

## CHAPTER 6 - CONTRACT ADMINISTRATION AND SERVICE CONTRACT ACT ISSUES

6-1. General. Although there are numerous labor standards issues which may arise in the administration of a service contract, the following sections focus on those that are most troublesome and the most common.

### 6-2. Conformance Actions.

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

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

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

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

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

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

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

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

(4) Trainee classes cannot be conformed.

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

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

6-3. Disposition of the Conformance Proposal. The CO must exercise good business judgement as to the proper rate for conformed classes. The primary considerations should be the welfare of the workers and the need to have a stable, qualified workforce to perform the government's work. As a guide, the CO may use the relative relationship between the Federal rate for the proposed class and the Federal rate for the other listed classifications. The CO should be alert to the possibility that the contractor may be attempting to use a conformance to lower labor costs and thereby increase profits or competitive advantage. The contractor assumes the risk of misjudging unlisted rates when formulating the bid (see, for example, Sunstate International Management Services, Inc. Comp. Gen. Dec. B-227036, 87-2 CPD 124, 31 Jul 87). If the contractor bids

unreasonably low labor rates, the conformance action cannot be used as a method to enhance the contractor's financial position to the detriment of the employees. Upon completion of the conformance proposal review steps noted above, the CO or his representative should forward the proposal to:

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

6-4. Conformance Appeals. As an interested party, the CO may disagree with the DOL's determination with respect to a conformance action. The CO may therefore request re-consideration of the DOL's decision by forwarding objective information/data to the Administrator who will respond within 30 days of the request. If the Administrator denies the request for re-consideration, the CO may pursue the matter through a petition to:

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

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

6-5. Complaints. Unlike the DBA, contracting agencies have no enforcement authority under the SCA. Thus, all complaints or allegations of non-compliance are to be promptly referred by COs to the appropriate Regional Office of the DOL (see FAR 22.1024). A complaint may be filed by any employee, labor or trade organization, contracting agency or other interested person or organization. The identity of an employee who makes a confidential written or oral statement as a complaint or in the course of a DOL investigation, as well as portions of the statement which would reveal his identity, will not be disclosed without the prior consent of the employee. CIR Representatives should be cognizant of the "whistleblower" protections created by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994, P.L. 103-355. The implementing regulation (FAR 3.903) provides that "Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract)." In this regard, upon receipt of a SCA minimum wage rate complaint that includes an allegation of

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

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

6-7. Withholding of Contract Payments.

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

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

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

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

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

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

bankruptcy violations of the SCA was deemed exempted from the automatic stay provisions within the Bankruptcy Act at 11 USC 362(a)).

6-8. Enforcement. As noted above, the DOL has exclusive enforcement authority under the SCA. Accordingly, reliance on advice from contracting agency officials is not a defense against a contractor's liability for back wages under the Act (see 29 CFR 4.187(e)(5)). COs must therefore exercise due caution with respect to questions arising as to contractor compliance with the Act.

6-9. Overtime.

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

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

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

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

e. All correspondence with contractors regarding CWHSSA violations, withholding of liquidated damages, and restitution payments resulting from violations will be initiated by the District Labor Advisor for the signature of the CO. Such notification to contractors regarding CWHSSA violations, proposed assessment of liquidated damages, and CO's recommendations with respect to the proposed assessment are to be prepared in accordance with FAR 22-406-8(d)(ii). It is imperative that the CO's report on the violations reflect the following:

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

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

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

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

6-11. Collective Bargaining and Union Representation.

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

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

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