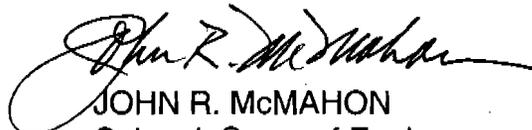


FOREWORD

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.



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Chief of Staff

Contracts
SERVICE CONTRACT ACT LABOR RELATIONS

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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 (SCA) 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
- j. Federal Acquisition Regulation, Subpart 22.10, 52.222

- k. Defense Federal Acquisition Regulation Supplement, Part 222
- l. Army Federal Acquisition Regulation Supplement, Part 5122
- m. Army Regulation 215-7
- n. Opinions of the Attorney General, Vol. 38, Page 412
- o. Comptroller General Decision Numbers A-90983, B-109257, B-221203, and B-227036
- p. Department of Labor All Agency Memoranda Nos. 149, 153, 159, 166, 185 and 188
- q. 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), Part 5122 of the Army Federal Acquisition Regulation Supplement (AFARS) 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

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.

labor on government contracts. Enacted in 1965, the McNamara-O'Hara Service Contract Act (SCA) was the 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 public policy commitment to the notion that Government procurements not 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 SCA 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. CO (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 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.

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

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

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

b. Contractor Industrial Relations Specialist (CIRS). The CIRS or District Labor Advisor is responsible for 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 sought to eliminate two destabilizing tendencies in the Federal procurement process. First, the impetus toward wage-cutting was generally unavoidable in a system predicated upon the award of contracts through competitive bidding to the lowest responsible, responsive bidder, although the emphasis upon best value procurement has lessened such pressures. 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, were 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 3141-48) (DBA). 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 DOL 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 3142c and 18 USC 874). This Act makes it unlawful to induce, by 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) (CWHSSA). 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) (SCA). 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)
- b. 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)
- g. Affirmative Action Compliance (FAR 52.222-25)
- h. Equal Opportunity (FAR 52.222-26)
- i. Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (FAR 52.222-35)
- j. Affirmative Action for Workers with Disabilities (FAR 52.222-36)
- k. Employment Reports on Disabled Veterans and Veterans of the Vietnam Era (FAR 52.222-37)
- l. Service Contract Act of 1965, as Amended (FAR 52.222-41)
- m. Statement of Equivalent Rates for Federal Hires (FAR 52.222-42)
- n. Fair Labor Standards Act and Service Contract Act---Price Adjustment (Multiple Year and Option Contracts) (FAR 52.222-43)
- o. Fair Labor Standards Act and Service Contract Act---Price Adjustment (FAR 52.222-44)
- p. Evaluation of Compensation for Professional Employees (FAR 52.222-46)
- q. Exemption from Application of Service Contract Act Provisions---Contractor Certification (FAR 52.222-48)
- 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)

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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) 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 COs 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 1-6(b) 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 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 DOL'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 (now the Government Accountability 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. 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, the statutory language is set forth below:

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

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- (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 22.1003-6.

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, 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 COs 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 that 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 policy 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 CO should then incorporate only wage determinations for those home or base office areas.

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 that 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

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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 contracts 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 22.1003-3(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, 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, 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.
- (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 A 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 electronic Standard Form SF 98 (e98), 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 COs (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 DOL's All Agency Memorandum No. 185, 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, 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 CO (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 CO 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 CO 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 CO 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, COs 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 DBA, 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 nature and content of SCA wage determinations differ from those arising under the DBA.

4-2. 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.

4-3. Selecting the Appropriate SCA Wage Determination (WD). It is essential that COs recognize the various types of SCA developed by the DOL. The DOL issues two basic types of SCA WDs: prevailing wage WDs and WDs based on collective bargaining agreements (CBAs) covered by SCA Section 4(c).

a. Prevailing Wage SCA WDs. Within the prevailing WD category, the DOL has developed three sub-categories of WDs: Standard, Non-standard, and Contract-specific.

(1) Standard WDs are generic WDs listing close to 300 different classifications (from several occupational groups, e.g., Clerical and Administrative, Technical Occupations, Information and Arts, Transportation). Each Standard WD reflects wages and fringe benefits found by DOL to be prevailing in a specific locality. The wage rates and health and welfare (H&W) rates are the same on each Standard WD for a locality. However, the method by which a contractor must comply with the H&W rate is different. Compliance with the H&W rate on all "odd numbered" Standard WDs (i.e., WD No. 1994-2103 or WD No. 1994-2113) requires payment of the minimum H&W rate for each hour paid for each employee, up to a maximum of 40 hours per week. Compliance with the H&W rate on all "even numbered" Standard WDs (i.e., WD No. 1994-2104 or WD No. 1994-2114) requires the contractor to contribute an average of the stated H&W rate per hour, computed on the basis of all hours worked by service employees on the contract. The latter method, "averaging H&W", was specified on WDs with the old "high benefit" rate that was

