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- Record-Keeping Requirements
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SCA Overview

- McNamara-O'Hara Service Contract Act of 1965 ("SCA")
 - 41 U.S.C. 351 et seq.
 29 C.F.R. Part 4

 - Federal Acquisition Regulation (FAR) Subpart 22.10, FAR clause 52.222-41
- Last in the line of federal statutes protecting wages and working conditions for federal contractor employees

 - 1931: Davis-Bacon Act (Construction workers)
 1936: Walsh-Healy Public Contracts Act (Manufacturing workers)
- Protects service workers from the consequences of low bidding by specifying required minimum wages and fringe benefits
- Administered by the Department of Labor's ("DOL") Wage & Hour Division ("WHD")

"Principal Purpose" Test

- SCA applies to federal services contracts in excess of \$2,500 for services performed in the "United States"
 "United States" defined at FAR 22.1001

 - District of Columbia contracts also covered
 Presume coverage for indefinite-quantity contracts
- BUT ONLY if the "principal purpose" of the contract is to furnish services to the government using "service employees." FAR 22.1003-1
- No precise rules for "principal purpose" determination broadly interpreted but does not cover "incidental" service work on construction and supply contracts
- Employees performing services in support of a contract that meets the "principal purpose" test must qualify for statutory or regulatory exemption to avoid SCA coverage

"Principal Purpose" Test

- "Non-exhaustive" list of 55 example service contract types:

- (5) Cafeteria and food service
 (10) Computer services
 (12) Custodial, janitorial, and housekeeping services
 (23) Guard and watchman security service
 (27) Landscaping (other than part of construction)
 (37) Nursing home services
 (38) Operation, maintenance, or logistic support of a Federal facility
 (51) Trash and garbage removal
 (52) Tree planting and thinning, clearing timber or brush, etc.
 (55) Warehousing or storage

29 CFR § 4.130

"Principal Purpose" Test

- "Service employees" working on contracts which do not meet "principal purpose" test are not covered by the SCA. Id.
- Davis-Bacon Act does not apply "principal purpose" test; construction laborers performing work on non-construction contracts are covered
- Inconsistent Results: Construction worker performing work on a "service contract" is covered by Davis Bacon, but a service employee working on construction contract is not covered by

Exempt Contract Types (a) Contracts for construction, alteration, or repair of public buildings or public works; (b) Manufacturing work covered by the Walsh-Healey Public Contracts Act; (c) Contracts for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect; (d) Contracts for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934; (f) Employment contracts to provide direct services to a Federal agency; or Additional exemptions for maintenance, calibration, and repair of certain types of equipment. FAR 52:222-48

"Mixed" Contracts

- "Mixed Contracts" include some work by services employees as well as manufacturing or construction work
- Tension between SCA (services) and Walsh-Healy (manufacturing)
 - SCA coverage often drastically increases a contractor's performance costs vs. Walsh-Healy coverage
- "Remanufacturing" that is so extensive as to be the equivalent of manufacturing is exempt from SCA

 • Major overhaul, substantial overhaul, most parts repaired or replaced, totally rebuilt item, process similar to original manufacturing

"Exempt" Employee Types

- Bona Fide Executive, Administrative, and Professional ("EAP") employees, as defined under FLSA
- EAP employees are exempt even though performing on a SCA-covered contract or subcontract
- Practice Tip: Perform a detailed analysis, document, and archive determinations to treat employees working on SCA-covered contracts as EAP-exempt
- Additional exemption for apprentices, student learners, and handicapped individuals

"Exempt" Employee Types

- "Administrative" employee exemption:
 - Paid not less than \$455 per week, exclusive of board, lodging or other facilities
 - Primary duty is office or non-manual work directly related to the management or general business operations
 - Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

29 CFR § 541.200

"Exempt" Employee Types

- "Executive" employee exemption:
 - Paid not less than \$455 per week, exclusive of board, lodging or other facilities
 - Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof
 Customarily and regularly directs the work of two or more other employees

 - Authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight

"Exempt" Employee Types

- "Professional" employee exemption:
 - Paid not less than \$455 per week, exclusive of board, lodging, or other facilities
 - Primary duty is the performance of work:
 - Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 - Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

SCA Wage Determinations

- Wage Determination ("WD") identifies classes of service employees by performance location with specified minimum wages and fringe benefits
- Service Contract Act Directory of Occupations list of SCA job category codes and descriptions
 - http://www.dol.gov/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.pdf
 "Wranglers" still exist!
- Example Wage Determination Attachment A

SCA Wage Determinations

- Prior to RFP/ITB, Contracting Officer obtains a WD
 - Self-service at DOL database "WDOL" http://www.wdol.gov/sca.aspx

- WHD provides in response to Standard Form (SF) 98 (e98) http://www.dol.gov/whd/govcontracts/sca/sf98/sf98.asp
- Must use e98 process if WDOL does not contain a WD for the contemplated contract action
- Updated WDs annually for multi-year contracts subject to annual appropriations
 Every 2 years for multi-year contracts not subject to annual appropriations

SCA Wage Determinations

- Type 1: Wages and Fringe Benefits "Prevailing in the Locality"
- Determination made by DOL WHD
- Type 1 applies where there is no predecessor contractor performing the services in the same locality based upon a collective bargaining agreement ("CBA")
- Where competing contractors are unknown, RFP can issue without a WD and be amended to include applicable WDs
- If performance location is unknown, WD will address all possible locations

SCA Wage Determinations

- Type 2: Section 4(c) CBA-based WDs
- "Successorship": applies where RFP relates to solicited work that is being performed by an incumbent contractor
 - "Substantially the same work"
 Same location

