DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
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Pamphlet
No. 1180-1-1

31 January 2022

Contracts
SERVICE CONTRACT ACT LABOR RELATIONS

1. Purpose. This pamphlet is designed to provide basic guidelines for all U.S. Army Corps of Engineers ("Corps," or USACE) employees tasked with the administration of Service Contract Act (SCA) responsibilities. Its primary aim is to effect a uniform and consistent program of the 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 on USACE acquisitions.

2. Applicability. This pamphlet is applicable to all USACE Commands and Headquarters USACE (HQUSACE) elements under the jurisdiction of the Commander, USACE.

3. Distribution Statement. Approved for public release; distribution is unlimited.

FOR THE COMMANDER:

John P. Lloyd
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SUMMARY OF CHANGE

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Significant changes are as follows:

- Added Paragraph 1-6, Positive Law Codification, Page 2
- Paragraph 1-9, Responsibilities, subparagraph a. has been revised to highlight execution of the Service Contract Act at all applicable levels across the Command, Page 3
- Paragraph 2-1, General, Congressional reference added, Page 5
- Removed Paragraph 2-8, The Brooks Act, Page 2-2 (2006 Version)
- Paragraph 3-6, Contracts of $2,500 or Less, deleted, Page 3-3 (2006 Version)
- Paragraph 3-6, Contract Amount, added, Page 12
- Paragraph 3-7, Duration of Contracts, added, Page 12
- Paragraph Title Change, 3-9, Information Technology Related Services, Page 13
- Paragraph Title Change, 3-22, Contracts with States and Political Subdivisions, Page 22
- Removed Paragraph 3-24, Contracts between a Federal or District of Columbia Agency and Another Such Agency, (2006 Version)
- Removed Paragraph 3-28, Application of Commercial Services Contract Exemption, Page 3-18 (2006 Version)
- Chapter 4 Title Change, Pre-Award Service Contract Formation Issues, Page 31
- Paragraph Title Change, 4-9, Prospective Contractor’s Compliance with VETS-4212 Reporting Requirement, Page 37
- Chapter 5 Title Change, Wage Determinations On-Line - SAM.gov, Page 41
- Appendix C, Positive Law Codification of Title 41, has been added, Page 71
- Appendix D, Service Contract Act Labor Relations Resource Page, has been added, Page 72

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CONTENTS

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Chapter 1
General Provisions

1-1. Purpose. This pamphlet is designed to provide basic guidelines for all "Corps," or USACE employees tasked with the administration of 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 on USACE acquisitions. Official acquisition policy is found in the Federal Acquisition Regulation (FAR), and its supplements. If there is any conflict between the FAR and its supplements, and this pamphlet, the current FAR and its supplements 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 Statement. Approved for public release; distribution is unlimited.

1-4. References.

a. McNamara-O'Hara Service Contract Act of 1965, as amended (41 USC chapter 67) (formerly §§ 351-358) (now called "Service Contract Labor Standards" in the FAR)
https://www.dol.gov/agencies/whd/government-contracts/service-contracts/laws

b. Code of Federal Regulations (CFR), Title 29, Parts 4 and 541
https://www.ecfr.gov/current/title-29/subtitle-A/part-4
https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-A/part-541

c. Federal Acquisition Regulation (FAR), Subpart 22.10
https://www.acquisition.gov/far/subpart-22.10

d. Defense Federal Acquisition Regulation Supplement (DFARS), Part 222
https://www.acquisition.gov/far/part-22

e. Army Federal Acquisition Regulation Supplement (AFARS), Part 5122
https://www.acquisition.gov/afars/part-5122-application-labor-laws-government-acquisitions

1-5. Records Management Requirements. The records management requirement for all record numbers, associated forms and reports required by this regulation are addressed in the Army Records Retention Schedule-Army (RRS-A). Detailed information for all related record numbers are in ARIMS/RRS-A at https://www.arims.army.mil. If any record numbers, forms and reports are not current, addressed and/or published correctly in ARIMS/RRS-A, see Department of the

Army (DA) PAM 25-403, Guide to Recordkeeping in the Army.

1-6. Positive Law Codification of Titles 40 and 41. On 29 April 2014, the FAR Council published the final FAR Rule in the Federal Register (79 FR 24192) (FAC 2005-73) concerning the positive law codification of Titles 40 and 41. See FAR 1.110. The codification changed the names of several laws referenced in this Engineer Pamphlet. To remain consistent with the U.S. Department of Labor's (DOL) terminology for these laws, which, to date, DOL has not changed, each law will be referenced using its traditional name. For a full list of renamed laws, see Appendix C of this EP.

1-7. 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 personnel 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.

1-8. Background.

a. The administration of statutory labor standards within USACE contracts is governed by the basic labor policy in Part 22 of the FAR. This has been further supplemented by Part 222 of the DFARS, Part 5122 of the AFARS, and various USACE circulars and regulations, including the UAI and USACE Desk Guide. Additionally, the Secretary of Labor has issued regulations implementing the labor statutes which are published in Title 29 of the CFR, Subtitle A, Office of the Secretary of Labor. DOL also publishes labor-related guidance, including All Agency Memorandum's (AAM) and the Field Operations Handbook (FOH). DOL has sole jurisdiction to issue legal and administrative decisions on labor standards, via the DOL Administrative Review Board (ARB) and for service contracts, holds enforcement authority. See FAR 22.1004 and 22.1024. Disputes concerning labor standards requirements of the contract are handled under paragraph (t) of the contract clause at 52.222-41, Service Contract Labor Standards, and not under the clause at 52.233-1, Disputes. See FAR 22.1026.

b. The various labor standards statutes were enacted by Congress to prevent exploitation of labor on Government contracts. Enacted in 1965, the McNamara-O'Hara Service Contract Act (SCA) was the culmination of an effort to extend the same protections enjoyed by contractor and subcontractor 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. 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/regulation, 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/Center Counsel and the District/Center Labor Advisor or Contractor Industrial Relations Specialist (CIRS).

1-9. Responsibilities.

a. Policies, procedures, and guidance for assuring compliance are provided by the contract, the FAR and its supplements, and the regulations of the Secretary of Labor. All Major Subordinate Commands, districts, laboratories, centers, and field operating activities under the jurisdiction of the Chief of Engineers must establish a system(s) that ensures the successful implementation of the Service Contract Act labor provisions and requirements. Specific actions must include the following:

(1) The incorporation of the appropriate wage determinations, and labor provisions and clauses in solicitations and contracts. See FAR 22.1006 for SCA solicitation provisions and contract clauses.

(2) Conformance requests: The review and evaluation of all contractor requests for authorization of additional classification(s) and rate(s) when such classifications are not provided in the applicable contract wage determination, as well as the subsequent submission of such actions to the Administrator, Wage and Hour Division at DOL. See FAR 22.1019.

(3) The prompt notification to DOL of any SCA violation or receipt of SCA complaints alleging non-compliance with the Act. See FAR 22.1024.

(4) The expeditious compliance with all DOL requests for withholding of contract payments to cover back wages resulting from non-compliance with the Act. See FAR 22.1022.

b. Contractor Industrial Relations Specialist /Labor Advisor. The CIRS or District/Center Labor Advisor is responsible for labor standards programs within the district/center. 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/center's mission. In other words, the CIRS is responsible for "preventive industrial

relations" – through pro-active measures, the CIRS seeks to prevent contractor non-compliance as well as disruption of the overall district/center mission. The CIRS also serves as the point of contact for any DOL-initiated investigations. The CIRS will maintain a liaison with the appropriate DOL representatives and apprise USACE personnel of the status and findings of these investigations.

c. Contractors. If applicable, the service contract labor standards provisions apply to all contractors and subcontractors regardless of their employment policies. The prime contractor is ultimately responsible for: procurement, supervision, and management of all labor required for the completion of the work; compliance with Federal labor standards applicable to its 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 protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. With regard to the Service Contract Act in particular, the reason for enactment was explained by the House Education and Labor Committee in its report of September 1, 1965, stating in part: "Many of the employees performing work on Federal service contracts are poorly paid. … Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. … The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder.[1] … Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are stacked in favor of the contractor paying the lowest wage. … When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages." H.R. Rep. No. 948, 89th Cong., 1st Sess.; reprinted in 1965 U.S. Code Cong. & Ad. News at 3739.

2-2. The Davis-Bacon Act (40 USC 3141-48) (FAR 22.4). This Act applies to contracts in excess of $2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works, within the United States, to which the Federal Government or the District of Columbia is a party, or as otherwise specified by law. It specifies that no laborer or mechanic employed directly upon the site of the work will receive less than the prevailing wage rates 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." Both DoL and the contracting agency can enforce the Davis-Bacon Act (DBA).

2-3. The Walsh-Healey Act (41 USC 6501-6511). This Act prescribes minimum wages to be paid contractor's employees on contracts in excess of $15,000 for the manufacture or furnishing of materials, supplies, articles, or equipment. Further, contracts principally for remanufacturing of equipment which is so extensive as to be equivalent to manufacturing are subject to the Walsh-Healey Act. See FAR Subpart 22.6, 22.1003-3(b), 22.1003-6, and 29 CFR 4.117. 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 et seq.). This Act provides for the establishment of minimum wage and maximum hour standards, creates a Wage and Hour Division

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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.

Note: Under Final Rule, the Department of Labor revised its regulations located at 29 CFR Part 541 with an effective date of 1 January 2020, implementing exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. See Appendix D, d. of this EP.

2-5. The Copeland (Anti-Kickback) Act (41 USC chapter 87 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 the person is entitled under their contract of employment.

2-6. The Contract Work Hours and Safety Standards Act (40 USC chapter 37) (FAR 22.3). This Act applies to both service and construction contracts at or above $150,000 and requires employees to be paid time and one-half for all hours worked in excess of 40 per week. The Act carries a monetary penalty that applies per day, per employee, and also contains certain health and safety standards.