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grandfathered as part of DOL rulemaking² in 1996. When the survey data for total benefits subsequently exceeded the grandfathered "high benefit" rate of \$2.56 per hour, the DOL increased the fringe benefit rates on all WDs to reflect the new survey data. However, while the H&W benefit levels are now the same, the DOL retained the two different methods for determining compliance. Thus, until such time as the DOL issues final regulations relating to a single method of compliance (per employee v. average cost), the average cost method of compliance will continue to be applied to those recurring contracts that were subject to the high, average cost fringe benefit level WDs. Similarly, the employee-by-employee method of compliance will apply to those contracts which were not subject to the "high" fringe benefit level. The www.wdol.gov menu for selecting Standards SCA WDs incorporates these issues into the selection process, and should, if answered carefully, lead the user to the correct SCA WD. COs should contact the CIRS for additional guidance on the application of the two rates.

(2) Non-Standard WDs are issued by DOL to reflect prevailing wages and benefits in specific service industries in designated localities. Non-Standard WDs may not be used in contracts for services other than those specified in the Non-Standard WD description; conversely, Standard WDs may not be used in contracts designated for Non-Standard WDs. The www.wdol.gov process for selecting Non-Standard WDs contains a drop-down menu that provides guidelines regarding their application.

(3) Contract-Specific or Special SCA WDs. There are a few, unique service contracts where DOL will issue contract-specific wage and benefit rates under SCA. An example of a contract-specific WD is a sole-source contract with a county, state or municipality where wages and benefits are already established. The SCA WD applicable to such a contract will be the rates established by the sole-source contractor. (Not all sole-source contract actions are subject to a Contract-Specific WD; only those contracts awarded to contractors similar to government organizations.) If a CO has determined that neither a Standard WD nor a Non-Standard WD is appropriate for a particular contract action, the CO should request an appropriate contract specific or special WD from DOL using the e98 system. DOL has sole authority to determine the appropriate wage and benefit rates for each contract action and will issue a WD reflecting such rates.

b. SCA WDs Based on CBAs

(1) The obligation of a successor contractor to pay its employees no less than the wages and fringe benefits required under the predecessor contractor's CBA is a statutory requirement of SCA

² For additional background on DOL's revised procedures for SCA H&W fringe benefit levels, see All Agency Memoranda 188, 196 and 198 which are available on the Library Page at www.wdol.gov.

Section 4(c). DOL has applied a limitation on the self-executing aspects of Section 4(c) (reference Title 29 CFR Part 4, Section 4.1(b)). This limitation only applies, however, if the CO has given both the incumbent (predecessor) contractor and the employees' collective bargaining representative written notification at least 30 days in advance of all estimated procurement dates.

(i) For contract actions resulting from other than sealed bidding:

(a) A revised CBA shall apply to the successor contract if it is received by the contracting agency before the date of award (or date of modification for an option or extension).

(b) If a CBA is received after award, it shall NOT apply to the successor contract if contract performance starts less than 30 days from date of award or modification.

(c) If a CBA is received after award and performance starts more than 30 days from award or modification date, the CBA shall apply to the successor contract if received no later than 10 days prior to start of performance.

(ii) For contract actions resulting from sealed bidding:

(a) A revised CBA shall NOT apply to the successor contract 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 revised WD.

(2) If the CBA has been timely received by the CO, the CO must prepare a CBA WD that references the CBA (by employer, union, contract number and effective dates) and incorporate into the successor contract action the CBA (complete copy of the CBA and all addenda) along with the CBA WD as a cover page. As a result of the launching of the WDOL.gov program (see Chapter 5 of this pamphlet), it is no longer necessary to send a copy of the CBA to DOL. The WDOL.gov database will not contain a copy of the CBA itself; it will only retain copies of the cover CBA WDs. Contractors and other WDOL.gov users must review specific solicitations or contracts (or contact the CO) in order to determine if a particular CBA is applicable under SCA to that action.

(3) The WDOL.gov Program menu includes a form for the CO to complete in order to prepare the cover CBA WD for each specific contract action, as required by SCA. The CO must prepare a separate CBA WD for each SCA-covered CBA applicable to a contract action (including separate CBA WDs for prime contractor and for subcontractor(s)).

4-4. 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 CBA 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 CBA, 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 CBA 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. Where the existence of a contingency clause may be an issue, 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.

e. Further the CO must give the union and the contractor written notice of the relevant procurement dates (see FAR 22.1010 and paragraph 4-6 below).

