencies. Evaluation of the initial experience indicates that these procedures maintain worker protections under the SCA while providing significant resource savings for both Federal procurement agencies and the DOL. The program has since been made available to all contracting agencies. The Department of the Army (DA) entered into an agreement with the DOL outlining the respective obligations of DA and the DOL. Under the Blanket wage determination procedure, the contracting office develops comprehensive annual procurement plans for service contracts in given geographic "blanket" areas. Based on those plans, each participating procurement agency submits a single SF 98 and related worksheet covering service contracts for a particular blanket area where services are to be performed. The DOL then issues Blanket wage determinations covering the different types of services and classifications listed on the SF 98 request and worksheet. The Blanket wage determinations issued apply to solicitations and subsequently awarded contracts for the previously identified services during a specified blanket year period (generally, but not exclusively 12 months), thereby eliminating the need for agencies to request a separate wage determination for each service contract. It should be noted, however, that with the emergence of the WDOL program, the DOL has indicated its intention to gradually scale back its SCA Blanket WD program.

6-2. Contracting Agency Blanket Wage Determination Program Requirements.

a. The DOL has advised that in order for an agency to participate in the Blanket program procurement agencies must undertake the following measures:

- (1) designate national and regional project coordinators;
- (2) facilitate the training of key agency staff;
- (3) develop and submit properly completed SF 98s and blanket worksheets;
- (4) utilize the conformance procedure, if applicable; and
- (5) observe restrictions on the use of Blanket wage determinations.

EP 1180-1-1
1 Aug 01

b. For purposes of the Blanket wage determinations, the Office of the Chief Counsel, CECC-C, will serve as the national coordinator and it is suggested that each interested MSC designate a blanket coordinator who will in turn be responsible for the training of those ordinarily tasked with the SCA wage request responsibility. Those offices wishing to develop Blanket Request proposals should coordinate with CECC-C. Training outlines and materials (including a detailed action plan for the development and submission of a Blanket wage determination request) are available through that office.

c. DOL has determined that there are four major procurement actions that are ineligible for Blanket wage determination participation. For the following service contracts, contracting officers are to continue to submit individual SF 98's:

(1) The service employees of a predecessor (incumbent) contractor are subject to a collective-bargaining agreement (CBA), or service employees, although not covered by the CBA, were subject to the minimum rates and fringe benefits of a predecessor's contract pursuant to section 4{c} of the Act.

(2) The locality where the contract services will be performed is unknown (i.e., outside of the blanket area being requested).

(3) Federal employees may be displaced (i.e., A-76).

(4) There will be consolidations or re-configurations of existing contracts.

d. It should also be stressed that for participating offices there are significant start-up requirements for this program. The experience of the participating pilot project agencies has been that the initial investment in time and resources resulted in more expeditious procurement during the blanket year. Subsequent annual requests will also be more easily facilitated due to the initial compilation and organization of material.

CHAPTER 7 – PRE-AWARD SERVICE CONTRACT LABOR ACTIONS

7-1. General. Among the contracting agency's pre-award obligations are those that relate to ensuring that prospective contractors have complied with certain Affirmative Action reporting requirements as described below.

7-2. Assuring Prospective Contractor's Compliance with VETS-100 Reporting Requirement.

a. Any contractor or subcontractor with a contract of \$25,000 or more with the Federal Government must take affirmative action to hire and promote qualified Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Contractors and subcontractors with openings for jobs, other than executive or top management jobs, must list them with the nearest State Job Service (also known as State Employment Service) office. The requirement applies to vacancies at all locations of a business not otherwise exempt under the company's Federal contract. Qualified Vietnam-era and special disabled veterans receive priority for referral to Federal contractor job openings listed at those offices. The priority for referral is not a guarantee that referred veterans will be hired. Federal contractors are not required to hire those referred, but must have affirmative action plans. Contractors with 50 employees and a \$50,000 contract must have a written affirmative action plan. They must be able to show they have followed the plans and that they have not discriminated against veterans or other covered groups. They also must show that they have actively recruited Special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war on in a campaign or expedition for which a campaign badge has been authorized and disseminated all information internally regarding promotion activities.

b. As provided by FAR 22.1308(b), covered employers must file an annual VETS-100 report, which shows the number of target veterans in their work force by job category, hiring location, and number of new hires, including targeted veterans hired during the reporting period and the maximum number and minimum number of employees of such contractor during the period covered by the report. Instructions, information and follow-up assistance is provided to employers who do not understand the reporting and other legal requirements.

c. USACE personnel tasked with ensuring prospective contractor compliance with this obligation may access the DOL's Database of contractors having filed the required VETS-100 report at <http://vets100.cudenver.edu>.

1 Aug 01

7-3. Pre-Award Clearance From the Office of Federal Contract Compliance Programs. If the estimated amount of the proposed service contract or subcontract is \$10 million or more, the contracting officer shall request clearance from the appropriate Office of Federal Contract Compliance Programs (OFCCP) regional office for the award of any contract, including any indefinite delivery contract or letter contract; or the modification of an existing contract for new effort that would constitute a contract award. Such clearance may be obtained as described below.

a. The OFCCP has established an on-line registry to facilitate procurement of the pre-award clearance. The registry provides information concerning Federal Contractors that have been reviewed by the OFCCP. These Federal Contractors have been found to be "In Compliance" with the Equal Employment Opportunity (EEO) regulations that the OFCCP is mandated to enforce. The information contained in this Registry covers a two year period prior to the date of search. The Registry is updated nightly and facilities reviewed more than 2 years ago are removed as new ones are added. This system provides information only for the specific Contractor Facility(s) requested. It does not provide information on the Parent Organization or other facility locations that have not been reviewed within the past two years. If a given facility is found to be "In Compliance", this does not imply that other sibling facilities under the same parent organization received the same favorable finding. USACE personnel tasked with ensuring that prospective contractors have been found to be "In Compliance" should first check the OFCCP's on-line Pre-award Registry at <http://www.dol-esa.gov/preaward/>. If the Contractor Facility in question is not found in this Registry, USACE personnel should contact the appropriate OFCCP Pre-Award Clearance Officer in their Regional area. Questions concerning the appropriate OFCCP Regional Office, USACE personnel may contact the OFCCP National Office, in Washington D. C., at area code (202) 693-0110. Preaward clearance for each proposed contract and for each proposed first-tier subcontract of \$10 million or more shall be requested by the contracting officer directly from the OFCCP regional office(s). Verbal requests shall be confirmed by letter or facsimile transmission.

b. When the contract work is to be performed outside the United States with employees recruited within the United States, the contracting officer shall send the request for a preaward clearance to the OFCCP regional office serving the area where the proposed contractor's corporate home or branch office is located in the United States, or the corporate location where personnel recruiting is handled, if different from the contractor's corporate home or branch office. If the proposed contractor has no corporate office or location within the United States, the preaward clearance request action should be based on the location of the recruiting and training

agency in the United States.

c. In the event, the prospective contractor's facility is not found within the Registry, the Contracting officer is required to obtain such clearance in writing. The contracting officer shall include the following information in the preaward clearance request:

(1) Name, address, and telephone number of the prospective contractor and of any corporate affiliate at which work is to be performed.

(2) Name, address, and telephone number of each proposed first-tier subcontractor with a proposed subcontract estimated at \$10 million or more.

(3) Anticipated date of award.

(4) Information as to whether the contractor and first-tier subcontractors have previously held any Government contracts or subcontracts.

(5) Place or places of performance of the prime contract and first-tier subcontracts estimated at \$10 million or more, if known.

(6) The estimated dollar amount of the contract and each first-tier subcontract, if known.

CHAPTER 8 - CONTRACT ADMINISTRATION AND SERVICE CONTRACT ACT ISSUES

8-1. General. Although there are numerous labor standards issues which may arise in the administration of a service contract, the following sections focus on those that are most troublesome and the most common.

8-2. Conformance Actions.

a. A conformance action or request for authorization of additional classification and rate is the process which establishes wage rates for classes of employees which are not included in the applicable wage determination already issued. The DOL's regulations outlining conformance procedures are set forth at 29 CFR 4.6(b)(2). Additional guidance may be found at FAR 22.1019 and FAR Clause 52.222-41(c)(2). These conformance provisions allow for extending the wage determination to cover classes of service employees needed for the contract's performance (either prime or subcontract) that were either unanticipated at the time of the wage determination request and therefore not listed in the SF 98a, or for which data were unavailable upon which to base a prevailing wage.

b. The conformance action is initiated by the prime contractor following contract award through the submission of SF 1444 (Appendix G) to the CO no later than 30 days after the unlisted class of employees performs any contract work (FAR 22.1019; FAR 52.222-41(c)(2)(ii)). Where a subcontractor is to use the requested classifications, the name and address of the subcontractor will be shown in item 10 and signed by the subcontractor in item 14. Where no subcontractor is involved, show in item 10 "Not Applicable."

c. It is important to emphasize that the contractor's proposal be supplemented by information relating to how the proposed wage rate was developed. For example, the contractor may identify similar service projects in the vicinity of the Corps contract where such a classification and rate was used.

d. In evaluating the contractor's request, the CO should be aware that a conformed class may be added to the wage determination provided the work to be performed by the class is not performed by any other class listed in the wage determination issued. The CO should review the job description on the SF 1444 and compare it to the job descriptions contained in the *Service Contract Act Directory of Occupations*. In addition, the following principles apply to the CO's evaluation of the conformance request.