2-7. The McNamara-O'Hara Service Contract Act (41 USC chapter 67) (FAR 22.10). This Act applies to Federal contracts in excess of $2,500, the principal purpose of which is to furnish services in the United States (as defined at FAR 22.1001) through the use of service employees, except as otherwise exempted. Service employees include all employees working under a contract except those in "bona fide" 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. Executive Orders. Federal contract labor standards can also be established by the President through the promulgation of Executive Orders (EO), which are later implemented by the Federal Acquisition Regulation. Among the most relevant labor-related Executive Orders are those noted below:

a. Executive Order 11246, Equal Employment Opportunity (Sept. 24, 1965, 30 FR 12319) which provides 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. See Appendix D, e. of this EP.

b. Executive Order13496, Notification of Employee Rights Under Federal Labor Laws (Jan. 30, 2009, 74 FR 6107), which requires covered contractors to post notice of employee rights under the National Labor Relations Act, the law that governs relations between unions and employees in the private sector. See Appendix D, f. of this EP.

c. Executive Order 14026, Increasing the Minimum Wage for Federal Contractors (April 27, 2021, 86 FR 22835), which requires that the Federal hourly minimum wage on covered contracts be increased to $15.00 beginning January 30, 2022, and beginning January 1, 2023 and annually thereafter, an amount determined by the Secretary of Labor. As of January 30, 2022, this EO supersedes EO 13658, Establishing a Minimum Wage for Contractors (Feb. 12, 2014, 79 FR 9851), to the extent EO 13658 is inconsistent with EO 14026. This EO also revokes EO 13838 of May 25, 2018 (Exemption from Executive Order 13658 for Recreational Services on Federal Lands) as of January 30, 2022.

d. Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (Sept. 7, 2015, 80 FR 54697), which requires parties that enter into covered contracts with the Federal Government to provide covered employees with up to seven days of paid sick leave annually, including paid leave allowing for family care.

2-9. Solicitation Provisions/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, via implementing solicitation provisions and contract clauses. To illustrate, listed below are provisions and clauses which are generally required for solicitations and contracts subject to the Service Contract Act (this is not meant to be an exclusive list).

- Notice to the Government of Labor Disputes (FAR 52.222-1)
- Convict Labor (FAR 52.222-3)
- Contract Work Hours and Safety Standards Act-Overtime Compensation (FAR 52.222-4)
- Prohibition of Segregated Facilities (FAR 52.222-21)
- Previous Contracts and Compliance Reports (FAR 52.222-22)
- Affirmative Action Compliance (FAR 52.222-25)

- Equal Opportunity (FAR 52.222-26)
- Equal Opportunity for Veterans (FAR 52.222-35)
- Equal Opportunity for Workers with Disabilities (FAR 52.222-36)
- Employment Reports on Veterans (FAR 52.222-37)
- Notification of Employee Rights under the National Labor Relations Act (FAR 52.222-40)
- Service Contract Labor Standards (FAR 52.222-41)
- Statement of Equivalent Rates for Federal Hires (FAR 52.222-42)
- Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment (Multiple Year and Option Contracts) (FAR 52.222-43)
- Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment (FAR 52.222-44)
- Evaluation of Compensation for Professional Employees (FAR 52.222-46)
- Service Contract Labor Standards-Place of Performance Unknown (FAR 52.222-49)
- Combating Trafficking in Persons (FAR 52.222-50)
- Employment Eligibility Verification (FAR 52.222-54)
- Minimum Wages Under Executive Order 13658 (FAR 52.222-55)
- Paid Sick Leave Under Executive Order 13706 (FA 52.222-62)
- Restrictions on Employment of Personnel (DFARS 252.222-7000) (applicable is solicitations and contracts for work on construction and service contracts performed in noncontiguous states, when the unemployment rate in the noncontiguous state is in excess of the national average rate of unemployment as determined by the Secretary of Labor).

Chapter 3
Applicability and Coverage

3-1. General. The 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 Contracting Officers (COs) in their determinations as to whether prospective solicitations are subject to the provisions of the SCA, the following criteria must be considered. Each of these criteria are discussed in further detail below.

- Will the "principal purpose" of the contract be to furnish services?
- Will "service employees" be used in providing such services?
- Will such services be furnished in the United States?

3-2. Principal Purpose. As was noted in paragraph 1-8(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 Federal Government service contracts. The Act covers contracts which have as their principal purpose the furnishing of services in the United States through the use of service employees. It does not apply to contracts for procurement of construction, alteration, or repair (as defined in the Davis-Bacon Act), or materials, supplies, articles, and equipment (as defined in the Walsh-Healey Act). Other exemptions are listed below. 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 (such as, 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 (such as, 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. In such cases, the contract will need to specify what portion of the work is covered by SCA, and what portion is covered by other than SCA.

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 in deciding whether a contract is subject to SCA. A good rule of thumb to follow arises out of several DOL administrative cases. In Raytheon

Aerospace, ARB Case Nos. 03-017, 03-019, 2004 WL 1166284 (DOL Adm. Rev. Bd.) (May 21, 2004), the DOL Administrative Review Board determined that a maintenance and logistical support contract for the Air Force met the "principal" test even though only 20% of the contract value was for work performed by service employees. In an earlier case, National Cancer Institute, BSCA No. 93-10, 1993 WL 832143 (L.B.S.C.A.) (Dec. 30, 1993), SCA was deemed not to apply because less than 10% of the work was performed by service employees. Specifically, the Board explained that "where use of service employees is less than 10 percent, there is no SCA coverage; if service employees comprise between 10 and 20 percent of the contract work force, Wage and Hour considers the totality of contract circumstances to make a determination as to whether th[e] contract is covered.

Thus: Services < 10% of estimated contract costs → SCA does not apply.
Services > 20% of estimated contract costs → SCA does apply.
Services 10-20% of estimated contract costs → Look at totality of circumstances.

Note: DOL does not seek to apply SCA to "professional service contracts" (such as, many Architect -Engineers (A-E) contracts) *unless* there is a significant or substantial amount of SCA-covered support services directly required. See section 3-13 of this EP on A-E contracts for further discussion. Again, consult with your CIRS to determine whether SCA applies in a particular contract.

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. 41 USC 6701 defines "service employee" as follows:

(1) Means an individual engaged in the performance of a contract made by the Federal Government and not exempted under section 6702(b) of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States;

(2) Includes an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor [for example, "independent contractor"]; but (C) does not include an individual 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. See also 29 CFR 4.113(b).

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 Part 541. For example, a contract for medical services furnished exclusively by professional personnel is not an SCA-covered contract. Regulatory guidance in 29 CFR 4.113 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 EP).

c. In contrast, service contracts involving a significant or substantial use of service employees along with 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. See FAR 22.1003-5 and 29 CFR 4.130 for examples of SCA-covered services.

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 Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the Outer Continental Shelf (as defined in the Outer Continental Shelf Lands Act). 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. See FAR 22.1001 and 41 USC 6701.

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, 41 USC 6707 authorizes the Secretary of Labor to "enforce [SCA], including the [] authority to prescribe regulations, issue orders, hold hearings, make decisions based on findings of fact, and take other appropriate action." This enforcement authority is outlined in greater detail in 29 CFR 4.187-4.191. 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 FAR 22.1015 and 29 CFR 4.5(c)). Further, 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 (D.N.J. 1974); Brinks, Inc. v. Board of Governors of the Federal Reserve System, 466 F. Supp 112 (D.D.C. 1979)). See also the decision of the Comptroller General in Associated Naval Architects, Inc. B-221203, Dec. 12, 1985, 85-2 CPD P 652.

3-6. Contract Amount.

a. As noted above, SCA is applicable to contracts in excess of $2,500. In general, the contract amount is measured by the consideration agreed to be paid, whether in money or other valuable consideration, in return for the obligations assumed under the contract. For example, if an agency procures continuing services through the issuance of monthly purchase orders, the amount of the contract for purposes of application of the SCA is not measured by the amount of an individual purchase order, but rather 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 29 CFR 4.141. Note that the limitation of the duration of SCA-covered contracts is a separate requirement from the prescription found at FAR 17.204(e), and from the rules pertaining to the ordering period of a task order or delivery order contract found at DFARS 217.204.

b. With respect to indefinite delivery - indefinite quantity contracts (IDIQs), where the total amount of the contract is uncertain, unless the Contracting Officer has "definite knowledge in advance" that the total contract value (including all orders) will not exceed $2,500 "in any event," the IDIQ is subject to SCA. See FAR 22.1006(a)(1)(ii) and 29 CFR 4.142(a). Essentially, this means that every USACE IDIQ services contract will be subject to SCA unless it contains a total ceiling price of $2,500.

Note: The applicable SCA clauses and wage determination(s) will be included in IDIQ services contracts, regardless of whether any of the contract's binding rates are applicable to service employees. Remember, SCA wages are the minimum the contractor is required to pay service employees; the binding rates established in the price/bid schedule are the rates the contractor charges the Government.

3-7. Duration of Contract. The Service Contract Act, at 41 USC 6707(d), prescribes a limitation to the duration of service contracts subject to SCA as not more than 5 years "if the contract provides for periodic adjustment of wages and fringe benefits per future determinations, issued in the manner prescribed in section 6703 of this title at least once every 2 years during the term of the contract, covering each class of service employee." Such adjustment is covered by the SCA clauses included in the contract. See also FAR 22.1002-1. Please contact the Labor Advisor, HQUSACE, for further information if you are considering a stand-alone ("C") contract or order for SCA-covered services that will exceed 5 years.

3-8. Exempt Contracts. The SCA 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. 41 USC 6702 specifically excludes from SCA coverage the following types of contracts. See also FAR 22.1003-3. The DOL's regulations at 29 CFR, Part 4, Sections 4.116 through 4.122 provide further explanation of the following statutory exemptions.

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

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

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

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 (41 USC 151 et seq.).