4-5. Effective and Expiration Dates of CBAs.

a. Effective Dates of CBAs. If the monetary provisions (wages and monetary benefits) of the new CBA are made effective only after the start of the next contract period, the CBA is not covered by the SCA successor provisions for that next period. The CO should not incorporate the CBA into the new contract period. For SCA purposes, the CBA must include monetary provisions

that are effective in the preceding contract period. Increases to those monetary provisions of the CBA may be made effective during the next contract period, and contractors should address these prospective increases in their proposals or requests for price adjustments for options or extensions. If the incumbent contractor signs a CBA that is first applicable during the middle of an existing contract period, that CBA is not incorporated into the contract until the next option or extension period, and no adjustment is provided for any increases in wage or benefit rates during that earlier period.

b. **Expiration Dates of CBAs.** If the expiration date of the CBA between the predecessor contractor and union occurs prior to the end of the contract period, the provisions of the CBA will no longer be applicable under SCA to the following contract period. An SCA Standard WD may be applicable instead of the CBA WD. COs should review the CBA to determine if there is a provision that automatically renews the CBA at the expiration date (generally providing such automatic renewal for one year unless one party or the other provides written notice of an intent to renegotiate the agreement).

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.

4-6. Notification to Interested Parties Under Collective Bargaining Agreements. COs must inquire at each contract action if the predecessor contractor has a CBA applicable to the workers performing work on the contract. In this regard, contract actions include re-solicitations or modifications to exercise an option, extend or significantly change the scope of work. If there is a CBA in place covering the affected employees, the CO is required to notify in writing both the incumbent contractor and its employees' collective bargaining representative of the prospective contract action. As required by FAR 22.1010, this notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable annual or biennial anniversary date of the contract.

4-7. 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:

- 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.

4-8. 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 CO 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).

4-9. Additional Pre-award Labor Standards Requirements. Among the contracting agency's pre-award labor standards obligations are those that relate to ensuring that prospective contractors have complied with certain Affirmative Action reporting requirements as described below.

4-10. 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>.

4-11. 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 CO 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

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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) 693-0101. Preaward clearance for each proposed contract and for each proposed first-tier subcontract of \$10 million or more shall be requested by the CO 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 CO 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 CO is required to obtain such clearance in writing. The CO shall include the following information in the pre-award 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 5 - THE WAGE DETERMINATION ON LINE (WDOL) PROGRAM

5-1. General. As a result of a collaborative e-Government initiative involving the Department of Labor (DOL), the Office of Management and Budget, the General Services Administration, the Department of Defense (DOD) and the National Technical Information Service, a single website (www.wdol.gov) has been established allowing for access to both SCA and DBA WDs. Based in large measure upon the success of the on line program managed by the Corps of Engineers Automated Legal System, the WDOL program provides even greater access to labor standards information while introducing a number of features that will facilitate contracting requirements while preserving labor standards protections.

5-2. Application. While the WDOL program is designed to be user-friendly in a menu-driven environment, it is strongly recommended that USACE personnel familiarize themselves with both the on line "User's Guide" as well as this Pamphlet to ensure the appropriate application of labor standards to USACE contracts. Neither the WDOL program nor the accompanying "User's Guide" relieve the CO or other program users of the requirement to carefully review the contract or solicitation, federal acquisition regulations, and/or DOL regulations related to these actions. Where the CO selects a SCA or DBA WD using the WDOL Program and DOL later determines, whether before or after contract award, that the appropriate SCA or DBA WD was not incorporated in a covered contract, the CO, within 30 days of notification by DOL, shall include in the contract the applicable WD issued by DOL (see Title 29 CFR Part 1, Section 1.6(f); Part 4, Sections 4.5(c) (2) and 4.101(b); and FAR Part 22, Subsection 22.404-9 and Section 22.1015).

5-3. WDOL Program Elements. While the number of WDOL program features available to USACE personnel tasked with labor standards responsibilities are quite extensive, the paragraphs below highlight the more significant elements.

a. Elimination of Standards Form 98, Notice of Intention to Make A Service Contract submission requirement. As a result of the increased emphasis upon e-Government, the WDOL program design specifically addressed the continued viability and utility of the Standard Form 98, Notice of Intention to Make A Service Contract. In particular, it was determined that the manual process of preparing and submitting a SF 98 was unable to provide the same level of benefit and responsiveness to contracting agency SCA WD requests as an automated process. Although the former WDOL.mil website managed by USACE allowed for more expeditious access to required WDs through automation, the 1996 Memorandum of Understanding which authorized its use required DoD contracting activities to continue to submit SF 98s to the DOL.