EP 1180-1-1
1 Aug 01

(1) Conformances may not be used to artificially subdivide classes already listed in the wage determination. For example: A supply clerk is the same job (in terms of knowledge, skills, and duties) as the shelf-stocker, or stock clerk and store worker. If a supply clerk was listed in the wage determination, a conformance cannot be based on splitting the job into two jobs -- shelf-stocker and store clerk.

(2) Conformances cannot take two or more classes listed in the wage determination and combine them into a new class to be conformed. For example, a contractor cannot take some of the duties of a warehouseman and combine them with the duties of a labor material handler, thereby establishing a new position with a different conformed wage rate.

(3) Where the wage determination lists a series of classes within a job classification family (e.g., technician classes I, II, and III), the lowest job level listed in the wage determination is considered the entry level for the classification family. A conformance cannot establish a job level lower than the lowest level already listed in the wage determination.

(4) Trainee classes cannot be conformed.

(5) Helper classes, including those in skilled maintenance trades (e.g., electricians, machinists, and auto mechanics) cannot be conformed. However, helpers in skilled maintenance trades whose duties constitute separate and distinct jobs may be used if listed in the wage determination (see 29 CFR 4.152(c)(1)).

(6) It is essential that the contractor proposal address item 16 of the SF 1444 which reflects the concurrence or non-concurrence of the affected employees or their representative. If there is no duly elected (union) representative, each employee who will be working under the proposed conformed rates should sign this form. If no employees have been hired, this may be indicated on the form.

8-3. Disposition of the Conformance Proposal. The CO must exercise good business judgement as to the proper rate for conformed classes. The primary considerations should be the welfare of the workers and the need to have a stable, qualified workforce to perform the government's work. As a guide, the CO may use the relative relationship between the Federal rate for the proposed class and the Federal rate for the other listed classifications. The CO should be alert to the possibility that the contractor may be attempting to use a conformance to lower labor costs and thereby increase profits or competitive advantage. The contractor assumes the risk of misjudging unlisted rates when formulating the bid (see, for

example, Sunstate International Management Services, Inc. Comp. Gen. Dec. B-227036, 87-2 CPD 124, 31 Jul 87). If the contractor bids unreasonably low labor rates, the conformance action cannot be used as a method to enhance the contractor's financial position to the detriment of the employees. Upon completion of the conformance proposal review steps noted above, the CO or his representative should forward the proposal to:

Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

8-4. Conformance Appeals. As an interested party, the CO may disagree with the DOL's determination with respect to a conformance action. The CO may therefore request re-consideration of the DOL's decision by forwarding objective information/data to the Administrator who will respond within 30 days of the request. If the Administrator denies the request for re-consideration, the CO may pursue the matter through a petition to:

Board of Service Contract Appeals
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Any appeals to the Board should be closely coordinated with the District Labor Advisor.

8-5. Complaints. Unlike the DBA, contracting agencies have no enforcement authority under the SCA. Thus, all complaints or allegations of non-compliance are to be promptly referred by COs to the appropriate Regional Office of the DOL (see FAR 22.1024). A complaint may be filed by any employee, labor or trade organization, contracting agency or other interested person or organization. The identity of an employee who makes a confidential written or oral statement as a complaint or in the course of a DOL investigation, as well as portions of the statement which would reveal his identity, will not be disclosed without the prior consent of the employee. CIR Representatives should be cognizant of the "whistleblower" protections created by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994, P.L. 103-355. The implementing regulation (FAR 3.903) provides that "Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for

disclosing to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract.” In this regard, upon receipt of a SCA minimum wage rate complaint that includes an allegation of retaliatory discharge, the complainant should be advised of the complaint procedures set forth at FAR 3.904.

8-6. Cooperation with the DOL. COs shall cooperate with DOL representatives in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the DOL.

8-7. Withholding of Contract Payments.

a. In the event that a contractor fails to provide the requisite restitution to underpaid employees, applicable regulations (29 CFR 4.187; FAR 22.1022) authorize the DOL to forward a request for a withholding of contract earnings. It is mandatory for a CO to adhere to a request from the DOL to withhold funds where such funds are available (see Decision of the Comptroller General, B-109257, October 14, 1952, arising under the Walsh-Healey Act).

b. Unlike the DBA where withheld funds must be forwarded to the General Accounting Office (see FAR 22.406-9(c)), the SCA provides that withheld funds shall be transferred to the DOL for disbursement to the underpaid employees. Such transfers are to be implemented by COs on order of the Secretary or his or her authorized representatives, an Administrative Law Judge, or the Board of Service Contract Appeals. Considerable attention has been afforded within the DOL's regulations (29 CFR 4.187(b)) as to the priority of withheld funds. These regulations have been developed in light of both judicial and administrative determinations.

c. The Comptroller General has afforded employee wage claims priority over an Internal Revenue Service levy for unpaid taxes.

d. Wage claims have priority over re-procurement costs and tax liens without regard to when the competing claims were raised.

e. Wages due workers underpaid on the contract have priority over any assignee of the contractor, including assignments made under the Assignment of Claims Act, 31 USC 203, 41 USC 15 to funds

withheld under the contract.

f. The Comptroller General, recognizing that unpaid laborers have an equitable right to be paid from contract retainages, has also held that wage underpayments under the Act have priority over any claim by the trustee in bankruptcy. Further, in Eddleman v. United States Department of Labor (923 F. 2d. 782, 10th Cir. 1991), the DOL's administrative enforcement proceeding for pre- bankruptcy violations of the SCA was deemed exempted from the automatic stay provisions within the Bankruptcy Act at 11 USC 362(a)).

8-8. Enforcement. As noted above, the DOL has exclusive enforcement authority under the SCA. Accordingly, reliance on advice from contracting agency officials is not a defense against a contractor's liability for back wages under the Act (see 29 CFR 4.187(e)(5)). COs must therefore exercise due caution with respect to questions arising as to contractor compliance with the Act.

8-9. Overtime.

a. While the DOL has exclusive enforcement authority with respect to the SCA, there are nonetheless certain enforcement actions which COs are required to undertake when there are violations of the Contract Work Hours and Safety Standards Act (CWHSSA). In this regard, the CO shall follow the same procedures and file the same reports for violations of the CWHSSA under service contracts as are required under construction contracts.

b. Typically, COs will be advised of CWHSSA violations by the DOL following the completion of a DOL SCA/CWHSSA investigation. Further such advice will provide the CO with copies of the DOL Compliance Officer's computations of CWHSSA wage underpayments and CWHSSA liquidated damages. The CO will review such findings and computations and, in the absence of any errors, may adopt the DOL's findings as his own.

c. In those cases where the employees allege violations of the CWHSSA, COs shall notify the District Labor Advisor who will make such additional investigation and coordination with the DOL as may be necessary to determine the appropriate course of action to be taken by the CO.

d. All correspondence with contractors regarding CWHSSA violations, withholding of liquidated damages, and restitution payments resulting from violations will be initiated by the District Labor Advisor

EP 1180-1-1
1 Aug 01

for the signature of the CO. Such notification to contractors regarding CWHSSA violations, proposed assessment of liquidated damages, and CO's recommendations with respect to the proposed assessment are to be prepared in accordance with FAR 22-406-8(d)(ii). It is imperative that the CO's report on the violations reflect the following:

(1) Section 104 of the Act provides that any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages shall have the right, within 60 days thereafter, to appeal to the head of the agency for which the contract work is performed.

(2) Such section also provides that the agency head shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination, or if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of the Act inadvertently, notwithstanding the exercise of due care on his part or that of his agents, recommendations may be made to the Secretary of Labor that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages.

(3) In those cases requiring the preparation of a CO's Report with recommendations as to the disposition of liquidated damages, the report should include the CO's notification as well as the contractor's request for relief from the proposed assessment. Appendix H is a schematic representation of the general process of CWHSSA liquidated damages notification and assessment.

CHAPTER 9. SERVICE CONTRACT ACT PRICE ADJUSTMENTS

9-1. General. The DOL periodically revises their SCA WDs to reflect current prevailing wage and benefit rates for the various localities. As provided by the DOL's regulations (29 CFR 4.4), the CO incorporates annual WD revisions into the contract when options are exercised, annual appropriations (new fiscal year funds) are added, or when the scope of the work is significantly modified, provided the WD revisions are received timely in accordance with FAR 22.1012. For multi-year contracts without annual appropriations or options, revised WDs are incorporated biennially.