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

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

(7) A contract with the U.S. Postal Service, the principal purpose of which is the operation of postal contract stations.

b. In addition, 41 USC 6707(b) grants the Secretary of Labor the authority to issue limitations and regulations for variations, tolerances, and exemptions to the SCA. Thus, the Secretary of Labor has exempted from SCA coverage certain contracts as set forth at 29 CFR 4.123; see also FAR 22.1003-411. 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.

3-9. Information Technology Related Services.

a. Contracts for information technology services (such as, data processing, software services, support services, maintenance, etc.) 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. Exemption for Contracts for Maintenance, Calibration, or Repair of Certain Equipment. The Secretary of Labor has set forth an exemption from SCA coverage for contracts or subcontracts in which the primary purpose is to furnish maintenance, calibration, or repair of (1) automated data processing equipment and office information/word processing systems; (2) scientific and medical equipment or apparatus; and (3) other office/business machines not included under (1), where such services are performed by the manufacturer or supplier of such equipment, if the following conditions are met:

(1) The items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(2) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of such equipment. As defined at 29 CFR 4.123(e)(1)(ii)(B):

(a) An "established catalog price" is a price included in a catalog price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(b) 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.

(c) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(d) The apparent successful offeror certifies to the conditions in paragraph (c)(2)(i) through (iii) of this subsection. (See 22.1006(e).)

Note: FAR 22.1003-4(c); see also 29 CFR 4.123(e). See also FAR 22.1006 for the use of provision 52.222-48, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Certification, and clause 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements.

c. Computer Employee Exemption. In 1990, Congress instructed DOL to enact regulations that would allow certain computer employees to qualify for Fair Labor Standards Act (FLSA) Section 13(a)(1)'s executive, administrative, or professional exemptions. DOL first adopted a rule under which they could qualify as "learned professionals" under Section 13(a)(1), and later codified specific duties and wages that would qualify computer employees as exempt in FLSA Section 13(a)(17). The single test now found at 29 CFR 541.400 qualifies a computer employee as exempt under both the learned professional exemption as well as the special exemption for computer employees. While 29 CFR 541.500 lists "computer systems analysts, computer programmers, and software engineers" as specific examples of "computer employees," it notes that job titles vary widely and change quickly in the computer industry, so job titles alone are not determinative of the applicability of this exemption.

3-10. Carpet Installation. As noted in Section 3-8, 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. This would apply to similar work like tile or flooring installation as well.

3-11. Overhaul and Modification of Equipment.

a. As noted in paragraph 3-8, the SCA exempts from its provisions "any work required to be done consistent with the provisions of the Walsh-Healey Public Contracts Act" (for example, specifications or requirements for the procurement of materials, supplies, articles, and/or equipment). 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.

3-12. Shipbuilding, Alteration, and Repair -versus- Vessel Inspection, Maintenance, or Cleaning.

a. FAR 2.101, Definitions, provides that the term "construction" does not include the

manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of "vessels." This is likely based on old legislative enactments that contracts for the construction, alteration, furnishing or equipping of a naval vessel are subject to the Walsh-Healey Act. However, the Secretary of Labor, who is tasked with the administration of both the Walsh-Healey and Davis-Bacon Acts, has interpreted the Walsh-Healey Act as applying only to the construction of naval (U.S. Navy and U.S. Coast Guard) vessels. Thus, contracts calling for the construction, alteration or repair of Corps vessels are subject to the Davis-Bacon Act, except as noted in the next paragraph.

b. Wage determinations for construction, alteration, or repair of vessels under the DBA are issued only if the location of contract performance is known or "reasonably can be foreseen to be," (see 22.402(a)(1)(i)) when bids are solicited. 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 or cannot be reasonably foreseen to be known, as may be the case with drydock contracts, the contract will be exempt from the requirements of the Davis-Bacon Act. See FAR 22.402 (a)(1)(i); see also 17 Comp. Gen. 585, A-90983, January 21, 1938. 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 performing at a specific site, or (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 inspection, maintenance, and/or cleaning, rather than construction, alteration, or repair, of a ship or vessel, including Corps vessels, is a service contract within the meaning of the SCA. In contrast with vessel construction contracts, unknown place of performance for vessel service contracts is handled in accordance with FAR 22.1009.

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.

3-13. Architect-Engineer Services.

a. As discussed in paragraph 3-3 above, service contracts involving a significant or substantial use of service employees along with use of bona fide executive, administrative, or professional personnel in the contract's performance are SCA-covered contracts. Thus, SCA applies to an A-E contract if the scope of work involves to a "significant or substantial extent" the use of service employees engaged in such work as computer services; data collection, processing, and/or analysis services; drafting and illustrating (such as CAD); exploratory drilling (other than part of construction); geological field surveys and testing; and surveying and mapping (not directly related to construction). See FAR 22.1003-5 and 29 CFR 4.130 for additional examples

of other types of services covered by SCA. See also Chapter 14 of the DOL Field Operations Handbook, section 14d, for a detailed discussion of these types of services.

b. Unfortunately, there are neither statutory nor regulatory criteria (for example, percentage of contract cost) available to assist COs in determining what constitutes a "significant or substantial extent." DOL has applied an informal rule of thumb which excludes from SCA contracts that are at least 80% to be performed by exempt employees (such as, persons who are bona fide executive, administrative, or professional personnel as defined by 29 CFR Part 541). Therefore, the 10-20% parameters discussed above in paragraph 3-2 may be a good rule of thumb to follow for A-E contracts. However, there is no rule barring the application of SCA to such contracts that have less than 80% exempt employees, and in some cases, particularly where there is a large number of nonexempt employees involved (even if the ratio of nonexempt employees to total employees is small), DOL may issue a wage determination. Therefore, the easiest course of action is simply to include SCA clauses and wage rates whenever "service employees" are required in an A-E action. FAR clause 52.222-41 defines "service employee" for the contractor and specifies that each service employee employed in the performance of the contract by the contractor, or any subcontractor will be paid not less than the minimum wages and fringe benefits as specified in the applicable wage determination(s).

c. A particular difficulty of the application of SCA to A-E actions, though, is the location(s) where the service employees will be performing the SCA covered work. Many A-Es have satellite offices to which they can farm out portions of their work, and in the increasing remote and digital landscape, it is possible that work can be performed virtually anywhere. Pending further guidance from DOL, the recommendation is to add language to the solicitation/contract that puts the contractor on notice that the contract (or order, as applicable) is subject to SCA, and directs them to where wage determinations can be found online, now available at SAM.gov (see Chapter 5).

d. Sample language that can be used is as follows: "This contract is subject to the provisions found in clause 52.222-41 and to all other applicable provisions of 41 U.S.C. chapter 67, Service Contract Labor Standards, and regulations of the Secretary of Labor (29 CFR Part 4). Each service employee employed in the performance of this contract by the Contractor or any subcontractor will be paid not less than the minimum monetary wages and will be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, as specified in the wage determination applicable to the locality where the work is performed, in effect on the date of award of this contract. "Service employee" means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Part 541 of Title 29, Code of Federal Regulations, as revised. It includes all such persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

Note: This language is provided as a sample only. Please consult with your CIRS and Office of Counsel for the language most appropriate for your contract (or order). 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.

3-14. Mapping and Surveying Services.

a. Although the Corps is required to procure surveying and mapping services in accordance with Brooks Architect-Engineer Act (40 USC chapter 11) processes (see 33 USC 569b, FAR 36.601-4, and EP 715-1-7), surveying and mapping services not directly related to construction (such as, part of and during a construction contract) are subject to SCA. See 29 CFR 4.130; EP 715-1-7, paragraph 4-9. Thus, as discussed above, SCA applies to an A-E contract if the scope of work involves the use of service employees engaged in such work as mapping or surveying to a "significant or substantial extent."

b. For a contract that consists solely of mapping and surveying services, as opposed to an A-E design type contract that may include some mapping and surveying, the wage determination for the location of the home office of the prime contractor will be used instead of the location of the performance of the work. This wage rate request process 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 A-E selection procedures. 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 noted above, the Corps is required to procure surveying and mapping services by means of the qualification-based selection process of the Brooks Architect-Engineer Act.

c. 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. In response to the above concerns, the DOL has agreed to using the wage determination for the location of the home office of the prime contractor instead of the location of the performance of the work. See also EP 715-1-7, paragraph 4-9.

3-15. Park/Gate Attendant Services.

a. With respect to the applicability of the SCA to park/gate attendant services commonly performed by family-owned businesses (such as, "Ma-and-Pa" contracts) under Civil Works Operation & Maintenance contracts, it depends on whether the contract is directly with the Park/Gate Attendant(s) themselves. If the prime contract is directly with the Park/Gate Attendant, SCA does not apply. The SCA specifically exempts any employment contract providing for direct services to a Federal Agency by an individual or individuals (see 41 USC 6702(b)(6); FAR 22.1003-3(f); 29 CFR 4.121).

b. If the contract is not directly with the individual or individuals providing the park/gate attendant services, SCA applies, regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such person. Thus, even where a contractor uses so called "independent contractors" to fulfill the park/gate attendant services, such persons are subject to SCA.

c. Note that 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.