With the introduction of the WDOL.gov program, the requirement to submit an annotated SF 98 following the procurement of a required WD has been eliminated.

b. Introduction of e-98. While the procurement of SCA WDs under the WDOL program now more closely mirrors the process by which COs have traditionally obtained DBA WDs, COs may nonetheless elect to use the e98 request process for any SCA-covered contract action. The WDOL program contains a link to the DOL's website hosting the e98 module. It is also noted that if a CO cannot determine an appropriate SCA WD within the WDOL database, the CO will be directed to the e98 website. Most requests are processed immediately. Some requests owing to their unique nature may require research and DOL may need additional time to respond.

c. H & W Fringe Benefit Rates on Standard WDs. As noted in paragraph 4-3(a)(1) of this Pamphlet, the Standard WD selection process was designed to lead the WDOL program user to the appropriate WD.

d. Non-Standard WDs. These WDs are issued by DOL to reflect prevailing wages and benefits in specific service industries in designated localities. Non-Standard WDs may not be used in contracts for services other than those specified in the Non-Standard WD description; conversely, Standard WDs may not be used in contracts designated for Non-Standard WDs. In the WDOL program WD selection process, the user will be asked to determine if the contract services are "non-standard" as designated by DOL. The menu provides a drop-down listing of such designated Non-Standard services.

e. Contract-Specific or Special SCA WDs. There are a few, unique service contracts where DOL will issue contract-specific wage and benefit rates under SCA. An example of a contract-specific WD is a sole-source contract with a county, state or municipality where wages and benefits are already established. Examples within USACE are the law enforcement contracts under the Water Resources Development Act (see paragraph 3-22). The SCA WD applicable to such a contract will be the rates established by the sole-source contractor. (Not all sole-source contract actions are subject to a Contract-Specific WD; only those contracts awarded to contractors similar to government organizations.) If a CO has determined that neither a Standard WD nor a Non-Standard WD is appropriate for a particular contract action, the CO should request an appropriate contract specific or special WD from DOL using the e98 system. DOL has sole authority to determine the appropriate wage and benefit rates for each contract action and will issue a WD reflecting such rates.

f. **SCA WDs Based on CBAs** When a predecessor contractor's SCA-covered service employees are subject to the monetary provisions of a CBA signed by the contractor and a labor union, SCA Section 4(c) requires that the successor contractor pay its employees no less than the wage rates and fringe benefits, including accrued or prospective changes in wages and benefits, required by the predecessor's CBA. (Reference SCA Sec. 4(c), Title 29 CFR Part 4 Sections 4.50(b) and 4.53, and FAR 22.1002-3.). While the WDOL program will guide COs as to the development of a SCA WD based on a CBA, the following considerations are critical to this process.

(1) COs must inquire at each contract action if the predecessor contractor has a CBA applicable to the workers performing work on the contract. Contract actions include re-solicitations or modifications to exercise an option, extend or significantly change the scope of work.

(2) If the CBA has been timely received by the CO, the CO must prepare a CBA WD that references the CBA (by employer, union, contract number and effective dates) and incorporate into the successor contract action the CBA (complete copy of the CBA and all addenda) along with the CBA WD as a cover page. It is not necessary to send a copy of the CBA to DOL. The WDOL database will not contain a copy of the CBA itself; it will only retain copies of the cover CBA WDs. Contractors and other WDOL program users must review specific solicitations or contracts (or contact the CO) in order to determine if a particular CBA is applicable under SCA to that action.

(3) The WDOL program menu includes a form for the CO to complete in order to prepare the cover CBA WD for each specific contract action, as required by SCA. The CO must prepare a separate CBA WD for each SCA-covered CBA applicable to a contract action (including separate CBA WDs for prime contractor and for subcontractor(s)).

g. **Alert Service Option.** To ensure that the CO (or any other interested party) is aware of revisions made by DOL to SCA WDs (Standard WDs and Non-Standard WDs) selected for a specific contract action, the WDOL program user may register for automatic email notification of such revisions. Upon selection of an appropriate SCA Standard or Non-Standard WD, the user will be offered the opportunity to request email notice of future revisions for a specific period of time, or until a specific date. USACE COs are strongly encouraged to request this automatic notification process in order to be aware of timely revisions applicable to specific contract actions.

(1) At the Alert Service menu, the user will be asked to provide an email address for the WDOL program to use in providing notification of a revision to a WD. The user may also provide an "alert identifier" which will appear in the WDOL notification and will assist the user in relating the newly revised WD to a specific contract or solicitation, or other area of interest.

(2) Users requesting the Alert Service will receive an email notice each time the selected SCA WD is revised until the Alert Service request expires. The Alert Service does not relieve the CO of the obligation under SCA and its regulations to use timely received new or revised SCA WDs in contract actions.

h. Archived SCA WDs. Once DOL revises an SCA WD, the most current revision will be published on the WDOL database. Prior revisions, no longer current, will be maintained in the "Archived SCA WD" database for information purposes only. COs should not use an archived WD in a contract action without prior approval of DOL.

5-4. Timely Receipt of New or Revised SCA WDs. The determination as to whether a new SCA WD or a revised WD must be incorporated in a solicitation is guided by DOL's regulations (Title 29 CFR Part 4, Section 4.5) and FAR Section 22.1012. Under the WDOL program, "receipt" date of a new or revised SCA WD is the first date at which that WD appears on the WDOL Program SCA Database. The DOL publishes all SCA WD revisions for a given week on the WDOL program database each Tuesday.

a. For contract actions resulting from other than sealed bidding:

(1) A revised SCA WD shall be effective if it is received by the contracting agency before date of award (or date of modification for an 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 or modification date, the WD (or CBA) will be effective if received no later than 10 days prior to start of performance.