9-2. Requests for Price Adjustments. In response to revised WDs having been incorporated into the contract and increases in the Fair Labor Standards Act minimum wage rate, the contractor may request a price adjustment. The revised WD must be officially incorporated into the contract before an adjustment claim can be processed. SCA and FLSA contract price adjustments apply to labor categories, listed on the contract's WD, which perform the work of the contract. The CO must assess the allowability and accuracy of the request and make the appropriate contract price adjustment. These adjustments are addressed in FAR 52.222-43, Fair Labor Standards Act and Service Contract Act - Price Adjustment (Multiple Year and Option Contracts), and FAR 52.222-44, Fair Labor Standards Act and Service Contract Act - Price Adjustment (Fixed Price, Not Multiple Year or Option Contracts).

9-3. Price Adjustment Methods.

a. Generally, a contractor's claim is based upon the projected impact of new or revised contract labor standards. The projection uses the service employee hours worked in the prior contract period, factoring in any expected changes to contract scope or workforce. This method is known as the Forward Pricing Adjustment Method (FPAM). If the price adjustment request has been delayed by either an approved extension to the usual 30-day requirement for filing (see FAR 52.222-43(f) or 52.222-44(e)), or by a delay in contract modification, the contractor should use actual employee hours worked and pay/benefit records for the basis of the claim. This method is known as the Actual Cost Adjustment Method (ACAM). Regardless of method used, there are four types of documentation needed from the contractor to process an adjustment claim: (1) Actual or projected contract work hours; (2) Actual or projected pay (wage) records; (3) Documents supporting impact on fringe benefit costs; and (4) Documents supporting accompanying payroll tax increases.

b. An adjustment must never exceed the differential in wages, fringe benefits and additional taxes between the 'old' WD and the 'new' WD, nor should the 'old' minimum wage exceed the 'new'

minimum wage for an FLSA adjustment. A greater adjustment would indicate that the contractor was previously paying less than the minimum wage rates required under the SCA or FLSA and, therefore, that difference would strictly be the liability of the contractor.

9-4. Required Documentation for SCA Price Adjustments.

a. Documentation period. Using the FPAM, the contractor must provide wage and fringe benefit data from the previous contract period with their claim for adjustment. The data will normally cover a 12-month period, but may be for a shorter period if less than 12 months have elapsed on the contract. A shorter time period may not produce an accurate forecast, particularly if the workload fluctuates by month or season. Projected adjustments for an extension period (generally three months or less) should utilize only the corresponding months from the prior contract year if the workload is subject to fluctuations.

b. Content. The contractor is obligated to provide sufficient documentation, in the opinion of the CO, to substantiate the claim. The supporting payroll documentation must list the hourly wage rate actually paid each employee in the prior contract period. In addition to hourly wage rates, documentation concerning any additional payments made to the employees, such as performance-based merit bonuses or commissions should be provided. These payments must be considered in determining the total actual wages paid to the employees. They are frequently overlooked by contractors, and the CO should specifically ask the contractor whether any such compensation payments were provided. Stock dividends received by employee-stockholders, and other payments that represent a return on the owner's investment in the business, are **not** considered when calculating the wage rate. If a Health and Welfare (H&W) rates adjustment is claimed, the CO may require data supporting the actual premiums paid by the contractor, or the contractor's actual costs for equivalent benefits provided.

c. Contract Price Adjustment Computation Format. In addition to supporting documentation, COs are encouraged to use a standard format for consistency in evaluating and computing contractor price adjustment claims.

9-5 Applicable Contract Work Hours. The applicable hours subject to adjustment under these clauses are projected from the historical payroll data after adjustments are made for the following: (1) exempt employees; (2) changed work conditions or contract requirements; (3) prorated contract periods; and (4) employees not performing the services under the contract. These adjustments are set forth below.

a. Exempt employees. No adjustment in contract price is permitted for employees who are exempt from the SCA and FLSA. The contractor must exclude exempt employees from the payroll documentation before calculating adjustments. Typical exempt classifications are degreed engineers, doctors, project managers, directors, contract management officials. Any questions concerning the allowability of a particular classification should be directed to the CIR Specialist.

b. Adjustments for changed work conditions. The historical payroll data must be adjusted for any peculiarities that would not apply in the future or would otherwise impact future workload. Examples include changes in contract scope, equipment changes which may impact labor requirements, and scheduled reductions or increases in the services provided. If unusual events occurred in the payroll period as the basis for the computation, the impact of such events would have to be factored out of the adjustment computation for the following period.

c. Prorated periods. When using FPAM, the contractor may have less than 12 months of historical payroll data to use as a basis for projecting the next fiscal year's hours. The historical data may be prorated to apply an adjustment claim across the 12 months of the next period, provided the work is not subject to seasonal or other significant fluctuations. If the work is subject to fluctuation, contact the CIR Specialist for guidance before proceeding. To prorate the available data for the next fiscal year, calculate the average monthly hours worked for each labor category and multiply by 12.

Example: The contractor provided four months of payroll data for employees in several labor categories. After eliminating exempt employees, the records indicate one category of employees worked a total of 12,000 hours, and the other category of employees worked a total of 16,440 hours. The prorated hours are calculated by dividing the hours worked (12,000 and 16,440) by 4 (the number of months of data) to establish the monthly average by labor category (3,000 and 4,110 respectively), and then multiplying by 12. The applicable hours for the next fiscal year would be 36,000 for the first classification and 49,320 for the other labor classification.

d. Non-work hours. Production as well as non-production hours are adjusted for SCA wage increases (and decreases). Paid non-work hours, such as SCA-required vacation, sick leave, holidays, and other specified leave benefits are included in the applicable hours. Reference the sections on adjustments for fringe benefits concerning increases in the number of holidays or vacation days specified by the WD.

9-6. Wage Adjustment Computation. To determine the amount of the wage adjustment, the following factors must be considered: the applicable revised WD wage rate for the new contract period, LESS the actual wage rate paid in the previous period, PLUS allowable payroll taxes applicable to this differential, EXCLUDING general and administrative expenses (G&A), overhead, profit.

a. Calculating the actual wage rate paid. The actual hourly rate paid in the previous period is the total of the hourly rate paid plus other compensations (bonuses, commissions, shift differentials, etc.) converted to an hourly rate. The other compensations must be prorated over the hours worked in the period for which they are paid. To do this, divide the total other compensations by the number of hours they cover. A yearly bonus would be divided by 2,080 hours to convert it to an average hourly rate for the standard work hours in one year. Conversely, a commission that was calculated and paid quarterly would be divided by 520 hours to convert it to an hourly rate. The regular hourly wage rates and “other” compensation hourly rates are then added together for each employee to determine their total actual hourly wage rate paid in the previous period.

Example: The contractor paid a regular hourly rate of \$7.10 per hour, and year-end performance bonus of \$350 to each employee. The bonus payment would apply to the entire year of 2,080 hours, and thus represent an additional \$.17 per hour wages (\$350 divided by 2,080 hours). The total actual wage rate paid to this employee is \$7.27 per hour for the year.

b. Calculating the applicable rate change. The amount of adjustment is limited to the difference between the new wage rate applicable to the contract and the wage rate applicable to the contract and the wage rate actually paid by the contractor to the employees in the previous contract period.

Example: The prior WD required a minimum wage rate of \$7.00 per hour. The contractor actually paid employees \$7.27 per hour in the contract period. The revised WD now requires a minimum wage rate of \$7.50 per hour. The allowable hourly wage adjustment is limited to \$.23 per hour (\$7.50 less the actual wages paid of \$7.27). No adjustment would be due if the contractor had paid wage rates in the previous period equal to or greater than the new minimum rate applicable to the next contract period.

When a WD is issued reflecting decreases in wage or benefit rates issued previously, a contract price decrease is only warranted when the contractor voluntarily decreases the wages or benefits paid or provided to the employees. WDs list minimum wage and benefit rates, and a contractor is not required to decrease the wage or benefit of the employees in order to comply with a new WD. If a voluntary decrease is made by the contractor, follow the same guideline as for an increase and reduce the contract price.

c. Payroll taxes applicable to the wage adjustment. Employer payroll taxes which are calculated as a percentage of wages paid (i.e., Social Security taxes, Federal or state unemployment taxes, and workers compensation insurance) , are included in the wage differential calculation to the extent that these taxes apply to the actual wage adjustment. Only the employer's share of the taxes is considered. In some states, worker's compensation insurance (WCI) is expressed as an hourly rate and not a percentage of wages. No adjustment would be allowable for such WCI inasmuch as the SCA wage increase would not cause a related increase in the contractor's cost of WCI. No adjustment is allowed for tax rate increases. However, the current tax rate applicable to the contractor for the time period being adjusted should be used in computing the payroll tax portion of the adjustment.

(1) Social Security (FICA). If the FICA rate is scheduled to change during the period for which adjustment is made, the adjustment should reflect both the current rate and the new rate. Estimate the number of hours for each period and apply the applicable rate to determine the total FICA adjustment for the period. As stated above, the appropriate FICA rate is adjusted only to the increase to wages, not the total wage.