3-16. Demolition, Dismantling, and Removal of Improvements

a. Contracts for demolition, dismantling, or removal of buildings, ground improvements, and other real property structures, or portions thereof, are subject to the SCA when their principal purpose is the furnishing of the dismantling/demolition/removal services, and no further construction at the site is contemplated. This remains true even if the demolition contractor receives salvaged materials as part of the contract (see 29 CFR 4.131(f)). However, if further construction is contemplated, even by separate contract, then the dismantling/demolition/removal contract would be subject to the Davis-Bacon Act. See 29 CFR 4.116(b) and FAR 37.301.

b. Asbestos or paint removal performed as a prelude to or in conjunction with a contract for the demolition of a public building or a public work would be subject to the SCA, if subsequent construction on the site is not contemplated. However, asbestos or paint removal being done as part of a general cleanup of a public building or work, that is not a prelude to demolition, is considered "alteration" by DOL and is therefore subject to the Davis-Bacon Act. This view is consistent with previous determinations that contracts for sandblasting or hydrostatic cleaning of public works are subject to the DBA. See DOL All Agency Memorandum No. 153, Application of the Davis-Bacon Act to Contracts for Asbestos and/or Paint Removal.

c. Contracts for Disaster Relief – SCA applies to cleanup, debris removal, or damage assessment contracts awarded by a federal agency. USACE, often on behalf of the Federal Emergency Management Administration, awards cleanup and assessment contracts in disaster areas. These contracts are subject to SCA.

3-17. Mixed or Hybrid Contracts.

a. One of the more troublesome issues in determinations of SCA applicability and coverage relates to mixed or hybrid contracts, such as, those that are comprised of separate service, construction, and/or supply elements. For example, a contracting agency may advertise for the installation of a plumbing system or for the installation of a security alarm system in a public building (DBA) and for the maintenance of the system for one year (SCA), all under one contract. Another example of a mixed or hybrid contract is the acquisition of a relocatable/temporary facility (see DoDI 4165.56, Relocatable Buildings). The set-up and demobilization of such a facility is considered construction (DBA) for wage rate purposes, but any maintenance services for the facility (such as during a lease period) are subject to SCA. 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 services, then the SCA would not apply (see discussion above in 3-2 and 3-13).

b. Even 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), "Nonconstruction contracts involving some construction work"; see also 29 CFR 4.116(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 (the word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract (whether in absolute dollars or cost percentages), while "segregable" refers to the construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract);

(2) The aggregate of such work exceeds or is expected to exceed $2,000; and

(3) The construction work is to be performed on a public building or public work

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.

3-18. Installation Support Contracts.

a. Certain installation support contract requirements such as custodial work or snow removal may be easily identified as being subject to the SCA. However, other installation requirements such as roof shingling, building structural repair, 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, DFARS 222.402-70(d) lays out some brightline thresholds. It provides that in those instances where a contract service call or order requires construction trade skills (such as, carpenter, plumber, painter, etc.), but it is unclear whether the work required is SCA maintenance or DBA painting/repairs, apply the following rules:

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

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

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

b. The determination of labor standards application will be made at the time the solicitation is prepared in those cases where the requirements can be identified. Otherwise, the determination will be made at the time the service call or order is placed against the contract. The service call or order will identify the labor standards law and contract wage determination which will apply to the work required. Note that COs will not avoid application of DBA by splitting individual tasks between orders or contracts.

3-19. Environmental Remediation/Restoration Contracts.

a. With regard to USACE's mission in the area of environmental remediation and restoration (such as, the Defense Environmental Restoration Program, work for others (such as, Environmental Protection Agency Superfund), Rapid Response, Total Environmental Restoration

Contracts or TERCs), while these are deemed to be contracts principally for services, they also typically have provisions for work that is subject to Davis-Bacon and that may be both substantial and segregable (see FAR 22.402(b) and 29 CFR 4.116(c)). Therefore, such contracts (or orders) may need to include both SCA and DBA clauses and wage determinations, as well as instructions for the contractor as to what work falls under SCA or DBA.

b. Typical service activities at environmental remediation/restoration sites may include:

- Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment
- Engineering and technical services
- Operation of government-owned equipment, facilities, and systems
- Transportation and related services
- Research and development
- Chemical testing and analysis
- Data collection and analysis
- Geological field surveys and testing
- Laboratory analysis
- Landscaping (other than as part of construction)
- Solid waste removal

(1) Operation and maintenance of treatment units (such as, incinerator units, pugmill systems, water treatment plants). While services under these types of contracts may be performed by either "professional" and/or "non-professional" personnel (see 29 CFR part 541 for definition of bona fide professional employees), COs will include FAR 52.222-41, and other SCA clauses as applicable, plus the applicable SCA wage determination(s) in environmental remediation/restoration contracts, unless it is determined that little or none of the work will be performed by service employees (see discussion in 3-2 and 3-13, above).

c. As noted above, environmental remediation/restoration contracts also typically include work such as substantial excavation and reclamation type work (for example, "moving dirt"), as well as other construction type activities. Where this type of work is both substantial and segregable, DOL has long held that these types of work activities fall under DBA rather than SCA. See, for example, Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE) and Local No. 8-652, ARB Case No. 04-033, Nov. 30, 2005 (2005 WL 3263821 (DOL Adm.Rev.Bd.)). Note that this decision also underscores DOL's authority to interpret the Davis-Bacon Act. In this decision, DOL Wage and Hour Division relied on previous DOL guidance on this topic: DOL AAM 155, Application of the Davis-Bacon Act to Hazardous Waste Cleanup Contracts, which discusses the application of DBA to environmental cleanup type contracts that involve elaborate landscaping activities or substantial excavation and reclamation work; and DOL AAM 187, Application of Labor Standards Provisions to Hazardous Materials (HAZMAT) Cleanup Contracts.

d. Work that is subject to Davis-Bacon at an environmental remediation/restoration site may include:

- Construction of either temporary or permanent water treatment system(s)
- Construction of a water distribution system
- Excavation, consolidation, and /or capping of contaminated soil
- Backfilling, regrading, and/or reseeding of excavated areas
- Removal of underground storage tanks (USTs) and backfill of excavated area
- Installation of a security fence/warning signs
- Clearing and construction of access roads

e. Where an environmental remediation/restoration contract includes both SCA services and DBA construction, the contract will need to include both SCA and DBA clauses and wage determinations, as well as instructions for the contractor as to what work falls under SCA or DBA.

f. The instructions may be included in the Performance Work Statement - for example:

WAGE RATE DETERMINATIONS

Both the Service Contract Act (SCA) (Service Contract Labor Standards) and the Davis-Bacon Act (DBA) (Construction Wage Rate Requirements) apply to this contract, because it includes a mixture of service and construction activities.

The Service Contract wage determination attached to this contract (WD ####-####) and Service Contract clauses apply to any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Part 541 of Title 29, Code of Federal Regulations, as revised. It includes all such persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons. The wage determination is applicable to [County, State] where the work required under this contract will be performed.

The Davis-Bacon wage determination attached to this contract (WD # and Name), and the Davis-Bacon and Related Act clauses in the contract, apply to [identify specific tasks, e.g., "installation of groundwater monitoring wells (Base Task 3, Option Task 3)"]. The work under this contract will be performed in the state of [], [] County.

Note: This language is provided as a sample only. Please consult with your CIRS and Office of Counsel for the language most appropriate for your contract (or order).

3-20. 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 SCA if such drilling operations are not directly connected with the construction of a public work. See 29 CFR 4.130. 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. See DOL Field Operations Handbook Chapter 15, paragraph 15d05.

3-21. 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. The SCA specifically exempts any employment contract providing for direct services to a Federal Agency by an individual or individuals. See 41 USC 6702(b)(6); FAR 22.1003-3(f); 29 CFR 4.121.

3-22. Contracts with States and Political Subdivisions. States and their political subdivisions may

obtain a Federal service contract and undertake to perform it with state or municipal employees (including, 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. This includes contracts entered into with States and their political subdivisions for the purposes of increased law enforcement services at USACE water resource development projects, as discussed in the next section.

3-23. USACE Law Enforcement Contracts at Civil Works Water Resource Projects.

a. 42 USC 1962d-5d provides that the Secretary of the Army, acting through the Chief of Engineers (USACE), may 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 to meet needs during peak visitation periods. These are the law enforcement contracts USACE commonly sets up with local law enforcement for services at our lakes and parks. ER 1130-2-1150, Chapter 7, paragraph 7-2(b) states that, "In addition to the enforcement of state or local laws, [contracts] for law enforcement services may be used for other related activities such as, but not restricted to, patrols in remote areas, serving bench warrants, fee collection and other services as determined by the Operations Project Manager. The activities included in an agreement depend on what can be negotiated with the law enforcement agency. In no case will [these contracts] include the provision of water safety patrols or the enforcement of state boating laws." (Note that these 42 USC 1962d-5d actions are to be done as procurement contracts, despite the use of the term "cooperative agreements" or "agreements" in EP 1130-2-550 and ER 1130-2-550 – see CECC-G Legal Opinion, Law Enforcement Services at Corps Water Resources Development Projects Under 42 USC 1962d-5d, dated 02 November 2005).

b. As discussed in the previous section, contracts with States and political subdivisions for services are subject to SCA, even where State or municipal employees are used to provide the services. 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.

c. Because these USACE law enforcement contracts are authorized by statute, they are exempt from the full and open competition requirements of the Competition in Contracting Act in accordance with FAR 6.302-5. Further, the wages for the employees of these State or local law enforcement agencies are generally established by their local jurisdictions and/or local collective bargaining agreement. Therefore, DOL has advised that for purposes of determining SCA wage rates for these actions, DOL will adopt as prevailing the established wages for the respective law enforcement agency. In submitting SCA wage rate requests to the DOL, COs are advised to

clearly indicate that the subject solicitation will be a sole-source type procurement. The DOL has recommended that such information be furnished within Block 6, Services to Be Performed, of the Standard Form SF 98 (e98), Notice of Intention to Make a Service Contract.

3-24. 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.