(4) With reference to SCA-covered CBAs, the CO must provide written notification to unions and contractors (in accordance with Title 29, CFR Part 4, Section 4.1b(b)(3), and FAR Section 22.1010) of the pending contract action and estimated date.

b. For contract actions resulting from sealed bidding:

(1) A revised SCA 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 revised WD.

5-5. Statement of Equivalent Rates for Federal Hires. Section 2(a)(5) of the Act and applicable regulations (29 CFR 4.6(k)(2) and FAR 22.1016) impose an obligation upon COs to incorporate a "Statement of Equivalent Rates for Federal Hires" in SCA covered contract solicitations. This Statement is incorporated for information purposes only and is not intended to serve as a statement of minimum wage rates that must be paid the contractor's employees. This information was formerly provided to the DOL by means of Standard Form 98a. In preparing this contract provision, COs should use the *Service Contract Act Directory of Occupations*, available at www.dol.gov/esa/regs/compliance/whd/wage/main.htm. The Directory includes Federal Wage Equivalents and should be used in conjunction with FAR 22.1016 (b).

CHAPTER 6 - CONTRACT ADMINISTRATION AND SERVICE CONTRACT ACT ISSUES

6-1. 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.

6-2. 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 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 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.

(1) Conformances may not be used to artificially subdivide classes already listed in the WD.

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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 WD 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 WD 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 WD 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 WD.

(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 WD (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.

6-3. 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

6-4. 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.

6-5. 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

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retaliatory discharge, the complainant should be advised of the complaint procedures set forth at FAR 3.904.

6-6. 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.

6-7. 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 Government Accountability 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)).

6-8. 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.

6-9. Overtime.

a. USACE personnel are reminded that for certain cost-reimbursable contracts, contractors must first seek CO approval for the use of overtime as outlined at FAR 22.103-4. Department of Army personnel authorized to approve overtime performance are set forth at AFARS 5122.10-4.

b. 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.

c. 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.

d. 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.

e. 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 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 B is a schematic representation of the general process of CWHSSA liquidated damages notification and assessment.

6-10. Labor Disputes. As provided by FAR 22.103-5 and AFARS 5122.101, when a labor dispute, work stoppage, or threat of a work stoppage occurs, the contractor is required by the clause set forth at 52.222-1 to notify the CO of its potential or actual impact upon contract performance. The CO should consult with the District Labor Advisor concerning the reporting of relevant labor dispute information.

6-11. Collective Bargaining and Union Representation.

a. The collective bargaining rights and obligations of employers (including contractors), employees, and employee representatives are established by law.

b. USACE personnel shall not participate in, facilitate, interfere with, or try to influence collective bargaining, organizing campaigns, or disputes between contractors and labor unions representing or seeking to represent contractor employees.

c. USACE personnel shall cooperate with Federal and state agencies having responsibilities relating to industrial labor-management relations activities affecting USACE operations.

CHAPTER 7. SERVICE CONTRACT ACT PRICE ADJUSTMENTS

7-1. 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.

7-2. 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).

7-3. 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.

7-4. SCA Price Adjustments on Indefinite Delivery Service Contracts.

a. COs are required to incorporate the most current SCA WD into SCA-covered indefinite delivery service contracts at each option, extension, or significant change in scope of work. (note: Generally, if performance has already begun on a task order issued in the preceding option period, the new SCA WD will not be applicable to that task order. The old SCA WD applicable in the preceding option will be applicable through completion of task orders issued during that option period.) If the indefinite delivery contract is fixed price, the clause at FAR 52.222-43 will also be incorporated into the contract, and the "contract unit price labor rates" (paragraph (d) of the clause) must be adjusted to reflect the contractor's actual cost incurred to comply with the new SCA requirements. The same principles in this pamphlet apply to the price adjustments computed for these contracts.

b. Where the contract unit price involves the effort of multiple employee classifications (e.g., a contract for ambulance services might be priced on a "per call" basis, and each call would involve the use of a driver, driver's helper, and emergency medical technicians), the price adjustment will be more complex. An example of a price adjustment computed for such a contract unit price may be found at FAR 52.222-32, "Davis-Bacon Act – Price Adjustment (Actual Method)".