(2) Unemployment taxes. Federal Unemployment Taxes (FUT) and State Unemployment Taxes (SUT) are not usually impacted by a WD revision. Unemployment taxes are paid by contractors on wages up to a specific annual ceiling or cap. The current FUT rate of .8% is only paid on wages up to a cap of \$7,000. SUT rates and caps may vary by state and by employer experience. Since annual employee wages have usually exceeded the cap without regard to the new wage rates under revised WDs, typically no additional FUT or SUT is required. Such taxes would not be allowable unless the contractor documents their applicability to the wage increase. The contract price will not be adjusted specifically for changes in the FUT or SUT rates. The CO verifies the applicable SUT tax rate by contacting the contractor's state unemployment tax office, or requesting appropriate documentation (i.e., state-issued tax notices) from the contractor. If an adjustment is due, it is only for the SUT percent times the wage rate differential.

Example: Assume the SUT rate is 2% (.02), the SU cap is \$14,000 and an employer's WD rate for a classification increased from \$6.00 per hour to \$6.50 per hour. For an Employee working 40 hours per week and earning only the minimum rate required by the WD, the cost to the employer would increase by \$20.80 for the year ($\$.50 \times 2080$ hours $\times .02$). If the cap was \$13,000, then the cost to the employer would be \$10.40 ($\$13,000$ [cap] less $\$12,480$ [amount earned in prior year] $\times .02$).

(3) Workers compensation insurance (WCI). WCI rates vary for each state, and for each contractor according to the nature of their business, compensation claim history, and employee classification. There is usually no ceiling or cap. The claim may include an amount for WCI applicable to the wage adjustment. In some states, WCI is expressed as an hourly rate, not as a percentage of wages. No adjustment would be allowable since the SCA or FLSA wage increase would not cause a related increase in the contractor's WCI cost. Again, the CO verifies the applicable WCI rates by contacting the state employment tax office, or by requesting documentation from the contractor.

(4) Taxes applicable to fringe benefits. Generally, payments made by contractors into legitimate SCA fringe benefit plans are not subject to the application of payroll taxes (FICA, FUT, SUT or WCI) as are wages. Typically, such payments are premiums on health or life insurance policies or plans. If the revised WD increases the health and welfare requirement under SCA, and the contractor elects to provide this increase in premiums paid to a legitimate plan, the adjustment for this benefit should not include payroll taxes because they do not necessarily apply to that payment. If the contractor pays the SCA-required fringe benefits direct to the employees in the form of wages or cash, such payments are subject to payroll taxes and any adjustment to the benefits thus paid would include an adjustment for the accompanying taxes. If the claim includes payroll taxes on fringe benefit increases, the CO should question the manner of benefit payment.

d. General and Administrative Expenses, Overhead, and Profit. General and administrative expenses (G&A), overheads, and profit are not allowable as part of the SCA contract price adjustment. Increases in general liability insurance and bonding costs are also not allowable as part of the SCA adjustment.

e. Employee reimbursements. Employer expenses reimbursed to the employee by the contractor, such as payment for fuel, mileage, meals, lodging, and uniform allowances, are not considered

compensation when calculating the hourly wage rate paid. The CO must ensure that reimbursements of this nature are not included when the hourly wage rate is calculated from payroll records.

9-7. Fringe Benefit Adjustments.

a. General. The fringe benefits listed in area WDs most often consist of (1) a specified hourly rate for health and welfare plans (health or life insurance, pension benefits, etc.); (2) a stated number of holidays; and (3) a stated number of vacation weeks.

b. Health and Welfare rates (H&W). The allowable hourly adjustment is the difference between the new hourly fringe benefit rate and the hourly rate of the benefits actually provided by the contractor during the previous contract period. Historically, DOL has issued a 'low' H&W fringe benefit rate (\$.90 through 31 May 1997) and a "high" H&W fringe benefit rate (\$2.56 since 1994). As a result of protracted litigation initiated by the Service Employees International Union challenging the methodology upon which these levels had been determined, the DOL changed to a 'single benefit' level for H&W fringe benefits in June, 1997. The "high" H&W fringe benefit rate will be 'grandfathered' for contracts (and follow-on contracts for substantially the same services) that currently require \$2.56 per hour. The single benefit level will be applied in the same manner as the lower rate. The lower level will be revised by the DOL annually until such time as it equals the 'grandfathered' \$2.56 higher rate. As of June, 1998, the single benefit rate was set at \$1.39. COs should contact the CIR Specialist for guidance on the application of the two rates.

(1) Low Rate: If the low rate is provided by the DOL, apply it to each hour paid by the contractor to the employee, up to a maximum of 40 hours per week, including paid non-work hours such as holiday and leave time.

(2) High ('Grandfathered') Rate: If the high rate is required by the WD, apply it to all hours worked, including hours in excess of 40 per week, but not including holidays, leave time or any other paid hours that were not actually worked. This high H&W level is applied and evaluated on an average of the total fringe benefit cost to the contractor for all hours worked by all non-exempt service employees used on the contract, not on an individual basis as is the lower H&W benefit level. As a result the contractor may incur a benefits cost of less than \$2.56 for some employees, while incurring a cost in excess of \$2.56 for other employees. Fringe benefits provided to exempt employees as well as the hours worked by these individuals must be excluded in evaluating any claim involving the high fringe benefit level.

c. The allowable hourly adjustment is the difference between the new hourly fringe benefit rate and the hourly rate of the benefits actually provided by the contractor during the previous contract period.

d. Holidays. When the revised WD increases the number of required holidays, the contractor may claim an adjustment for the increased cost. The adjustment is the SCA minimum wage rate for each classification working on the contract, times the number of increased holiday hours (usually 8 hours per specified new holiday). However, if in the preceding period, the contractor provided more holidays or leave time than the revised WD required, an adjustment for the increase in SCA-required holidays is not due.

e. Vacation. Area WDs usually list vacation benefits as a number of weeks earned per total years of service. Total years of service include continuous employment on predecessor contracts. (Continuous employment may include employment with more than one predecessor contractor if each performed essentially the same services in the same location, with essentially no break in that service.) Unless the WD states otherwise, vacation benefits become vested on the employee's anniversary date. The anniversary date is the date of the month the employee was first employed on the contract. A vacation adjustment is only applicable if the revised WD changes the original vacation benefit or entitlement criteria. No adjustment is permitted merely because an individual employee's seniority has increased his or her entitlement to an unchanged WD benefit.

Example: The original WD required one week vacation after one year of service, two weeks vacation after three years, and three weeks vacation after five years. The revised WD now changes the vacation requirement to: two weeks vacation after one year, and three weeks vacation after five years (the three-year entitlement was dropped and the five-year entitlement remains unchanged). An adjustment equal to one week's pay at the new, revised WD wage rate may be claimed for each employee who will reach their one-year or two-year anniversary date during the next contract period. No adjustment is required for employees reaching their third or greater anniversary date during the next contract period because there was no change in their benefits or entitlement criteria.

f. Part-Time employees.

(1) Part-time employees are entitled to fringe benefits unless specifically excluded by the WD. Therefore, the contractor is allowed to claim appropriate adjustments for these employees as well as full-time employees. The amount of holiday and vacation adjustment is prorated on their normal schedule of hours worked.

Example: An employee who regularly works 17 hours per week on the contract would receive 17/40ths of the full-time benefit for a holiday or vacation. If the revised WD authorized an additional holiday, the contractor would be entitled to an adjustment for that employee equal to the WD wage rate multiplied by 8 hours multiplied by 17/40ths.

(2) Part-time employees working on an irregular schedule are entitled to holiday pay based on the number of hours worked in the workweek preceding the holiday. Vacation for irregularly scheduled employees is based on the number of hours worked in the year preceding their anniversary date.

g. Overtime. Some cost increases associated with overtime hours are reimbursable and some are not. Generally, overtime hours are paid at a premium rate of time and one-half or double time. The straight time portion of WD or FLSA wage increases are properly reimbursable under a price adjustment claim, but the premium portion of such wages are not. The contractor has the ability to manage his work force so that overtime hours do not occur by rescheduling of employees and/or hiring additional workers. Therefore, the overtime premium payments are viewed as within the contractor's control. An exception may be considered in the rare instance that the overtime hours were actually required and/or authorized by the contract.

Example: The contractor's employees work a total of 12,000 hours in a given labor Category of which 1,000 hours were considered overtime and paid at time and one-half the regular rate of pay. The WD increased the wage rate for that classification by \$.30 per hour. The contractor would be entitled to a price adjustment of \$3,600 ($$.30 \times 12,000$), but would not be entitled to the additional premium of \$150 ($$.30 \times .5 \times 1,000$) that occurred due to 1,000 of the hours being overtime.