3-25. Nonappropriated Fund Contracts. The SCA applies to Nonappropriated Fund Contracts (NAF) service contracts over $2,500. See AR 215-4, paragraphs 1-22 and 7-9. This includes labor intensive contracts that provide services to civilian nonappropriated fund instrumentalities (NAFIs). 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.

a. SCA does not apply to any contract for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect. See FAR 22.1003-3 and 29 CFR 4.118. In order for this exemption to be applicable, the contract must be for such carriage by a common carrier described by the terms used. It does not, for example, apply to contracts for taxicab or ambulance service, because taxicab and ambulance companies are not among the common carriers specified by the statute. Also, a contract for transportation service does not come within this exemption unless the service contracted for is actually governed by published tariff rates in effect per State or Federal law for such carriage.

b. The contracts excluded from the SCA by this exemption are typically those where there is on file with the Interstate Commerce Commission or an appropriate State or local regulatory body a tariff rate applicable to the transportation involved, and the transportation contract between the Government and the carrier is evidenced by a Government bill of lading citing the published tariff rate. There is also an administrative exemption for certain contracts where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act and is in accordance with applicable regulations governing such rates. See FAR 22.1003-4(b)(3) and 29 CFR 4.123(d). Note that only contracts principally for the carriage of "freight or personnel" are exempt. Thus,

the exemption does not apply where the principal purpose of the contract is packing, crating, handling, loading, and/or storage of goods prior to or following line-haul transportation.

c. The fact that substantial local drayage to and from the contractor's establishment (such as a warehouse) may be required in such contracts does not alter the fact that their principal purpose is other than the carriage of freight. Also note that 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, SCA & Motor Carriers, no longer qualify for the statutory exemption set forth at Section 7(3) of the Service Contract Act.

3-27. Exemption for Certain Commercial Service Contracts.

a. Except for solicitations and contracts (i) awarded under 41 USC chapter 85 (Committee for Purchase from People Who Are Blind or Severely Disabled – see FAR subpart 8.7); (ii) for the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services); or (iii) subject to 41 USC 6707(c) (see FAR 22.1002-3, Wage determinations based on collective bargaining agreements), the Secretary of Labor has exempted from SCA contracts and subcontracts in which the primary purpose is to provide the following services, if certain conditions are met:

(1) Automobile or other vehicle (such as, aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).

(2) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(3) Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

(4) Maintenance, calibration, repair, and/or installation (where the installation is not subject to Davis-Bacon, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

(5) 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).

(6) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(7) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which will not include actual moving or storage of household goods and related services).

b. The exemption for the above services only applies if all the following conditions are met for a contract (or for a subcontract) – see FAR 22.1003-4(d)(2); see also 29 CFR 4.123(e)(ii):

(1) Except for maintenance, calibration, repair, and/or installation services, as described above, the contract 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 or, with the combination of other non-price or cost factors at least as important as price or cost.

(2) The services under the contract 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 (for example, they are commercial services).

(3) The contract services are furnished at prices that are, or are based on, established catalog or market prices (as defined at FAR 22.1003-4(d)(2)(iii) and 29 CFR 4.123(e)(2)(ii)(C)).

(4) Each service employee who will perform services under the contract will spend only a small portion of the employee's 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.

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

(6) The CO (or prime contractor with respect to a subcontract) determines in advance before issuing the solicitation, 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 conditions. If the services are currently being performed under contract, the CO (or prime contractor with respect to

a subcontract) will consider the practices of the existing contractor in making a determination regarding the above conditions.

(7) The apparent successful contractor certifies in the prime contract or subcontract, as applicable, that the conditions in FAR 22.1003-4(d)(2)(ii) through (v) will be met, and for other than sole source awards, the CO determines that the same certification is obtained from substantially all other offerors that are (i) in the competitive range, if discussions are to be conducted (see FAR 15.306(c)); or considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

c. See FAR 22.1003-4(d)(3) for discussion of contract award or resolicitation of acquisitions subject to the exemption at FAR 22.1003-4(d). Note that after award, if DOL determines that any conditions for exemption at FAR 22.1003-4(d)(2) have not been met, the exemption will be deemed inapplicable, and the contract will become subject to SCA. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

Chapter 4
Pre-Service Contract Award and Formation Issues

4-1. General. 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 practicable. Experience has indicated that where the determination of the appropriate labor standards statutes and provisions are an addendum or afterthought rather than an integral element within the procurement planning process, the potential for disruption of solicitation 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 Formation 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 contracts. However, noted below are some of the more problematic issues that have arisen in recent years.

4-3. Selecting the Appropriate SCA Wage Determination. It is essential that COs recognize the various types of SCA Wage Determinations (WDs) developed by the DOL. The DOL issues two basic types of SCA WDs: WDs based on prevailing wage rates (FAR 22.1002-2), and WDs based on collective bargaining agreements (CBAs) (FAR 22.1002-3).

a. Prevailing Wage SCA WDs (FAR 22.1002-2; 22.1008-1; 22.1012-1; 22.1013). 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, such as, 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) fringe benefit 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 (for example, WD No. 2015-21**03** or WD No. 2015-21**13**) 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 (for example, WD No. 2015-21**04** or WD No. 2015-21**14**) 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 grandfathered as part of DOL

rulemaking in 1996. For additional background on DOL's revised procedures for SCA H&W fringe benefit levels, see All Agency Memorandum 188. DOL updates the SCA H&W fringe benefit annually (see, AAM 237, issued July 29, 2021).

(a) 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.

(b) The SAM.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 (Were these services previously performed under an SCA covered contract? Are the contract services to be performed a Non-Standard Service?). COs should contact the CIRS for additional guidance on the application of the two rates.

Note: As of July 24, 2021, even numbered SCA WDs have been removed from SAM.gov. Users should use the DOL e98 process. See Appendix D, g. of this EP.

(2) Non-Standard WDs are issued by DOL to reflect prevailing wages and benefits in specific service industries (such as, Aerial Photographers/Seeding/Spraying Services, Quality Assurance Services) in designated localities (often regional or nationwide). 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 SAM.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 (for example, USACE law enforcement contracts discussed in paragraph 3-22 above). The SCA WD applicable to such a contract will be the rates established by the sole-source contractor. If a CO has determined that neither a Standard WD nor a Non-Standard WD is appropriate or available 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 (FAR 22.1002-3; 22.1008-2; 22.1010; 22.1012-2; 22.1013).

(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 Section 4(c). For section 4(c) to be applicable, the predecessor contract must involve substantially the same services being provided in the same locality. See 29 CFR 4.163(i). The successor contractor is obligated to pay its service employees the CBA rates whether or not the employees of the predecessor contractor are hired by the successor contractor. See 29 CFR 4.163(a). The provisions of section 4(c) are generally self-executing and failure to include the CBA rates in the wage determination issued for the successor contract does not relieve a successor contractor of the statutory requirements to comply with the CBA rates. See 29 CFR 4.163(b). DOL has applied a limitation on the self-executing aspects of Section 4(c) (see 29 CFR 4.1b(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.

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

(a) A revised CBA will 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 will 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 will apply to the successor contract if received no later than 10 days prior to start of performance.

(3) For contract actions resulting from sealed bidding:

(a) A revised CBA will 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.

(b) 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. The SAM.gov database will not contain a copy of the CBA itself; it will only retain copies of the cover CBA WDs. Contractors and other SAM.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.

(c) The SAM.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)).

Note: The successorship provisions of section 4(c) apply to full term successor contracts. Bridge or short-term interim contracts due to bid protests, default by the predecessor contractor, temporary closing of facility, etc., are not predecessor contracts for section 4(c) purposes and do not negate the application of section 4(c)'s successorship provisions to the full term contract awarded after the temporary interruption or hiatus. However, contractors are required to pay the predecessor contractor's CBA rates during short-term interim contracts. See 29 CFR 4.163(h).

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 6707(c); 29 CFR 4.163, 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, as follows:

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" negotiation.

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, 22.1008-2, 22.1013, 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. As noted above, 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).

Note: The obligation of the successor contractor is limited to the wage and benefit requirements of the predecessor contractor's CBA and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc. See 29 CFR 4.163(a).

4-5. Effective and Expiration Dates of CBAs. Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, section 4(c) would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the predecessor contract. See FAR 22.1008-2(c)(1) and 29 CFR 4.163(f).

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 the contract, 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 (issuance of solicitation, opening of bids, commencement of negotiations, award of contract, or start of performance, as the case may be; or exercise of option, extension of contract, change in scope, or start of performance, as the case may be), or the forthcoming annual or biennial anniversary date of a multiple year contract.

4-7. Substantial Variance. Requests for a DOL "substantial variance" hearing or "arm's length" determination involve the use of Administrative Law Judges in accordance with the DOL's regulations. For either type of request, information must be submitted (in accordance with FAR 22.1021) as follows:

a. For sealed bid contracts, more than 10 days before contract award; or

b. For negotiated contracts and for contracts with provisions exceeding the initial term by option, before the commencement date of the contract or the follow-up option period.

Note: See also, 29 CFR 4.10 and 4.11. Requests for DOL determinations under these regulations should be forwarded to the District Labor Advisor for coordination with CECC-C.

4-8. Seniority Lists - 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, FAR 22.1020 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, together with anniversary dates of employment on the contract with either the current or predecessor contractors of each such service employee, to the CO not less than 10 days before contract completion. This requirement is found in clause 52.222-41, paragraph (n). 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 29 CFR

4.6(l)(2).

4-9. Prospective Contractor's Compliance with VETS-4212 Reporting Requirement. One of the contracting agency's pre-award obligations is to ensure that prospective contractors have complied with certain affirmative action reporting requirements as described below.

a. Under the Vietnam Era Veterans' Readjustment Assistance Act, any contractor or subcontractor with a contract of $150,000 or more with the Federal Government must take affirmative action to hire and promote qualified covered veterans as defined by 38 USC 4212. As addressed in FAR 22.1302, contractors and subcontractors must list all employment openings with the appropriate employment service delivery system where the opening occurs, except for executive and senior management positions, positions to be filled from within the contractor's organization, and positions lasting three days or less. 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 at least 50 employees and a $150,000 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, as well as disseminated all information internally regarding promotion activities.

b. As provided by FAR 22.1303(c) and 22.1306(b), covered employers must file at least annually a VETS-4212 report, which reflects employment of protected veterans (such as, active duty wartime or campaign badge veterans, Armed Forces service medal veterans, disabled veterans, and recently separated veterans, unless all of the terms of the clause at 52.222-35, Equal Opportunity for Veterans, have been waived (see 22.1305). Instructions, information and follow-up assistance is provided to employers who do not understand the reporting and other legal requirements. See Appendix D, h. of this EP.

c. USACE personnel tasked with ensuring prospective contractor compliance with this obligation may access DOL's VETS-4212 Database. See Appendix D, i. of this EP. Additionally, the CO may contact the VETS-4212 customer support via e-mail at VETS4212-customersupport@dol.gov for confirmation, if the proposed contractor represents that it has submitted the VETS-4212 Report and is not listed on the verification file.