7-5. Required Documentation for SCA Price Adjustments.

a. General. The contractor must provide documentation to establish the amount paid to the workers in the preceding contract period for comparison with the requirements for the following contract period. There are four types of documentation needed from the contractor to process an adjustment request:

- (1) Actual or projected pay (wage) records
- (2) Actual or projected contract work hours
- (3) Documents supporting accompanying costs (payroll taxes)

(4) Documents supporting impact on fringe benefit costs

b. 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.

c. Content. The contractor is obligated to provide sufficient, credible documentation, in the opinion of the CO, to substantiate its request for a contract price adjustment. 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 request for contract price adjustment is based on an increase in the SCA fringe benefits (e.g., the H&W rate), the CO should require documentation to establish the amount of actual premiums paid by the contractor directly to the worker or to a benefit provider in the preceding contract period. An adjustment for increases in fringe benefits is always computed on the differential between the total benefits paid in the preceding contract period, and the total benefits required under SCA in the following contract period. The contractor's request for an adjustment for SCA benefits should include proper documentation for each benefit provided in the preceding period. The request should also include documentation that verifies the allowable accompanying costs, such as state and Federal documents establishing an employer's specific unemployment tax rate or worker's compensation insurance rate.

d. Contract Price Adjustment Computation Format. CO's should establish procedures to evaluate contractor price adjustment requests in a timely and consistent manner. Documentation presented by the contractor in support of an adjustment request should be clear and readily understandable. Computerized payrolls should include explanations of acronyms, codes, and computations. If the supporting documentation is vague, non-substantive, or in any way questionable, the request should be returned to the contractor for correction and resubmission.

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Delays in processing contractor price adjustments often result in confusion, animosity, the contractor's failure to comply with wage and benefit increases, and labor disputes that might affect contract performance. The CO should respond promptly to the contractor's request for adjustment.

7-6. 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 hours to be expended in the next contract period. 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.

7-7. 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. The CO should never encourage a contractor to reduce employee wages or benefits to meet the new, decreased minimums under SCA.

c. **Maximum Adjustment.** An adjustment must never exceed the differential in wage and fringe benefit rates (and allowable payroll taxes) between the “old” WD and the “new” WD. An adjustment for an increase in the FLSA minimum rate should never exceed the difference between the “old” minimum wage rate and the “new” minimum wage rate. Any adjustment greater than these differentials would indicate that the contractor was previously paying less than the minimum rates required under SCA or FLSA, or the contractor is requesting a price adjustment for wage or benefit rates in excess of the new SCA requirement.

d. **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 \text{ hours} \times .02$). If the cap was \$13,000, then the cost to the employer would be \$10.40 ($\$13,000 [\text{cap}] \text{ less } \$12,480 [\text{amount earned in prior year}] \times .02$).

(3) 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 on the wages subject to the tax. WCI is an allowable add-on to the contract price adjustment request, to the extent that the WCI tax is incurred due to the SCA or FLSA wage increase. 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) WCI and General Liability Insurance Plans. Many employers meet their statutory obligation to provide WCI for their workers by purchasing an insurance policy from an insurer provider. Such a policy often has a premium established as a percentage of total payroll cost. The policy often includes coverage for other liabilities such as general liability insurance, life insurance for key management personnel, automobile and equipment liability, as well as the WCI tax

requirement. Regardless of the fact that the premium is based on total payroll cost, the only allowable portion of the premium is that amount designated as the WCI tax requirement, applicable to the SCA or FLSA wage increase. Therefore, the CO should request documentation to confirm the specific WCI rate for the employer, i.e., the state's taxing document and should not accept or use the insurance policy's premium rate which covers more than the WCI requirement.

(5) Taxes applicable to fringe benefits. Generally, cash payments made by contractors in lieu of fringe benefit plans are subject to the various payroll taxes (including FICA, FUTA, SUTA, and WCI). However, employer payments into legitimate SCA fringe benefit plans are not subject to the application of payroll taxes. 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. However, 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. The accompanying payroll taxes on such a payment (to meet an increase in the SCA fringe benefits) would be allowable in the contract price adjustment request. In determining the allowability of a contract price adjustment request for increases in SCA fringe benefits, the CO should also request sufficient documentation to establish the allowability of any accompanying payroll taxes.

d. General and Administrative (G&A) Expenses, Overhead, and Profit. G&A expenses, overheads, and profit are not allowable as part of the SCA contract price adjustment. The clause specifically allows an adjustment to include costs incurred for FICA, FUTA, SUTA, and WCI. Other payroll costs are not allowable, including (but not limited to) general liability or other insurance premiums; bonding costs; increases in management or supervisory wage rates to maintain equity with SCA-covered wage levels; increases in state or other labor standards requirements; state disability insurance; and state general excise taxes (i.e., Hawaii or New Mexico general excise taxes).

e. Employee Reimbursements for Business Expenses. Payments made by the employer to the employee for fuel, mileage, meals, lodging, uniforms and uniform maintenance are the employer's cost of doing business (G&A expenses or overhead) and are not considered wages or benefits of the employee (even if such payments are included in and required by a collective bargaining agreement). The CO must ensure that reimbursements of this nature are not included when the hourly wage rate is calculated from payroll records for purposes of the contract price adjustment.