9-8. Wage Determinations Based on Collective Bargaining Agreements (CBAs). The wage rates and monetary fringe benefits in an incumbent contractor's CBA, provided to the contract agency in a timely manner (FAR 22.1012), will become applicable as SCA minimum compensation for the following

contract or option period. This requirement is statutory and becomes effective whether or not the new or revised CBA is incorporated into the contract.

a. The CO will obtain the CBA by contacting the incumbent contractor, and the union representing their employees, with written notice as required by FAR 22.1010. If the CBA is not received by the agency in accordance with the timeliness of FAR 22.1012, the CBA or its revisions will not be applicable to that contract period. The timely CBA must be submitted by the CO to the DOL with the SF 98 request for that contract period and DOL will issue WDs reflecting these same rates, provided the CBA does not contain certain prohibited contingency provisions. Contingencies that provide for wage/fringe benefit increases only upon incorporation into a government contract or upon the contractor receiving a price adjustment (and similar contingencies) are prohibited by DOL. Such CBA WDs will be incorporated into the appropriate solicitation, new contract, or option period.

b. Contract price adjustments under SCA clauses are limited to those classifications performing contract work and subject to such CBA provisions. Employee classifications not subject to the CBA provisions may be subject to the provisions of an area WD.

c. Solicitations. When DOL has not responded to an SF 98 request for a CBA type WD applicable to a solicitation, the CO may include the clause at FAR 52.222-47 (“Service Contract Act Minimum Wages and Fringe Benefits”) and a copy of the incumbent’s actual CBA in that solicitation so that the process is not delayed. When the CBA WD from the DOL is received by the CO, it should be reviewed for consistency with the CBA it reflects, and incorporated into the solicitation. If the CBA WD is received subsequent to the issuance of the solicitation, or after award, it should be incorporated into the contract without adjustment of contract price (because the rates were already in the solicitation under this Clause).

d. Options. If the incumbent contractor has provided a new or revised CBA to the Corps in a timely manner (see FAR 22.1012-3), the CO must attach a copy to the SF 98 request applicable to the following contract period. If the CBA is not new or revised, but is an existing (or continuing) CBA with wage and benefit increases scheduled to be effective during the following contract period, it should still be submitted to DOL prior to the beginning of each contract period. If the agreement between the contractor and the union expires prior to the award of the previous contract period, or the union no longer represents the contractor’s employees, the provisions of the original CBA will no longer be applicable to the following contract period. An SCA area type WD may be applicable instead of a CBA type WD.

9-9. CBA Wage Determination Revisions. The effective dates of CBA wage and benefit increases do not always coincide with the start of a contract period. In such cases, the contractor is only reimbursed for that portion of the contract period affected by the increase. For example, if an annual option period began 1 October, and CBA increases became effective 1 January of the following year, the increased wages are effective for nine months of the option period. The adjustment is limited to those nine months. DOL often issues “short form” WDs for option periods. This type of CBA WD merely references by name the CBA between the incumbent contractor and its unions. There are no specific wage or fringe benefit amounts listed. Without the specific rates listed on the WD, the CO must determine the allowable adjustment by reviewing the CBA provisions. The adjustment is limited to the allowable wage rates and monetary fringe benefits as noted in paragraphs 9-7 and 9-8.

9-10. CBA Provisions Subject to Adjustments. Wage and benefit provisions found in a CBA (or WD based on a CBA) are adjusted in the same manner as area type WD adjustments. However, CBA provisions are often more varied and complex.

a. Shift Differentials. This pay is often required by CBAs and is specified as an additional wage rate for hours worked at different time schedules (*example: an additional \$.05 per hour for the shifts worked between 4:00 pm and midnight, and \$.08 per hour for the hours worked between midnight and 8:00 am*). These are not considered “overtime” provisions, but additional SCA-required minimum wage rates. As such, they are covered by SCA and subject to adjustment under the Clause.

b. Vacations. Some CBAs specify an accrual period of less than one year, such as weekly or monthly. Each week, pay period, or month the employee earns (accrues) the vacation benefit hours. Price adjustments for increases in vacation benefits should be computed with the same application of accrual criteria, particularly for adjustments applicable to short term contract extension periods.

Example: If a CBA increased vacation benefits from four hours every two weeks worked, to five hours every two weeks, the adjustment would be computed on each employee for each two-week period within the extension. However, if the WD had required an increase of vacation benefits for one year of service to two weeks for one year of service, the adjustment for the extension period would be limited to those employees who would reach their one year anniversary dates within that extension period.

c. Sick Leave, Jury Duty, or Bereavement Leave. If such leave is a CBA requirement, the adjustment should be based upon the difference between the new requirement and the amount actually paid in the prior contract period. Again, only the contractor's costs are to be considered when impacted by any revised CBA provisions. Revisions which reduce the contractor's share (cost) for plan benefits should be considered a reduction in SCA-required benefits and adjusted accordingly.

Example: The contractor's previous CBA calls for 5 sick days per year with an annual 'cash out' provision for any unused sick leave at the end of the year. The new agreement changes the sick leave provisions to 10 sick days per year with no 'cash out' provision, but does permit employees to accumulate sick leave in the same manner as Federal civil service employees. The contractor's claim for reimbursement of the difference between 5 days per year per employee and 10 days per year per employee is not appropriate for reimbursement unless the contractor can reasonably demonstrate that all this sick leave will actually be used and therefore the cost will be incurred.

d. Overtime. Many CBAs provide overtime compensation for hours worked in excess of a standard schedule (i.e., time and one-half rates for hours worked over 8 hours per day, or double-time pay for Sunday or holiday work). Such overtime provisions (premium payments) are not required by SCA, nor are they considered fringe benefits under SCA. Any increases to such compensation requirements would not be subject to adjustment under the Clause.

e. Retirement and Pension Plans, Health or Life Insurance. If such plans are a CBA requirement the adjustment should be based upon the difference between the new requirement and the amount actually paid in the prior contract period. Only the contractor's portion of the costs are to be considered when these plans are affected by CBA provisions. Revisions which reduce the contractor's contribution to a benefits plan should be considered a reduction in SCA-required benefits and adjusted accordingly.

f. Other Premium Payments. Payments made as a result of CBA provisions for work conditions or rules are not enforceable under SCA, and therefore are not subject to adjustments under the Clause.

Examples: Show-up or Call-in payment. CBA requires an employee to be paid a minimum of 4 hours wages if called to work on their regularly scheduled day off. The employee may work only 1 hour, but is paid 4 hours. The three non-work hours are not an SCA-required benefit, nor are they included in the hours adjusted

for wage increases.

9-11. Equivalent Fringe Benefits. As previously stated, adjustments are limited to the difference between the new benefits required on the WD or CBA, and the actual benefits provided by the contractor in the prior contract period. A contractor may furnish any combination of bona fide fringe benefits to their employees to meet the requirement of the WD.

Example: The WD requires H&W benefits of \$1.39 per hour and \$.50 per hour in pension benefits. The contractor provided a health plan costing \$1.99 per hour and met the requirements for both benefits. If either benefit increases, the contractor may claim an adjustment for that amount. However, if the contractor had paid \$2.13 per hour for a plan providing similar benefits, any price adjustment claim for an increase in either benefit would be offset by the payment made in excess of the former minimum benefits.

A review of price adjustment claims for increased benefits under SCA should include an inquiry on equivalent benefits provided by the contractor. Note that any payments by a contractor for benefit plans, in excess of those benefits required by the WD, do not offset wage requirements under SCA. However, payment of additional wages may be used to offset required fringe benefits, provided they are clearly identified as such on payroll records and communicated as fringe benefit 'cash equivalents' to the affected employees. All such payments need to be considered when evaluating SCA price adjustment claims.

Example: The contractor's minimum pay rate under the WD is \$7.00 per hour and the minimum H&W fringe benefit level is \$.90 per hour. The contractor was paying employees \$7.10 per hour plus a health insurance plan payment that costs \$1.00 per hour. The new WD leaves the wage rate at \$7.00 per hour, but increases the H&W fringe benefit minimum to \$1.15. The employer decides to maintain his health insurance plan payments of \$1.00 per hour, but begins paying employees \$.25 per hour in additional wages separately identified as a cash equivalent fringe benefit payment. The contractor would be entitled to only \$.05 per man hour price adjustment under these circumstances. The minimum required under the WD is \$8.15 (\$7.00 hourly rate + \$1.15 H&W). The rate actually paid prior to the WD change was \$8.10 (\$7.10 hourly rate + \$1.00 health insurance). The cost increase that will actually be incurred by the contractor and caused by the WD change is \$.05

EP 1180-1-1
1 Aug 01

(\$8.15 less \$8.10).

9-12. Unlisted Classifications. When the WD initially issued for a contract or solicitation does not include all SCA non-exempt labor classifications proposed by the contractor, such missing classifications must be added (conformed) to the applicable wage standards after award. An SF-1444 is submitted to DOL in accordance with FAR 22.1019 and 52.222-41(c)(2) to establish enforceable SCA minimum wages and benefits for the unlisted classes. Unlisted classifications are not subject to price adjustments under these clauses in the base period of a new contract, or in any subsequent periods when the classification is initially conformed.

a. Indexing conformed wage and benefit rates. Frequently, the classifications, which were conformed in the first contract, continue to be missing from subsequent WDS issued by DOL for following contracts or contract periods (options). If the conformed classifications continue to be employed on the contract, the old, conformed rate is brought forward into the following contract period by “indexing” it to the rates which do appear on the revised WD for the new period. The indexing computation is performed by the contractor, with notice to and verification by the CO. The method is set forth below:

(1) Determine the percentage of change from the rates listed on the old WD to the rates listed on the new WD, for each classification used on the contract.