 - Covered by CBA
 FAR 22.1008-2
- WD mirrors wages and fringe benefits mandated in the CBA
- "Substantial variance" and "arms length negotiation" appeal
 - Agency or contractors4 CFR §§ 4.10, 4.11

Conformance Process

- Applies where WD does not include a category of service employee working on the contract
- Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate (Attachment B)

 Proposed classification title

 Job description
- Submitted to Contracting Officer not later than 30 days after unlisted employee class first works on the contract
- Contracting Officer submits to DOL for review and approval
- Practice Tip: Identify "missing" labor categories before bid submission and avoid the conformance process

Fringe Benefit Rules

- Furnished separate and in addition to wages
- Fringe benefits must be "Bona Fide" legally enforceable and meet criteria in 4 C.F.R. § 4.171
- Fringe benefit types include:
 - pension contribution
 disability insurance

 - life insurance
 health insurance
- Detailed implementing regulations for benefit types

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Fringe Benefit Rules

- Fringe may be paid "in kind" (i.e., holidays) or in cash
- Same method of benefit distribution must be used throughout the contract term
- Wages in excess of the WD rates cannot be used to "offset" fringe benefit requirements
- Different than Davis-Bacon Act which allows the contractor to offset higher wages and/or benefits against lower wages and/or benefits (i.e., contractor complies as long as its aggregate wage and fringe payments meet the WD aggregate amount)

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Other SCA Requirements

- Contractor notice to service employees of minimum wage and fringe benefits
 - Poster in prominent locations
- DOL interviews with service employees at the worksite during normal working hours
- Safe and sanitary working conditions
- FAR 52.222-41

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Contract Option Year Pricing

- SCA-covered contracts often structured as a base period with options to renew
- Contractor warrants that prices do not include contingency for changes to employee wages based upon revised WDs during the contract term
- FAR 52.222-43, "Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multiple Year and Option Contracts)"
 - FAR 52.222-44. Same concept for contracts that are not multiple year/option contracts

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Contract Option Year Pricing

- Contract labor unit price is adjusted to match changes in the applicable WD (prevailing wage or CBA)
- Voluntary increases to service employee pay are <u>not</u> eligible for unit price increase
- Adjustments made at beginning of option periods
- Contractor bears risk of WD-based adjustments during contract base period
- Contractor files request for Equitable Adjustment within 30 days of new WD

Fair Labor Standards Act (FLSA)

- FLSA establishes minimum wage and overtime requirements
- SCA expressly provides that notwithstanding WD requirement, the contractor shall not pay less than the FLSA minimum wage to its service employees. FAR 22.1002-4
 - SCA prevailing wages almost always higher than the FLSA minimum wage, FLSA minimum wage rule rarely applies
 - Minimum wage executive order ("EO") could increase instances where FLSA minimum wage exceeds SCA WD rates
- FLSA overtime rule applies to SCA wage rate but not fringe benefits, even when fringe is paid in cash

"Minimum Wage" Executive Order

- EO increases the minimum wage for federal contractor employees:
 \$10.10 per hour beginning January 1, 2015
 Annual review and updates by the DOL beginning January 1, 2016
 http://www.whitehouse.gov/lhe-press-office/2014/02/12/executive-order-minimum-wage-contractors
- Applies to contracts awarded pursuant to RFPs issued after January 1, 2015
- DOL implementing regulations due October 14, 2014
 - FAR clause to follow shortly after DOL regulations
- Minimum wage will apply to SCA-covered contracts
- Practical impact somewhat limited because SCA prevailing wage rates will still generally exceed (new) minimum wage

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Subcontractors

- SCA requirements apply to service employees of subcontractors. 29 CFR § 4.150
- Prime contractor must "flow down" SCA requirements to its subcontractors. 29 CFR § 4.114
- Prime contractor financial liability for subcontractor failure to make payments required in applicable WD . Id.
- Practice Tip:
 - Make the SCA requirements an express contract term (vs. a FAR flow down clause on list only)

SCA Record-Keeping Requirements

- - (A) Name and address and social security number;
 - (B) Correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of payments in lieu of fringe benefits, and total daily and weekly compensation.

 - (D) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.
- List of predecessor contractor employees (if applicable)

- Records must be kept for 3 years from completion of the work

Penalties - Withholding **Contract Payments**

- At DOL's request, Contracting Officer will withhold contract payments from <u>any</u> of the contractor's government contracts to cover possible underpayments to service employees. FAR 52.222-41(k)
- Funds are placed in trust until DOL determines the amount due to the contractor's service employees
- Refund of underpayments made directly to service employees where
- "Party Responsible" includes subcontractors and officers of the contractor responsible for SCA underpayments
- Contractor may appeal underpayment determination to DOL
 Contract Disputes Act ("CDA") appeal procedure not applicable

Penalties – Debarment and **Default Termination**

- A party determined to have violated the SCA shall be <u>debarred</u> for 3 years, absent "unusual circumstances"
 - Administrative process at DOL
 - Negligence, ignorance, and bad record-keeping do not establish "unusual circumstances"
 - No authority to reduce the debarment period
- "Substantial Interest" extension of debarment
- Termination for Default

Questions?

The Service Contract Act: Avoiding Common Mistakes And Problems



Presented by: Matt Koehl 208.383.3965 208.383.3965
gmkoehl@hollandhart.com
U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1400
Boise, ID 83702



Claire Rosston 208.383.3960 ccrosston@hollandhart.com U.S. Bank Plaza 101 S. Capitol Boulevard, Suite 1400 Boise, ID 83702

HOLLAND&HART