7-8. Fringe Benefit Adjustments.

a. General. The fringe benefits listed in area WDs most often consist of (1) a specified hourly rate for H & W plans (health or life insurance, pension benefits, etc.); (2) a stated number of holidays; and (3) a stated number of vacation weeks. It is important to note that how the contractor complies with the SCA-required fringe benefits affects the contractor's request for adjustment as discussed below.

b. Fringe Benefit Compliance. Contractors may comply with SCA fringe benefit requirements by paying cash in an amount equivalent to the hourly amount of benefits listed on the WD (or any portion of the total benefits). However, compliance requires that the contractor designate in his pay records that he is paying a specific sum of cash equivalent to the required benefits (or a portion of the benefits). If the contractor does not separately state a sum of cash as an equivalent benefit, the extra cash paid is simply a part of the employee's wage rate and not creditable toward the employer's benefit requirement. If a contractor regularly pays higher wages than the minimum wage rates listed on the SCA WD, the wages in excess of the minimum cannot be claimed toward any requirement for fringe benefits. Therefore, if the SCA WD increases the benefit requirements for a contractor that pays higher wages than the minimum, the contractor will still have to increase the employee's fringe benefits to comply with the new SCA WD. The cost incurred by the contractor to comply with the new SCA benefit requirement will be allowable under the clause.

Example: Contractor A is working under a contract that contains an SCA WD requiring \$10.00 per hour and \$2.02 in fringe benefits. He pays all of his workers \$12.02 per hour in wages and provides exactly \$2.02 in fringe benefits. The new WD requires a wage rate of \$11.00 per hour and fringe benefits of \$2.12. The contractor is not entitled to an adjustment in contract price for the wage increase (he is already paying in excess of the minimum). However he would be entitled to an adjustment for the \$.10 per hour he must pay to comply with the new benefit rate of \$2.12 per hour.

Example: Contractor B works under the same SCA WDs as noted above. However, he pays his workers only the SCA minimum wage rate of \$10.00 per hour and the \$2.02 in cash equivalent for fringe benefits. This contractor would be entitled to an adjustment in contract price for the increases in both the wage rate and the fringe benefit requirement.

c. H & W Rates. As was noted in paragraph 4-3(b)(1) of this pamphlet, the DOL has developed two standard WDs for each locality in the United States. The wage rates were the same

for each WD with the distinction between the WDs arising in the H&W fringe benefit levels. Prior to 2004 the DOL maintained two different fringe benefit level WDs for covered areas, a “low” benefit level and a “high” benefit level.

(1) Low Rate: If the low rate is required by the SCA WD, 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 less than the “high” for some employees, while incurring a cost in excess of the “high” rate 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 allowable adjustment is the SCA minimum wage rate for each classification working on the contract, times the number of added holiday hours (usually 8 hours per specified new holiday). However, if, in the preceding period, the contractor provided more holidays or other leave time (or any total combination of leave time and other bona fide fringe benefits) than required by the new WD, an adjustment for the increase in SCA-required holidays is not due. The adjustment is limited to the difference between the total benefits required by the new WD and the total benefits provided in the preceding contract period.

e. Vacation. Standard and Non-standard WDs usually list vacation benefits as a specified 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. Continuous employment also includes prior years of uninterrupted service with the current contractor, on or off government contracts.) Unless

the WD states otherwise, vacation benefits become vested on the employee's anniversary date. The anniversary date is the day the employee was first employed on the contract. A contract price adjustment is only applicable under the clause if the new WD changes the original vacation benefit or entitlement criteria. No adjustment is permitted merely because an individual employee continues to work throughout contract performance and reaches the number of years of service eligible for the next level of vacation benefits already established in the old WD.

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 20 hours per week (4 hours for each of 5 workdays) on the contract is entitled to 4 hours for each holiday and 20 hours for a vacation week if he works through his anniversary date. If the new WD required an additional holiday, the contractor would be entitled to an adjustment for that employee equal to the WD wage rate multiplied by 4 hours.

(2) Eligibility for annual vacation benefits still requires that the employee reach an anniversary date. Therefore, if a part-time employee is a casual hire, or temporary worker, employed for only a short duration with a break in service prior to reaching an anniversary date, the employee would not be due any vacation benefits

(3) Part-time employees are entitled to the full H&W requirement listed on the WD, for each

hour worked. Therefore, if the new WD increases the H&W rate, the contractor will be entitled to an adjustment for the increase on the hours worked by all part-time employees (casual and regular), as well as full-time workers (assuming the contractor has not provided benefits in the preceding contract period greater than the benefits required under the old WD).

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.