(2) Compute the mean average of these percentages to determine the “index” rate by dividing the total of the percentage changes by the total number of classifications used on the contract.

(3) Apply this average percentage change to the wage rate that was conformed in the previous contract period. This indexed amount is an allowable adjustment under the Clause.

Example: the old WD listed seven classifications, five of which were used on the contract (A, B, C, F, and G). The contractor also used Classification X which did not appear on DOL’s WD. A conformance was submitted for Classification X and DOL had approved a rate of \$10.00 per hour. At the first option period, DOL issued a WD which changed the listed classifications in the following manner:

A = +3% B = +3.5% C = -2% F = no change G = +2.5%

The total of these changes is 7%; divided by 5 to obtain the average change for listed classifications, which is 1.4% increase. This index rate is applied to the conformed

Classification X (\$10.00 times 1.4%) to provide the SCA enforceable new wage rate of \$10.14 per hour. The increase of \$.14 per hour is an allowable adjustment under the Clause.

b. Follow-on contracts. If a labor classification was conformed in the previous contract, but does not appear on the WD initially provided for a new, follow-on contract, the conformed classification should be added to the solicitation and resulting contract by reference attached to the applicable new WD. A rate should be established by the CO for this classification by using the indexing method to carry the rate from the old contract to an indexed relationship with the new WD. A new SF 1444 is not required.

9-13. Fair Labor Standards Act (FLSA) Adjustments. The policies and procedures described above for SCA adjustments also apply to revisions of the FLSA minimum wage. No contract adjustment is made for FLSA minimum wage increases which are signed into law prior to contract award, even though the effective date of the increase is after award. Given public notice of the change in the FLSA minimum, the contractor would have anticipated the increase when developing the original bid or proposal and there should be no adjustment of the contract price.

1 Aug 01

APPENDIX A

SERVICE CONTRACT ACT OF 1965, AS AMENDED¹

(41 U.S.C. 351, et seq.)

(Revised text¹ showing in italics new or amended language provided by Public Law 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976.)

AN ACT To provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Service Contract Act of 1965".

SEC. 2. (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, *where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).*

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or; *where a collective-bargaining agreement*

covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement, as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday-pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency,

¹ Public Law 89-286, 79 Stat. 1034, as amended by Public Law 92-418, 86 Stat. 789; by Public Law 93-57, 87 Stat. 140; and by Public Law 94-489, 90 Stat. 2358.

1 Aug 01

Service Contract Act

or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b) (1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a) (1) of the Fair Labor Standards Act of 1938, as amended (62 Stat. 1060; 29 U.S.C. 201, et seq.).

(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2 (a) (1) or (2) or of section 2 (b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is

subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

SEC. 4. (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended, shall govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (*other than section 10*), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary,

Service Contract Act

be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees.

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of under-payments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall

not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

SEC. 7. This Act shall not apply to --

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works ;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036) ;

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 ;

(5) any contract for public utility services, including electric light and power, water, steam, and gas ;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals ; and

(7) any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

SEC. 8. For the purposes of this Act-

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons

1 Aug 01

Service Contract Act

regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

SEC. 9. This Act shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act.

Sec. 10. It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such

determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are, to be employed.

(5) For the fiscal year ending June 30, 1977, and for each fiscal year thereafter, all contracts under which more than five service employees are to be employed.

Approved October 22, 1965 (Public Law 89-286).

Approved October 9, 1972 (Amendments, Public Law 92-473).

Approved October 13, 1976 (Amendments, Public Law 94-489).

2 Canton Island added by Public Law 93-57. 87 Stat. 140.

Legislative History (Public Law 89-286) :

House Report No. 948 (Comm. on Education & Labor).

Senate Report No. 798 (Comm. on Labor & Public Welfare).

Congressional Record, Vol. 111 (1965) :

Sept. 20, Considered and passed House.

Oct. 1, Considered and passed Senate, amended.

Oct. 6, House concurred in Senate amendment.

Legislative History (Public Law 92-473) :

House Report No. 92-1251 (Comm. on Education and Labor).

Senate Report No. 92-1131 (Comm. on Labor and Public Welfare).

Congressional Record, Vol. 118 (1972) :

Aug. 7, considered and passed House.

Sept. 19, considered and passed Senate, amended.

Sept. 27, House concurred in Senate amendments.

Legislative History (Public Law 94-489) :

House Report No. 94-1571 (Comm. on Education and Labor).

Congressional Record, Vol. 122 (1976) :

Sept. 21, considered and passed House.

Sept. 30, considered and passed Senate.

1 Aug 01

U.S. Department of Labor

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



MAR 21 1989

MEMORANDUM NO. 149

MEMORANDUM FOR ALL CONTRACTING AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: PAULA V. SMITH ^{pvs}
 Administrator

SUBJECT: Exemption from the McNamara-O'Hara Service Contract Act for Contracts for Maintenance or Repair of Automated Data Processing Equipment

Contracts entered into by agencies of the Federal government or the District of Columbia that are principally for the furnishing of services through the use of service employees are subject to the McNamara-O'Hara Service Contract Act of 1965, as amended ("SCA"), 41 U.S.C. 351 et seq., and implementing regulations, 29 CFR Part 4, Labor Standards for Federal Service Contracts. An administrative exemption from the provisions of the SCA is codified at 29 CFR 4.123(e) for certain contracts for the maintenance, calibration and/or repair of automated data processing (ADP) equipment and certain other related high technology equipment under specified conditions. It has been brought to our attention that clarifying guidance is needed to achieve consistent interpretations among contracting agencies on the intended scope of the exemption. The purpose of this memorandum is to provide such clarifying guidance on the application of the exemption set forth in 29 CFR 4.123 (e).

The codified exemption does not expressly define the types of ADP equipment that are considered to be within the scope of the exemption. As originally proposed in 1981, the exemption was limited to ADP equipment "procured pursuant to Public Law 89-306. (40 U.S.C. 759)," known as the Brooks Act (46 Fed. Reg. 41403, August 14, 1981). (The Brooks Act is part of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 751 et seq., which, among other provisions, directs the General Services Administration to coordinate and provide for the purchase, lease, and maintenance of ADP equipment by Federal agencies.) The reference to equipment "procured pursuant to" the Brooks Act was deleted from the final rule, not because of any definitional inconsistency between the Brooks Act and the SCA ADP exemption, but because various exemptions in the Brooks Act would have had an unintended limiting effect on the scope of the SCA exemption (see 48 Fed. Reg. 49748-50, October 27, 1983).

1 Aug 01

APPENDIX C

U.S. Department of Labor

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

AUG 6 1990

MEMORANDUM NO. 153

TO: All Government Contracting Agencies of the
Federal Government and the District of Columbia

FROM: *Samuel D. Walker*
SAMUEL D. WALKER
Acting Administrator

SUBJECT: Application of the Davis-Bacon Act to Contracts
for Asbestos and/or Paint Removal

This memorandum clarifies the application of Government contract labor standards coverage to contracts calling for asbestos or paint removal from public buildings or public works and structural components thereof. We have learned that some contracting agencies are incorporating the Davis-Bacon Act (DBA) requirements in these contracts while others are including the McNamara-O'Hara Service Contract Act (SCA) requirements. To ensure greater consistency, we are providing unitary guidance on the subject.

The DBA applies to Federally-financed contracts in excess of \$2,000 for the construction, alteration, and/or repair, including painting and decorating, of a public building or a public work. The SCA applies to Government contracts, the principal purpose of which is the furnishing of services through the use of service employees.

We have determined, after substantial review, that removal of asbestos or paint from public buildings or public works constitutes building alteration within the statutory language of DBA because asbestos or paint removal clearly alters those buildings or works, regardless of whether subsequent reinsulating or repainting is being considered. This view is consistent with previous determinations that contracts for sandblasting or hydrostatic cleaning of public buildings are subject to DBA.

Accordingly, any Federal or District of Columbia contract in excess of \$2,000 that calls for asbestos or paint removal is subject to DBA and must include its stipulations and the applicable wage decision.