4-10. Pre-Award Clearance from the Office of Federal Contract Compliance Programs.

a. Except as provided below, if the estimated amount of the proposed service contract or subcontract is $10 million or more, the CO will 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. Pre-award clearance for each proposed contract and for each proposed first-tier subcontract of $10 million or more will be requested by the CO directly from the OFCCP regional office(s). Verbal requests will be confirmed by letter or facsimile transmission. See FAR 22.805(a). FAR 22.805(a)(5) provides a list of the information a CO must submit in a pre-award clearance request.

b. When the contract work is to be performed outside the United States with employees recruited within the United States, the CO will send the request for a pre-award 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 pre-award clearance request action should be based on the location of the recruiting and training agency in the United States. FAR 22.805(a)(3).

c. The CO does not have to request a pre-award clearance if: (i) the specific proposed contractor is listed in the OFCCP's National Pre-award Registry; (ii) the projected award date is within 24 months of the proposed contractor's Notice of Compliance completion date in the Registry; and (iii) the CO documents the Registry review in the contract file. See FAR 22.805(a)(4). The OFCCP has established an on-line registry to facilitate procurement of the pre-award clearance. See Appendix D, j of this EP. 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 regulations that the OFCCP is mandated to enforce.

d. 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.

e. 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. If the Contractor Facility in question is not found in this Registry, USACE personnel should contact the appropriate

OFCCP Pre-Award Clearance Officer in their Regional area. Questions concerning the appropriate OFCCP Regional Office, USACE personnel may contact the OFCCP National Office, in Washington D. C.

f. In accordance with FAR 22.805(a)(8), if the pre-award clearance request procedures specified in FAR 22.805(a)(6) and (a)(7) would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the offer or extension thereof, the CO will immediately inform the OFCCP regional office of the expiration date of the offer or the required date of award and request clearance be provided before that date. If the OFCCP regional office advises that a pre-award evaluation cannot be completed by the required date, the CO will submit written justification for the award to the head of the contracting activity, who, after informing the OFCCP regional office, may then approve the award without the pre-award clearance. UAI 5122.805(a) provides that the Chief of the Contracting Office is delegated the authority under FAR 22.805(a)(8) to approve award without pre-award clearance. If an award is made under this authority, the CO will immediately request a post-award evaluation from the OFCCP regional office.

Chapter 5
Wage Determinations OnLine – SAM.gov

5-1. General. DOL's former website for obtaining wage determinations, wdol.gov, has been migrated to the System for Award Management (SAM), available at https://sam.gov. See Appendix D, a. of this EP.

5-2. Application. While the SAM.gov Wage Determinations program is designed to be user - friendly in a menu-driven environment, it is strongly recommended that USACE personnel familiarize themselves with both the online resources as well as this Pamphlet to ensure the appropriate application of labor standards to USACE contracts. Neither the SAM.gov WD program nor the accompanying online resources relieve the CO or other program users of the requirement to carefully review the scope of work for the solicitation, the FAR and its supplements, and/or DOL regulations related to these actions. Where the CO selects a SCA WD using the SAM.gov WD program and DOL later determines, whether before or after contract award, that the appropriate SCA WD was not incorporated in a covered contract, the CO, within 30 days of notification by DOL, will include in the contract the applicable WD issued by DOL. See FAR 22.1015 and 29 CFR 4.5(c).

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

a. Navigating an e-98 request. The procurement of SCAWDs under the SAM.gov program 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 SAM.gov program contains a link to the DOL's website hosting the e98 module. See Appendix D, g. of this EP. It is also noted that if a CO cannot determine an appropriate SCA WD within the SAM.gov 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.

b. Health & Welfare Fringe Benefit Rates on Standard WDs. As noted in paragraph 4-3(a)(1) of this Pamphlet, the Standard WD selection process is designed to lead the SAM.gov program user to the appropriate WD. H&W rates can be found at the end of a standard WD. Two H&W rates are listed, including one subject to EO 13706, Establishing Paid Sick Leave for Federal Contractors. The H&W rate subject to EO 13706 is to be used only when compensating employees for performance on an SCA- covered contract also covered by EO 13706 (see FAR 22.2103 and 22.2104). A contractor may not receive credit toward its SCA obligations for any paid sick leave provided under EO 13706.

c. Non-Standard WDs. These WDs are issued by DOL to reflect prevailing wages and benefits in specific service industries (for example, Aerial Photographers/Seeding/Spraying Services, Quality Assurance Services) in designated localities (often regional or nationwide). 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 SAM.gov 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.

d. 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 (for example, USACE law enforcement contracts discussed in paragraph 3-22 above). The SCA WD applicable to such a contract will be the rates established by the sole-source contractor. 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.

e. 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. See paragraph 4.3.b above. While the SAM.gov 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 issuance of the solicitation, re-solicitation, exercise of an option, extension of contract, significant change in the scope of work, or the forthcoming annual or biennial anniversary date of a multiple year contract.

(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 SAM.gov database will not contain a copy of the CBA itself; it will only retain copies of the cover CBA WDs. Contractors and other SAM.gov 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 SAM.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)).

f. "Following" a Wage Determination. 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 SAM.gov program user may register for automatic email notification of such revisions. After signing into SAM.gov, upon selection of an appropriate SCA WD, select the "Follow" link at the top of the WD record. By default, you will receive immediate notifications of changes to the WD. To manage the WDs that you follow, go to the "Profile" section of your Workspace and select the "Following" icon. The items you are following will be listed in a table. You can use the "Domain" filter on the left to narrow the list to wage determinations. You can change the frequency of email notifications by using the dropdown menu in the "Email Frequency" column next to each item. You can use the dropdown menu in the "Action" column to unfollow a WD.

g. Inactive SCA WDs. Once DOL revises an SCA WD, the default setting on SAM.gov shows only the most current revision. Users may view older, inactive WDs by selecting "Inactive" under "Status" in the selection pane. COs should not use an inactive 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 (29 CFR 4.5) and FAR 22.1012. For purposes of using SAM.gov, the time of receipt by the contracting agency will be the first day of publication of the revised prevailing wage determination on the website. All SCA WD revisions for a given week are posted on the SAM.gov program database on a regular basis; however, field staff must be diligent about checking SAM.gov for SCA wage determination revisions (see paragraph 5.3(f) about "following" a wage determination). For purposes of using the e98 process, the time of receipt by the contracting agency will be the date the agency receives actual notice of a new or revised prevailing wage determination from the Department of Labor as an e98 response. (If the contracting officer has submitted an e98 to the Department of Labor requesting a prevailing wage determination and has not received a response within 10 days, the contracting officer should contact the Wage and Hour Division by telephone to determine when the wage determination can be expected); or contact the HQs Labor Advisor.

a. For contract actions resulting from other than sealed bidding (FAR 22.1012-1(c)):

(1) A revised SCA WD will 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 or modification, it will NOT be effective if contract performance starts within 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 not less 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 29 CFR 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 will NOT be effective if received by the contracting agency less than 10 days prior to opening of bids, unless there is not reasonable time to amend the solicitation and incorporate the revised WD. FAR 22.1012-1(b).

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 is accomplished by inclusion of FAR clause 52.222-42, Statement of Equivalent Rates for federal Hires. As stated in the clause, 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; however, note that this clause is still required in all service contracts over $2,500 – see FAR 22.1006(b). 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. See Appendix D, k. of this EP. 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, for example, a request for authorization of additional classification(s) and rate(s), is the process which establishes wage rates for classes of employees which are not included in the applicable wage determination already issued (for example, the work to be performed is not performed by any classification listed in the wage determination). The DOL's regulations outlining conformance procedures are set forth at 29 CFR 4.6(b)(2); see also FAR 22.1019 and FAR Clause 52.222-41(c)(2). Information about the conformance process may also be found at the end of individual WDs. The conformance process results in expanding the wage determination to cover classes of service employees needed for the contract's performance (either prime or subcontracts) 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. Conformed wage rates must be paid to all employees in the affected class retroactive to the date such employees started any contract work. Such rates are treated as if the rates and classes had been included on the original wage determination issued for the contract.

b. The conformance action is initiated by the prime contractor following contract award through the submission of Standard Form (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)). The contractor completes blocks 2 through 15 on the form. Where a subcontractor is to use the requested classifications, the name and address of the subcontractor will be shown in block 10 and signed by the subcontractor in block 14. Where no subcontractor is involved, block 10 should show "Not Applicable."

c. It is important to emphasize that the contractor's proposal should 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. Further, there has to be a "reasonable relationship" (for example, an appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination.

d. It is essential that the contractor proposal address item 16 of the SF1444 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.

e. In reviewing 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 review of the conformance request:

(1) Conformances may not be used to artificially subdivide classes already listed in the WD. For example: A supply clerk is the same job (in terms of knowledge, skills, and duties) as the shelf-stocker, or stock clerk or 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 (for example, 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 (for example, 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) Subminimum rates for apprentices, student learners, and disabled workers are permissible in accordance with paragraph (q) of clause 52.222-41.

f. 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 alerted to the possibility that the contractor may be attempting to use a conformance to lower labor costs and thereby increase profits or competitive advantage.