7-9. 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 option, extension, significant change in scope, or for a re-solicitation (applicable to the successor's contract base 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.

b. Contract price adjustments under SCA clauses are limited to those classifications performing contract work and subject to such CBA provisions. Non-exempt classifications performing contract work but who are not represented by a union would be subject to the provisions of a Standard or Non-Standard WD as may be appropriate.

c. **Effective Dates of CBA Wage and Benefit Increases.** The effective dates of CBA wage and benefit increases do not always coincide with the start of the contract period. In such cases, the contractor is only reimbursed for that portion of the contract period affected by the increase.

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.

7-10. **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.

7-11. **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.

7-12. 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 (\$8.15 less \$8.10).

7-13. 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%

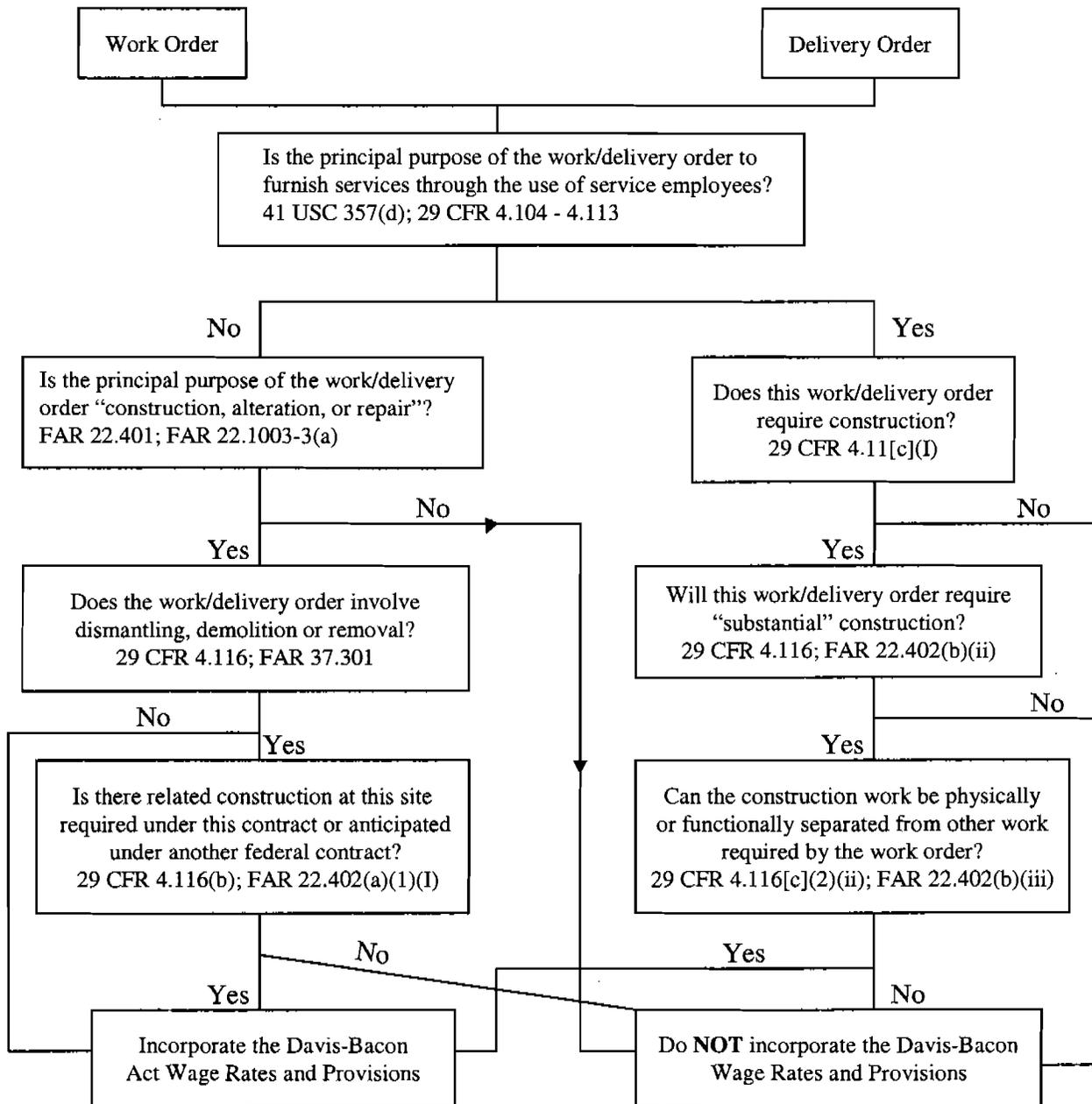
The total of these changes is 7%; divided by 5 to obtain the average change for listed classifications, which is 1.4% increase. This index rate is applied to the conformed Classification X (\$10.00 times 1.4%) to provide the SCA enforceable new wage rate of \$10.14 per hour. The increase of \$.14 per 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.

7-14. 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.



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



Processing of Contracting Officer Reports Relating to Contractor Violations of the Contract Work Hours and Safety Standards Act (CWHSSA) and the Assessment of Liquidated Damages