1 Aug 01

- 2 -

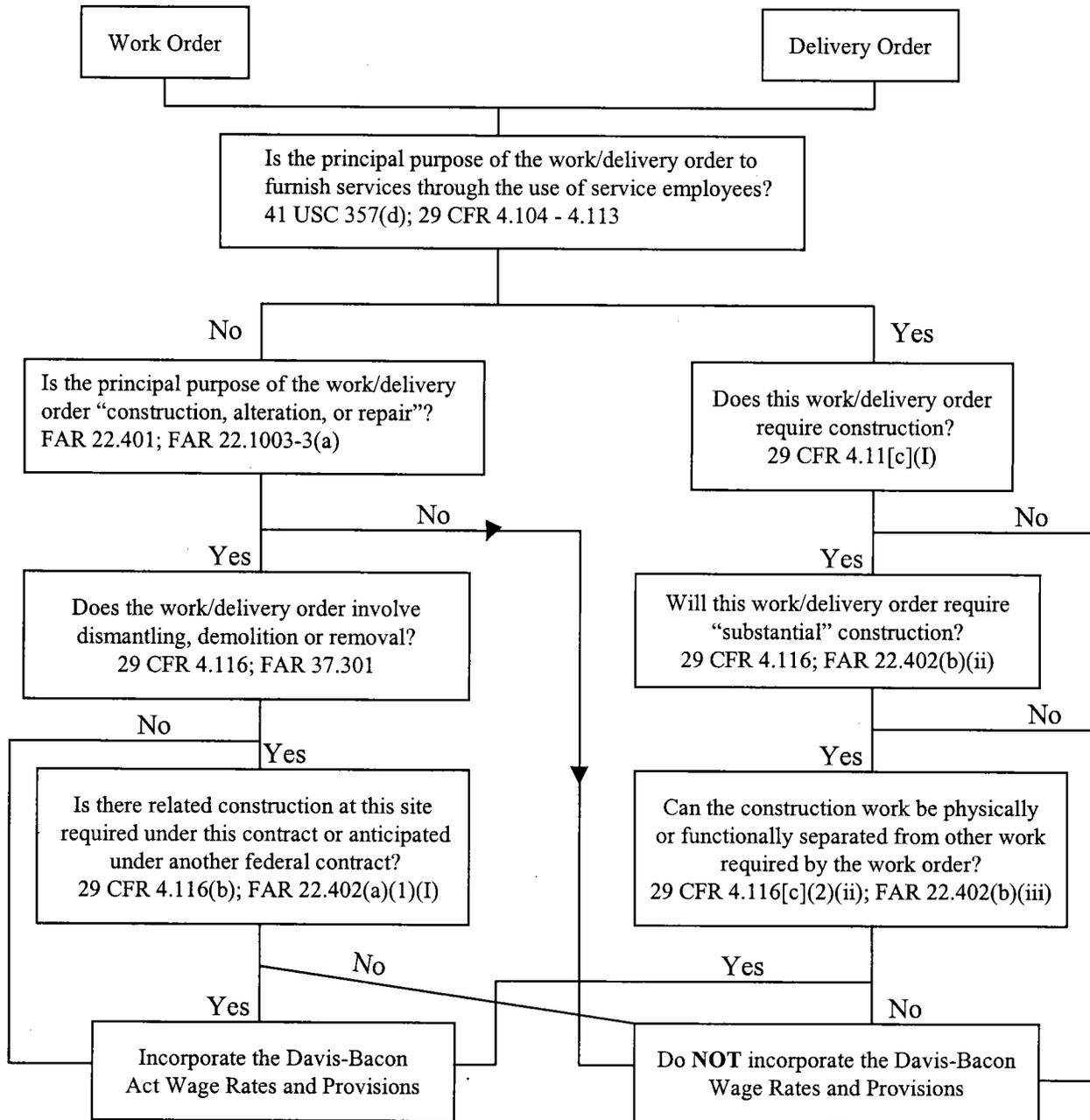
The Brooks Act originally did not include a definition of ADP equipment. However, Congress has amended that Act to include a functional definition of ADP equipment (Public Law 99-591, Title VIII, Section 822; P.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 776). The definition provides an operationally effective way of evaluating when ADP equipment is to be acquired, used, or managed in accordance with the Federal Property and Administrative Services Act. The new definition reflects Congress' explicit recognition of the merging of ADP and telecommunications technologies. See 40 U.S.C. 759(a)(2).

In determining the applicability of the SCA exemption set forth in 29 CFR 4.123(e), contracting officers should follow the Brooks Act definition of ADP equipment set forth in 40 U.S.C. 759(a)(2), and implementing regulations of the General Services Administration, 41 CFR 201-2. This will provide the procurement community with a more consistent and easily understood approach to applying the SCA exemption.

Accordingly, contracts which are principally for the maintenance, calibration and/or repair of ADP equipment as that term is defined by the Brooks Act are exempt from the SCA, provided that the requirements for exemption set forth in 29 CFR 4.123(e) (1)(ii) (A) through (D) are met. The contracting officer initially must make an affirmative determination that all of the conditions of the exemption have been satisfied prior to contract award. If, after contract award, it is later determined that the exemption does not apply, corrective procedures are provided in 29 CFR 4.5(c)(2) for inserting the required contract clauses and applicable wage determinations into the contract.

Contracts entered into before the date of this memorandum which contain SCA provisions will continue to be subject to SCA for the duration of the contract, and the Wage and Hour Division will enforce SCA on such contracts. However, note that, in applying this policy, pursuant to 29 CFR 4.143 - 4.145, multi-year contracts are considered new contracts under SCA on the annual or biennial anniversary date of the contract. In addition, contract options or extensions are also considered new contracts for purposes of SCA.

**Labor Standards Decision Tree
Hybrid Environmental Restoration Contracts**



STANDARD FORM 98 Rev. Feb. 1973 U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION	NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT AND RESPONSE TO NOTICE <i>(See Instructions on Reverse)</i>	A. NOTICE NO. C
--	---	------------------------

MAIL TO: <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> Administrator Wage and Hour Division U.S. Department of Labor Washington, D.C. 20210 </div>	2. Estimated solicitation date <i>(use numerals)</i> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Month</td> <td style="width:33%;">Day</td> <td style="width:33%;">Year</td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </table> 3. Estimated date bids or proposals to be opened or negotiations begun <i>(use numerals)</i> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Month</td> <td style="width:33%;">Day</td> <td style="width:33%;">Year</td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </table> 4. Date contract performance to begin <i>(use numerals)</i> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Month</td> <td style="width:33%;">Day</td> <td style="width:33%;">Year</td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </table>	Month	Day	Year				Month	Day	Year				Month	Day	Year			
Month	Day	Year																	
Month	Day	Year																	
Month	Day	Year																	

5. PLACE(S) OF PERFORMANCE	6. SERVICES TO BE PERFORMED <i>(describe)</i>
----------------------------	---

SAMPLE ONLY

7. INFORMATION ABOUT PERFORMANCE
A. <input type="checkbox"/> Services now performed by contractor B. <input type="checkbox"/> Services now performed by Federal employees C. <input type="checkbox"/> Services not presently being performed

8. IF BOX A IN ITEM 7 IS MARKED, COMPLETE ITEM 8 AS APPLICABLE	
a. Name and address of incumbent contractor	b. Number(s) of any wage determination(s) in incumbent's contract

c. Name(s) of union(s) if services are being performed under collective bargaining agreement(s). <i>Important:</i> Attach copies of current applicable collective bargaining agreements	RESPONSE TO NOTICE <i>(by Department of Labor)</i> A. <input type="checkbox"/> The attached wage determination(s) listed below apply to procurement. B. <input type="checkbox"/> As of this date, no wage determination applicable to the specified locality and classes of employees is in effect. C. <input type="checkbox"/> From information supplied, the Service Contract Act does not apply <i>(see attached explanation)</i> . D. <input type="checkbox"/> Notice returned for additional information <i>(see attached explanation)</i> . Signed: _____ <div style="text-align: right; margin-right: 50px;"><i>(U.S. Department of Labor)</i></div> <div style="text-align: right; margin-right: 50px;">_____</div> <div style="text-align: right; margin-right: 50px;"><i>(Date)</i></div>
9. OFFICIAL SUBMITTING NOTICE	
SIGNED:	DATE
TYPE OR PRINT NAME	TELEPHONE NO.
10. TYPE OR PRINT NAME AND TITLE OF PERSON TO WHOM RESPONSE IS TO BE SENT AND NAME AND ADDRESS OF DEPARTMENT OR AGENCY, BUREAU, DIVISION, ETC.	

Appendix F

**MEMORANDUM OF UNDERSTANDING
BETWEEN
U.S. DEPARTMENT OF THE ARMY
AND THE U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
REGARDING USE OF
SERVICE CONTRACT ACT WAGE DETERMINATION
DATABASE BY MEANS OF NTIS FedWorld**

This memorandum defines the procedures to be used in implementing an interim pilot program that will permit designated contracting offices under defined conditions to select, download, and use Service Contract Act (SCA) wage determinations by means of the National Technical Information Service's (NTIS) FedWorld System.

INTRODUCTION

On October 26, 1993, President Clinton issued a Memorandum to the Heads of Executive Departments and Agencies directing Federal Departments and Agencies to undertake a number of actions designed to promote electronic commerce throughout the Federal Government. This Directive is predicated in large measure upon the Findings and Recommendations of the National Performance Review (NPR).

The NPR specifically outlines the expansion of electronic commerce through the Department of Labor's (DOL) application of information technology to expedite wage determinations for Federal service contracts. The NPR specifically recommended that DOL "develop an electronic data interchange/data mapping (EDI/DM) system and integrate it into the Service Contract Act wage determination process." Towards this objective, the DOL has undertaken initiatives to develop an electronic data interchange (EDI) data mapping system. The DOL's EDI system will be implemented by first utilizing the electronic mail capabilities of the Internet and later the government-wide Federal Acquisition Network (FACNET). The DOL and the Department of the Army agree that an EDI/DM system offers the most efficient and effective process for requesting and issuing SCA wage determinations, and the parties to this MOU are committed to the implementation of an EDI/DM system.

