CHAPTER 4 - PRE-SOLICITATION ADMINISTRATION AND DETERMINATION

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

4-2. Service Contract Administration Issues. Due to the complexity of the regulations implementing the Act, it would be impossible to consider all potential problems in the pre-solicitation and pre-award phase of service contract administration. However, noted below are some of the more problematic issues that have arisen in recent years.

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

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

(1) Standard WDs are generic WDs listing close to 300 different classifications (from several occupational groups, e.g., Clerical and Administrative, Technical Occupations, Information and Arts, Transportation). Each Standard WD reflects wages and fringe benefits found by DOL to be prevailing in a specific locality. The wage rates and health and welfare (H&W) rates are the same on each Standard WD for a locality. However, the method by which a contractor must comply with the H&W rate is different. Compliance with the H&W rate on all "odd numbered" Standard WDs (i.e., WD No. 1994-21**03** or WD No. 1994-21**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 (i.e., WD No. 1994-21**04** or WD No. 1994-21**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[2] in 1996. When the survey data for total benefits subsequently exceeded the grandfathered "high benefit" rate of $2.56 per hour, the DOL increased the fringe benefit rates on all WDs to reflect the new survey data. However, while the H&W benefit levels are now the same, the DOL retained the two different methods for determining compliance. Thus, until such time as the DOL issues final regulations relating to a single method of compliance (per employee v. average cost), the average cost method of compliance will continue to be applied to those recurring contracts that were subject to the high, average cost fringe benefit level WDs. Similarly, the employee-by-employee method of compliance will apply to those contracts which were not subject to the "high" fringe benefit level. The www.wdol.gov menu for selecting Standards SCA WDs incorporates these issues into the selection process, and should, if answered carefully, lead the user to the correct SCA WD. COs should contact the CIRS for additional guidance on the application of the two rates.

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

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

b. SCA WDs Based on CBAs

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

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

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

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

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

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

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

(ii) For contract actions resulting from sealed bidding:

(a) A revised CBA shall NOT apply to the successor contract if received by the contracting agency less than 10 days prior to opening of bids, unless there is sufficient time to amend the solicitation and incorporate the revised WD.

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

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

4-4. Successor Contractor Obligations. There are special requirements for both contractors and contracting agencies under the SCA in connection with recurring service contracts. Specifically, the Act requires a new contractor who replaces a contractor subject to a CBA with a union to pay its employees not less than the wage rates and fringe benefits that its predecessor would have had to pay under the most current CBA, including any prospective increases provided for in the agreement (see 41 USC 353(c); 29 CFR 4.163(b) and FAR 22.1002-3). This provision is self-executing and imposes an absolute duty on the successor contractor, regardless of the contractor's knowledge of the predecessor's collective bargaining agreement. There are certain conditions under which this requirement would not apply and they are set forth below:

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

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

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

d. "Contingency Clause". The DOL has determined that CBAs which contain increased wage and fringe benefit provisions which are contingent on a number of factors (but principally, upon approval by the DOL's Wage and Hour Division) do not satisfy the criteria for the establishment of successor contractor obligations under section 4 (c). FAR subparts 22.1002-3, 22.1008-3, and 22.1021 have been revised to implement the guidance previously furnished by DOL on these issues within All Agency Memoranda 159 and 166. Where the existence of a contingency clause may be an issue, the determination as to whether the CBA has application for section 4(c) purposes is to be made by the DOL, and not the contracting agency.

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

4-5. Effective and Expiration Dates of CBAs.

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

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

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

COs and their representatives need to be aware of the above successor contractor obligation as well as the conditions which alter its applicability insofar as it may affect certain solicitations. The contracting agency or any other person affected or interested, including contractors, and employee representatives, may request a determination by the DOL on these issues.

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

4-7. Substantial Variance. Requests for a DOL "substantial variance" hearing or "arm's length" determination involve the use of Administrative Law Judges (ALJ) in accordance with the DOL's regulations. For either type of request, information must be submitted (in accordance with 29 CFR 4.10 and 4.11) as follows:

a. Prior to 10 days before contract award, if an advertised contract; or

b. Prior to the contract or option period start date, if a negotiated contract, or existing contract with an option or extension period.

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

4-8. Certified Listing of Employee Anniversary Dates. In the case of a contract performed at a Federal facility where employees may be retained by a succeeding contractor, DOL's regulations (29 CFR 4.6(1)(2)) provides that the incumbent prime contractor must furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract (with the incumbent as well as predecessor contractors) of each employee, to the CO not less than 10 days before contract completion. A copy of this list is to be provided to the successor contractor for determining employee eligibility for vacation fringe benefits which are based on length of service with predecessor contractors (where such benefit is required by an applicable wage determination). Failure to obtain such employment data will not relieve a contractor from any obligation to provide vacation benefits (see also FAR 22.1020).

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

4-10. Assuring Prospective Contractor's Compliance with VETS-100 Reporting Requirement.

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

They also must show that they have actively recruited special disabled veterans, veterans of the Vietnam-era and any other veterans who served on active duty during a war on in a campaign or expedition for which a campaign badge has been authorized and disseminated all information internally regarding promotion activities.

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

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

4-11. Pre-Award Clearance From the Office of Federal Contract Compliance Programs. If the estimated amount of the proposed service contract or subcontract is $10 million or more, the CO shall request clearance from the appropriate Office of Federal Contract Compliance Programs (OFCCP) regional office for the award of any contract, including any indefinite delivery contract or letter contract; or the modification of an existing contract for new effort that would constitute a contract award. Such clearance may be obtained as described below.

a. The OFCCP has established an on-line registry to facilitate procurement of the pre-award clearance. The registry provides information concerning Federal Contractors that have been reviewed by the OFCCP. These Federal Contractors have been found to be "In Compliance" with the Equal Employment Opportunity (EEO) regulations that the OFCCP is mandated to enforce. The information contained in this Registry covers a two year period prior to the date of search. The Registry is updated nightly and facilities reviewed more than 2 years ago are removed as new ones are added. This system provides information only for the specific Contractor Facility(s) requested. It does not provide information on the Parent Organization or other facility locations that have not been reviewed within the past two years. If a given facility is found to be "In Compliance", this does not imply that other sibling facilities under the same parent organization received the same favorable finding. USACE personnel tasked with ensuring that prospective contractors have been found to be "In Compliance" should first check the OFCCP's on-line Pre-award Registry at http://www.dol-esa.gov/preaward/. If the Contractor Facility in question is not found in this Registry, USACE personnel should contact the appropriate OFCCP Pre-Award Clearance Officer

in their Regional area. Questions concerning the appropriate OFCCP Regional Office, USACE personnel may contact the OFCCP National Office, in Washington D. C., at area code (202) 693-0101. Preaward clearance for each proposed contract and for each proposed first-tier subcontract of $10 million or more shall be requested by the CO directly from the OFCCP regional office(s). Verbal requests shall be confirmed by letter or facsimile transmission.

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

c. In the event, the prospective contractor's facility is not found within the Registry, the CO is required to obtain such clearance in writing. The CO shall include the following information in the pre-award clearance request:

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

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

(3) Anticipated date of award.

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

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

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