6-3. Disposition of the Conformance Request.

a. The CO reviews the request for completeness and signs the SF 1444 designating the contracting agency's concurrence or disagreement with regard to the contractor's proposal. If the CO disagrees with the contractor's proposal, a statement must be attached supporting a recommendation for different rates. The CO then submits the proposal with all attachments to the Wage and Hour Division at DOL for review.

b. To submit completed SF 1444 Requests to the Department of Labor via email, scan the completed form and all supporting documents into a PDF file and attach to the email. Include the CO's name, address, telephone, and email address, and submit the email to: scaconformance@dol.gov.

Contracting Officers may also submit completed SF 1444 Requests to DOL via regular mail, addressed to:

U.S. Department of Labor, Wage and Hour Division
Branch of Construction Wage Determinations
200 Constitution Avenue NW
Washington, D.C. 20210

c. The Wage and Hour Division will approve, modify, or disapprove the action, or render a final determination in the event of disagreement within 30 days of receipt, or will notify the CO within 30 days of receipt that additional time is necessary. The final determination of the conformance action by the Wage and Hour Division will be transmitted to the CO who will promptly notify the contractor of the action taken (the contractor has 30 days to appeal the decision, so it is imperative we do not affect their appeal timeline by failing to forward the DOL decision timely). Each affected employee will be furnished by the contractor with a written copy of such determination or it will be posted as a part of the wage determination.

d. Pending a response from DOL, the contractor is obligated to pay the proposed wage and benefit rates. The wage rate and fringe benefits finally determined by DOL under the conformance process will be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Failure to pay such unlisted employees the compensation agreed upon by the parties and/or finally determined by the

Wage and Hour Division retroactive to the date such class of employees started contract work will be a violation of the SCA and the contract. See FAR clause 52.222-41(c)(2)(v); 29 CFR 4.6(b)(2)(v).

e. The contractor assumes the risk of misjudging unlisted rates when formulating the bid or proposal (see, for example, Sunstate International Management Services, Inc., B-227036, Jul. 31, 1987, 87-2 CPD ¶ 124). 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. Further, absent unusual circumstances, the conformance process is not considered a "change" to the contract and the contractor is not entitled to an equitable adjustment because the burden of inaccurate or missing wage rate classifications is placed on the contractor, not the Government, by the contract, the Service Contract Act, and case law. See, for example, Collins Intern. Service Co. v. United States, 744 F.2d 812 (Fed. Cir. 1984); Sterling Services, Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714; Northern NEF, Inc., ASBCA No. 44996, 94-3 BCA ¶ 27094.

6-4. Conformance Appeals.

a. After the contractor receives the conformance decision from DOL (forwarded by the CO), if they disagree with the decision, they may request to appeal it. The timeframe for the contractor to request an appeal is within 30 days of the date of the DOL conformance decision (again, why it is critical that the CO promptly forwards the decision). This is an appeal to DOL in accordance with DOL procedures, and is not done under the Disputes clause of the contract. The contractor may request the Branch of Construction and Wage Determination to review its conformance decision; this is referred to as a branch review. To appeal, the contractor submits a letter listing the concerns with the decision. A full statement of the contractor's position and any relevant information (wage payment data, project description, area practice material, etc.) should accompany the request. Normally, a decision of this type is made within 30 days. The Wage and Hour Administrator conducts this review. The request is sent to:

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

See 29 CFR 1.8. The conformance decision letter itself typically has information on contacting DOL about any questions or concerns regarding the conformance request. If the decision of the Administrator is not favorable, the contractor may appeal directly to the DOL Administrative Review Board (see 29 CFR Part 7). All ARB decisions are final.

b. The CO is also an "interested party" in a conformance, and as such, also may disagree

with the DOL's determination with respect to a conformance action. Like the contractor, 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, as discussed above. If the Administrator denies the request for re-consideration, the CO may pursue the matter through a petition to the ARB, as discussed above. Any appeals to the ARB should be closely coordinated with the District Labor Advisor.

6-5. Complaints.

a. 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 the employee's identity, will not be disclosed without the prior consent of the employee.

b. CIR Representatives should be cognizant of the "whistleblower" protections created by 10 USC 2409, Contractor employees: protection from reprisal for disclosure of certain information, implemented at DFARS Subpart 203.9, Whistleblower Protections for Contractor Employees. (Note: most of FAR Subpart 3.9 is only applicable to civilian agencies and not to DoD, with the exception of 3.909 – see FAR 3.900). 10 USC 2409 prohibits contractors and subcontractors from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing to certain entities information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, an abuse of authority relating to a DoD contract, a violation of law, rule, or regulation related to a DoD contract (including the competition for or negotiation of a contract), or a substantial and specific danger to public health or safety. Entities to whom disclosure can be made:

- A Member of Congress or a representative of a committee of Congress
- An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD
- The U.S. Government Accountability Office
- A DoD employee responsible for contract oversight or management
- An authorized official of the Department of Justice or other law enforcement agency

- A court or grand jury

- A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

c. In this regard, upon receipt of a SCA minimum wage rate complaint that includes an allegation of retaliatory discharge, a contracting officer will forward it to legal counsel or to the appropriate party in accordance with agency procedures. In the absence of an actual complaint, but upon observation of possible retaliatory actions (for example, pattern of employees with whom field staff conducted labor interviews then being discharged), field staff should contact their CIRS to discuss potential courses of actions (for example, initiation of a labor investigation, referral to DOL, Contractor Performance Assessment Reports evaluation).

6-6. Cooperation with the DOL. COs will cooperate with DOL representatives in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the DOL. See FAR 22.1024.

6-7. Withholding of Contract Payments.

a. In the event that a contractor fails to provide the requisite restitution to underpaid employees, applicable regulations (FAR 22.1022; 29 CFR 4.187) authorize the DOL to forward a request for a withholding of contract earnings. The CO may withhold - or, upon written request of the Department of Labor from a level no lower than that of Deputy Regional Administrator, Wage and Hour Division, Department of Labor, will withhold - the amount needed to pay such underpaid employees from accrued payments due the contractor on the contract, or on any other prime contract (whether subject to the Service Contract Labor Standards statute or not) with the contractor.

b. Under the SCA, withheld funds will 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 their authorized representatives, an Administrative Law Judge, or the Board of Service Contract Appeals. See 29 CFR 4.187 for an extensive discussion of the priority of withheld funds, which have been developed in light of both judicial and administrative determinations.

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)). Regardless, COs must 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 5122.103-4; this includes the CO.

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 CWHSSA. CWHSSA requires that certain contracts contain a clause (FAR clause 52.222-4) specifying that no laborer or mechanic doing any part of the work contemplated by the contract will be required or permitted to work more than 40 hours in any workweek unless paid for all such overtime hours at not less than 1 1/2 times the basic rate of pay). In this regard, the CO will follow the same procedures and file the same reports for violations of the CWHSSA under service contracts as are required under construction contracts (see FAR 22.303).

c. Typically, COs will be advised of CWHSSA violations by the DOL following the completion of a DOL SCA/CWHSSA investigation. DOL 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 the CO's own.

d. In those cases where the employees allege violations of the CWHSSA, COs will 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 the CO's recommendations with respect to the proposed assessment are to be prepared in accordance with FAR 22-406-8(d)(2)(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 will 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 will 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 the contractor/subcontractor's part or that of their 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 22.101-3, if the contract contains the clause at 52.222-1, Notice to the Government of Labor Disputes, the contractor must report any actual or potential labor dispute that may delay contract performance. The CO will consult with the District Labor Advisor concerning the reporting of relevant labor dispute information. In accordance with AFARS 5122.101-3, Army personnel cannot give information about work stoppages or labor disputes to representatives of labor or management without authorization from the labor advisor.

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 will 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 will 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 multiple year contracts without annual appropriations or options, revised WDs are incorporated biennially. See FAR 22.1007.

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 Standards - Price Adjustment (Multiple Year and Option Contracts), and FAR 52.222-44, Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment.

Note: Price adjustments are done under the authority of the applicable labor clause, not the Changes clause in the contract.

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. 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 (for example, 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 contract work hours

(2) Actual or projected pay (wage) records

(3) Documents supporting impact on fringe benefit costs

(4) Documents supporting accompanying payroll tax increases

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.

d. 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.

e. If a request for contract price adjustment is based on an increase in the SCA fringe benefits (for example, 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.

f. Contract Price Adjustment Computation Format. COs 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. 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 the labor 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.

d. An example is as follows: 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.

e. 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.

b. An example is a follows: 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.

c. 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.

(1) An example is as follows: 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.

d. 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.

e. Payroll taxes applicable to the wage adjustment. Employer payroll taxes which are calculated as a percentage of wages paid (such as, 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 .6% 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 (such as, state-issued tax notices) from the contractor. If an adjustment is due, it is only for the SUT percent times the wage rate differential.

(a) An example is as follows: 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 x 2080 hours x .02). If the cap was $13,000, then the cost to the employer would be $10.40 ($13,000 [cap] less $12,480 [amount earned in prior year] x .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, such as, 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 <u>not</u> 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 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 (such as, 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 its pay records that it 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.

c. Fringe Benefit Compliance Examples:

(1) Contractor A is working under a contract that contains an SCA WD requiring $10.00 per hour and $2.02 in fringe benefits. The contractor pays all of its 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 (because it is already paying in excess of the minimum). However, the contractor would be entitled to an adjustment for the $.10 per hour it must pay to comply with the new benefit rate of $2.12 per hour.

(2) Contractor B works under the same SCA WDs as noted above. However, the contractor pays its 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.

d. 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.

e. 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.

f. 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.

g. 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.

(1) An example is as follows: 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.

h. 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.

(a) An example is as follows: 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 the employee works through their employment 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).

(4) 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 its 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.

(a) An example is as follows: 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 x 12,000), but would not be entitled to the additional premium of $150 ($.30 x .5 x 1,000) that occurred due to 1,000 of the hours being overtime.