As a prelude to the full-scale implementation of an EDI SCA wage request process, an interagency task group was established to identify SCA performance needs. The task force recommended that the NTIS FedWorld system be used to provide access to SCA wage

EP 1180-1-1
1 Aug 01

determinations as an interim measure while DOL's SCA EDI design and implementation planning proceeds. The parties to this MOU emphasize that this is an **interim** measure, and it is not intended to replace or in any way diminish commitment to the full scale implementation of the EP EDI/DM system.

Under the FedWorld procedures, the contracting agencies will be permitted to obtain SCA wage determinations for specific procurements as set forth below. The intent of this MOU is to authorize immediate access on the part of contracting agencies to "official" SCA wage determinations while simultaneously alleviating the demand upon DOL staff resources through a reduction in the number of individual SCA wage determination requests submitted to the Wage and Hour Division.

A committee, consisting of representatives from DOL and participating procurement agencies will monitor the implementation of this MOU. The committee will ascertain the extent to which the MOU promotes the following objectives: (1) protection of statutory labor standards; (2) issuance of more timely wage determinations; (3) proper implementation of these wage determinations by the parties to the agreement; and (4) reduced paperwork. Committee personnel may obtain data from contracting officers and DOL staff involved to facilitate procedural modifications. Data to be collected and analyzed may include, but not be limited to the number of NTIS-accessed wage determinations, the number of contracts covered by these requests, extent of coverage of contracts, and time and labor benefits for both the procurement agencies and the DOL. Agencies will train contracting officers in the use of NTIS-SCA access before the contracting officers may use such wage determinations in their procurements.

TERMS OF AGREEMENT

Eligibility to utilize NTIS-accessed wage determinations is to commence upon completion of the agency-designed and DOL-approved training plan. The agency training plan shall be submitted to DOL and cover each office that contemplates the use of NTIS-accessed wage determinations within their solicitations. The agency will certify its completion of NTIS-access training of contracting agency personnel to be involved, and establishment of a continuing training capability to account for normal staff turnover.

Participating agencies must continue to submit individual SF-98's for contracts involving the following situations:

- a. Solicitations where any service employees of a predecessor (incumbent) contractor was subject to a collective bargaining agreement (CBA), or where any service employees, although not covered by the CBA, were subject to the minimum rates and fringe benefits of a predecessor's contract pursuant to section 4(c) of the SCA.
- b. Any solicitation for which the FedWorld system does not contain an appropriate wage

determination or for which the wage determinations omit a principal occupation to be employed on the contract.

Any solicitation for which there is any question regarding labor standards coverage, requesting offices should contact their agency labor advisor.

The Department of the Army, as a participating procurement agency will follow the procedures set forth below:

- a. The contracting office will obtain the appropriate SCA wage determination by accessing the NTIS SCA Database no more than 15 days prior to the issuance of solicitation (IFB or RFP), exercise of option, contract extension, or contract modification.
- b. The contracting office will forward a completed SF-98, **NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT AND RESPONSE TO NOTICE** and SF-98a to the Administrator, Wage and Hour Division on or before the issuance of the solicitation. In addition to completing the usual sections of the SF-98, the contracting office will complete the **RESPONSE TO NOTICE** section of the form by listing the number, including the revision number, of all wage determinations included in the solicitation. A trained and authorized contracting agency representative will sign the Response section of the form. The SF-98 should be clearly annotated with the letters **MOU** on or near the Notice No. Section which appears on the upper right section of the SF-98. All sections of the SF-98 shall be completed fully and accurately. The agency-designed training will place particular emphasis on the accurate completion and submission of the SF-98.
- c. The contracting office will monitor the SCA Database to determine if an applicable wage determination has been revised. Wage determinations will be considered received by the Federal Agency on the date of their publication in the NTIS Database. The provisions of 29 CFR 4.5(a)(2) shall be followed to determine whether a revised wage determination must be included in the solicitation and subsequent contract. Thus,
 1. For contracts which are the result of sealed bidding procedures, revisions to the wage determination which are published in the NTIS SCA Database 10 or more days prior to bid opening shall be effective. Any revised wage determination which is published in the NTIS SCA Database less than 10 days prior to bid opening shall not be effective if the contracting office determines that there is not a reasonable time still available to notify bidders of the revision.
 2. For contracts which are the result of other than sealed bidding procedures, any revision to a wage determination which is published in the NTIS SCA

EP 1180-1-1
1 Aug 01

to the date of award (or the date of a specified modification having the effect of a new award) shall be effective. Any revision to a wage determination that is in the NTIS SCA Database after the date of award shall not be effective provided that contract performance commences within 30 days of the award date. If contract performance commences more than 30 days after award (or the specified modification), any revised wage determination published in the NTIS SCA Database at least 10 days prior to commencement of the work shall be effective and applicable to the contract.

- d. If it is discovered that the most current, applicable wage determination (i.e., covering the appropriate locality, occupations, type of service and fringe benefit level for the service to be performed) contained in the NTIS SCA Database system was not included in the contract, the agency agrees to exercise any and all of its power to incorporate the applicable wage determination in the contract as provided by 29 CFR 4.5(c)(2), 4.101(b) and FAR 22.1015.

The DOL will ensure that the NTIS SCA Database is updated no less often than weekly.

Nothing in this memorandum of agreement shall be construed to alter any obligations or responsibilities of the parties under applicable statutes or regulations.

Either party to this agreement may terminate the agreement upon 30 days notice to the other party.

/s/

Ms. Maria Echaveste
Administrator
Wage and Hour Division

/s/

Kenneth J. Oscar
Deputy Assistant Secretary of the Army
(Procurement)

**REQUEST FOR AUTHORIZATION OF
ADDITIONAL CLASSIFICATION AND RATE**

CHECK APPROPRIATE BOX
 SERVICE CONTRACT
 CONSTRUCTION CONTRACT

OMB No. 9000-0089
Expires: 02/28/96

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, DC 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0089), Washington, DC 20503.

NOTE: THE CONTRACTOR SHALL COMPLETE ITEMS 3 THROUGH 16 AND SUBMIT THE REQUEST, IN QUADRUPPLICATE, TO THE CONTRACTING OFFICER

1. TO: ADMINISTRATOR, Employment Standards Administration
WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C. 20210

2. FROM: (REPORTING OFFICE)

3. CONTRACTOR

4. DATE OF REQUEST

5. CONTRACT NUMBER

6. DATE BID OPENED (SEALED BIDDING)

7. DATE OF AWARD

8. DATE CONTRACT WORK STARTED

9. DATE OPTION EXERCISED (IF APPLICABLE) (SCA ONLY)

10. SUBCONTRACTOR (IF ANY)

11. PROJECT AND DESCRIPTION OF WORK (ATTACH ADDITIONAL SHEET IF NEEDED)

12. LOCATION (CITY, COUNTY AND STATE)

13. IN ORDER TO COMPLETE THE WORK PROVIDED FOR UNDER THE ABOVE CONTRACT, IT IS NECESSARY TO ESTABLISH THE FOLLOWING RATE(S) FOR THE INDICATED CLASSIFICATION(S) NOT INCLUDED IN THE DEPARTMENT OF LABOR DETERMINATION

NUMBER:	DATED:	b. WAGE RATE(S)	c. FRINGE BENEFITS PAYMENTS
a. LIST IN ORDER: PROPOSED CLASSIFICATION TITLES(S); JOB DESCRIPTION(S); DUTIES; AND RATIONALE FOR PROPOSED CLASSIFICATIONS (SCA ONLY)			
<i>(Use reverse or attach additional sheets, if necessary)</i>			

14. SIGNATURE AND TITLE OF SUBCONTRACTOR REPRESENTATIVE (IF ANY)

15. SIGNATURE AND TITLE OF PRIME CONTRACTOR REPRESENTATIVE

16. SIGNATURE OF EMPLOYEE OR REPRESENTATIVE

TITLE

CHECK APPROPRIATE BOX REFERENCING BLOCK 13.
 AGREE DISAGREE

TO BE COMPLETED BY CONTRACTING OFFICER (CHECK AS APPROPRIATE - SEE FAR 22.1019 (SCA) OR FAR 22.406-3 (DBA))

- THE INTERESTED PARTIES AGREE AND THE CONTRACTING OFFICER RECOMMENDS APPROVAL BY THE WAGE AND HOUR DIVISION. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.
- THE INTERESTED PARTIES CANNOT AGREE ON THE PROPOSED CLASSIFICATION AND WAGE RATE. A DETERMINATION OF THE QUESTION BY THE WAGE AND HOUR DIVISION IS THEREFORE REQUESTED. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.

(Send copies 1, 2, and 3 to Department of Labor)

SIGNATURE OF CONTRACTING OFFICER OR REPRESENTATIVE

TITLE AND COMMERCIAL TELEPHONE NO.

DATE SUBMITTED