7-9. Wage Determinations Based on Collective Bargaining Agreements. 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. Collective Bargaining Agreement 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 discussed in paragraphs 7-8 and 7-9.

7-11. Collective Bargaining Agreement 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.

(1) An example is as follows: 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.

(1) An example is as follows: 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 (such as, 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.

(1) An example is as follows: 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.

a. An example is as follows: 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.

b. example is as follows: 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 its 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 person 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.

(a) An example is as follows: 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%

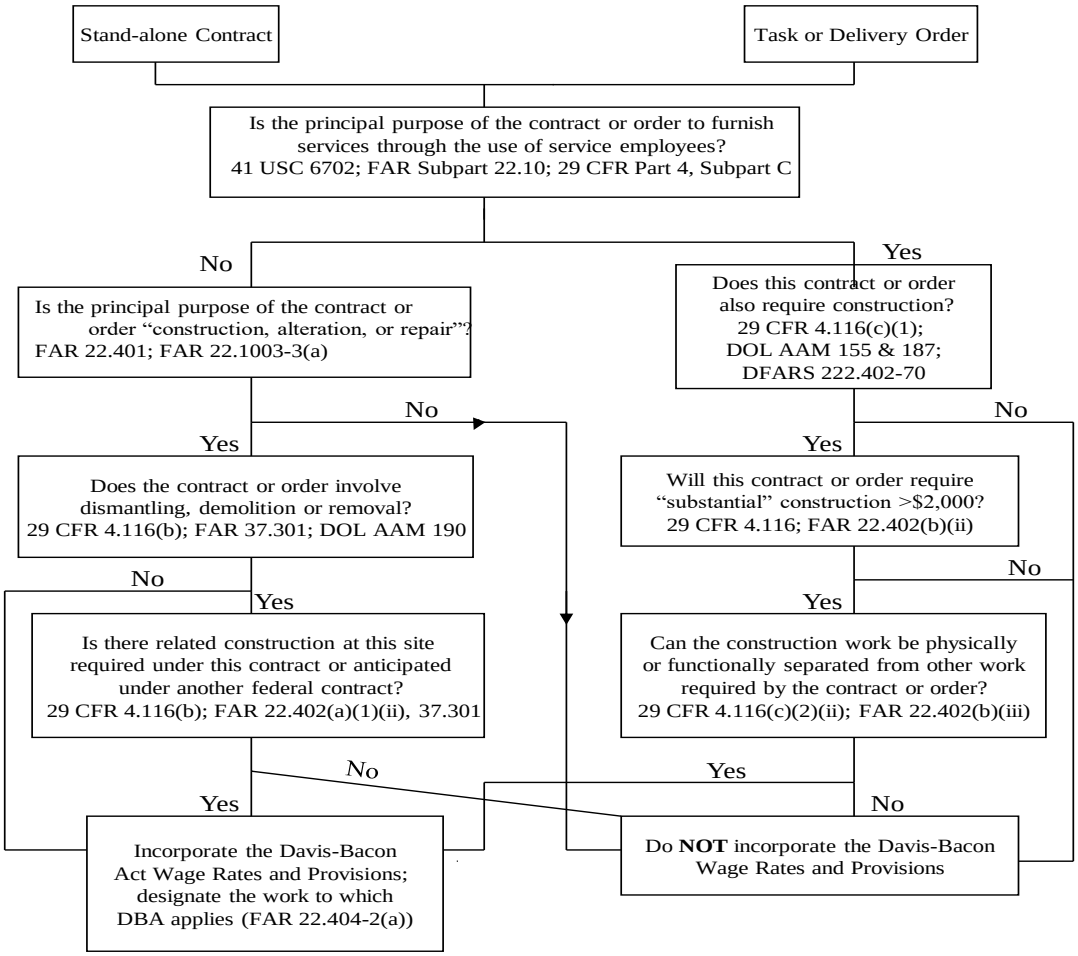
The total of these changes is 7%; divided by 5 to obtain the average change for listed classifications, which is 1.4% increase. This index rate is applied to the conformed Classification X ($10.00 times 1.4%) to provide the SCA enforceable new wage rate of $10.14 per hour. The increase of $.14 per hour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

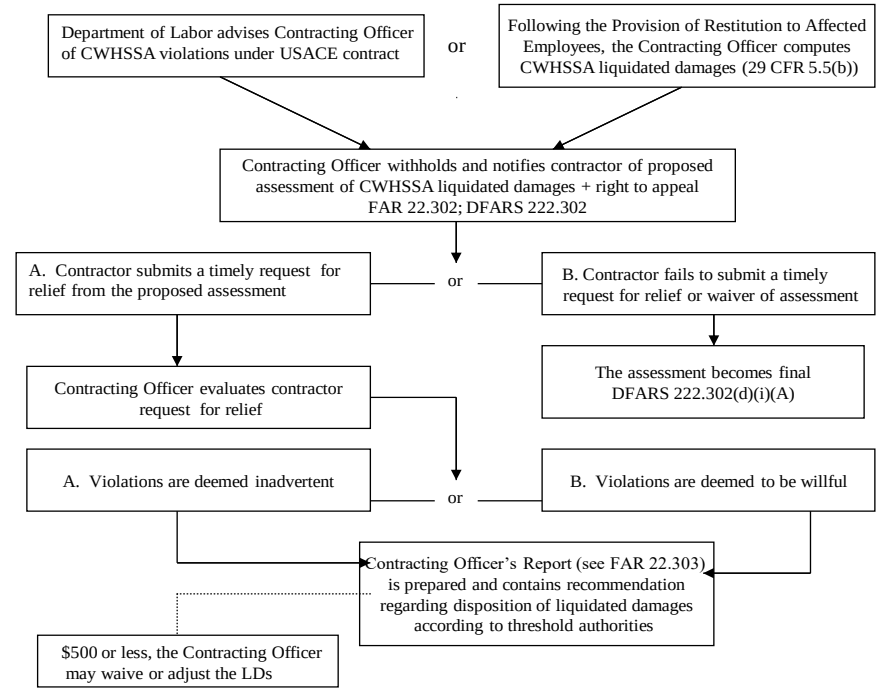
APPENDIX A

Labor Standards Decision Tree
Hybrid Service-Construction Contracts
(e.g., Environmental Remediation, Installation Support)



APPENDIX B

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



Before exercising steps 1 and 2 below, the HQs Labor Advisor must be notified:

1). More than $500, the CO's report & recommendation must be forwarded to the Sec. of Labor, 22.302(c)(3).

2). $1,000 or more, the CO must send a detailed enforcement report to the Administrator, Wage and Hour Division, within 60 days after completion of the investigation, 22.406-8(d)(2)(i)(A).

APPENDIX C

FAR 1.110, Positive Law Codification

Historical Title of Act	Division/Chapter/Subchapter	Title
Anti-Kickback Act	41 U.S.C. Chapter 87	Kickbacks
Brooks Architect-Engineer Act	40 U.S.C. Chapter 11	Selection of Architects and Engineers
Buy American Act	41 U.S.C. Chapter 83	Buy American
Contract Disputes Act of 1978	41 U.S.C. Chapter 71	Contract Disputes
Contract Work Hours and Safety Standards Act	40 U.S.C. Chapter 37	Contract Works Hours and Safety Standards
Davis-Bacon Act	40 U.S.C. Chapter 31, Subchapter IV	Wage Rate Requirements (Construction)
Drug-Free Workplace Act	41 U.S.C. 81	Drug-Free Workplace
Federal Property and Administrative Service Act of 1949, Title III	41 U.S.C. Div. C of Subtitle 1*	Procurement
Javits-Wagner-O'Day Act	41 U.S.C. 85	Committee for Purchase from People Who Are Blind or Severely Disabled
Miller Act	40 U.S.C. Chapter 31, Subchapter III	Bonds
Office of Federal Procurement Policy Act	41 U.S.C. Div. B of Subtitle I**	Office of Federal Procurement Policy
Procurement Integrity Act	41 U.S.C. Chapter 21	Restrictions on Obtaining and Disclosing Certain Information
Service Contract Act of 1965	41 U.S.C. Chapter 67	Service Contract Labor Standards
Truth in Negotiations Act	41 U.S.C. Chapter 53	Truthful Cost of Pricing Data
Walsh-Healey Public Contracts Act	41 U.S.C. Chapter 65	Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000

*Except sections 3302, 3501(b), 3509, 3906, 4710, and 4711.
**Except sections 1704 and 2303.

APPENDIX D

Service Contract Act Labor Relations Resource Page

a. Service contract wage determinations
https://sam.gov/content/wage-determinations

b. Department of Labor All Agency Memorandums (AAM):
https://sam.gov/content/wage-determinations/resources/all-agency-memos

c. Department of Labor Field Operations Handbook (FOH) Chapter 14, The McNamara-O'Hara Service Contract Act
https://www.dol.gov/agencies/whd/government-contracts/service-contracts/interpretive

d. DoL's 541 Final Rule
https://www.federalregister.gov/documents/2020/06/08/2020-11979/defining-and delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and

e. Executive Order 11246, Equal Employment Opportunity
https://www.dol.gov/agencies/ofccp/executive-order-11246/ca-11246

f. Executive Order13496, Notification of Employee Rights Under Federal Labor Laws
https://www.dol.gov/agencies/ofccp/faqs/executive-order-13496

g. DoL e98 Process
https://www.dol.gov/agencies/whd/government-contracts/service-contracts/sf98/index.asp

h. Employer Assistance - Annual VETS-4212 Report
https://www.dol.gov/agencies/vets/programs/vets4212

i. DoL VETS-4212 Verification Database
https://www.dol.gov/agencies/vets/programs/vets4212#verify

j. OFCCP On-Line Pre-Award Registry
https://www.dol.gov/agencies/ofccp/pre-award/registry

k. SCA Directory of Occupations
https://sam.gov/content/wage-determinations - select "DBA & SCA Resources"