The Service Contract Act: What Government Contractors Need to Know

Wednesday, July 19, 2017
12:00 pm – 1:30 pm ET

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Today’s Speakers

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Agenda

• Overview of the Service Contract Act (Service Contract Labor Standards)
• Labor Mapping and Conformances
• DOL Audit Risk and Exposure
• Common SCA Pitfalls/Issues
• Competitive Landscape
• Other Related Rules
Overview of the Service Contract Act
Overview of the Act

• McNamara-O’Hara Service Contract Act created in 1965
• SCA applies to contracts “the principal purpose of which is to provide services in the US through the use of service employees” (41 U.S.C. 6702(a))
  – “Principal purpose” is a simple majority of contract requirements
    • (>50% of FTEs and/or value)
• Provides protection of prevailing wages and benefits for workers
  – On federal service contracts > $2,500
  – For contracts that incorporate the SCA clause and Wage Determination
  – Similar to protections under Davis-Bacon Act (construction) and Walsh-Healey (manufacturing)
Overview of the Act: Exempt Contracts

- SCA does not apply to all service contracts:
  - Contracts for professional services performed almost exclusively by employees who meet the exemption under 29 CFR Part 541
  - Commercial contracts specifically exempted by FAR 22.1003. Very limited exemption does not apply to contracts for commercial items
  - Employment contracts providing direct service to a federal agency
  - Contracts for leasing of space
  - Public Utility Services
  - Federally assisted contracts for services entered into by state governments (Medicaid, Medicare programs)
  - Work covered by Walsh-Healy Public Contracts Act (Supply or manufacturing)
Overview of the Act: Employee Coverage

- SCA coverage applies to “service employees” – historically non-exempt, “blue collar” workers
  - All contract employees may not be covered
- Recent DOL actions highlight a shift to include more professional services under SCA
- Determination of coverage is primarily based on job function, secondarily salary tests
- SCA does not apply to contracts where non-exempt employees are a minor factor in contract performance (29 CFR 4.113(a)(3))
  - DOL applies a 10 – 20% range
Overview of the Act: Exempted Employees

- Service Contract Act *does not* apply to the following classes of employees as defined by 29 CFR Part 541:
  - **Executives/Supervisors:** Salaried (minimum $455/wk), supervise two or more workers, exercise authority, and spend most of their time doing so
  - **Administrative/Managers:** Salaried, make decisions of importance and significance using independent judgment and discretion, and spend most of their time doing so
  - **Professionals:** Salaried or fee-based; perform work primarily requiring advanced knowledge, predominantly intellectual, customarily acquired by a prolonged course of specialized intellectual instruction (e.g., college-level); and exercise independent judgment and discretion
Overview of the Act: Exempted Employees

- Service Contract Act also does not apply to the following classes of employees:
  - **Teachers:** Primary duty of teaching, instruction, no salary requirement, work for an educational institution
  - **Computer employees:** Perform higher-level duties (e.g., design, development work with greater responsibilities), paid NLT $27.63/hr or $455/wk
  - **Creative professionals:** Salaried ($455/wk) primary duty is the performance of work requiring imagination, invention or originality in a recognized field of artistic or creative endeavor
  - **Outside salesperson:** Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities which a consideration will be paid by the client or customer; customarily engaged away from employer's place of business
Overview of the Act: Compliance Requirements

• WDs stipulate the minimum requirements for:
  – Wages
  – Benefits
    o Health and Welfare (H&W)
    o Vacation
    o Holiday

• SCA also requires contractors to post DOL notice WH 1313 and applicable wage determinations in a prominent area at the work site
Overview of the Act: Wages

- Wages may be paid by hourly rates, salary, piecework, bonuses or some combination

- Contractors must be able to document all hours worked and demonstrate that the SCA rate (or more) was paid for each covered hour
Overview of the Act: Health and Welfare

• Current WDs establish minimum benefits of $4.27/hour for all covered labor (exception in Hawaii)
• Employers may comply with the required benefits by providing
  – Cash payment at the H&W rate
  – Bona fide benefits
  – Or a combination of the two
• Bona fide benefits must “constitute a legally enforceable obligation” which meet the following criteria:
  – Specified in writing and communicated to the employee
  – Provide for the payment of benefits to employees on account of death, disability, retirement, medical expenses, unemployment benefits, etc.
  – Contain a definite formula for determining the amount contributed by the contractor and the benefits received by participating employees
  – Contributions must be paid irrevocably to a trustee or third party
  – Not otherwise required by law
Overview of the Act: Health and Welfare

• Examples of typical H&W benefit plans are:
  – Life, disability, health, dental, or vision-care insurance
  – Sick leave
  – Employer contributions to 401(k) or other retirement savings plans
  – Vacation or holiday benefits (in excess of WD requirements)
  – Jury duty, bereavement leave

• Examples of benefit plans that are not considered bona fide:
  – Unfunded, self-insured fringe benefit plans under which contractors make
    “out of pocket” payments as expenses arise, rather than making irrevocable
    contributions – unless DOL approval is obtained
  – Benefits required by law
  – Payments for conveniences considered to be “business expenses” of the
    contractor (e.g., relocation expenses)
Overview of the Act: Holiday

• Wage Determinations specify the number of holidays owed
  – WD lists specific holidays to be received (e.g., New Year’s, July 4th, etc.)
  – Employer may comply by providing a different designated holiday than listed on the WD, if communicated to employees in writing

• Employee is entitled to holiday pay if they work in the week a holiday occurs
  – Part-time employee is eligible for holiday pay commensurate with their regularly scheduled hours in the week the holiday occurs

• Employee is not entitled to holiday pay if holiday is not named in WD (e.g., government closes by presidential proclamation)

• Cannot enforce a “use or lose” policy
Overview of the Act: Vacation

• WDs stipulate “x Wks after x Years of Service”
  – Employee is vested on his/her anniversary date
  – Years of Service is calculated from employee’s service date
  – No use or lose. Vested balances must be discharged at next
    anniversary date, completion of the contract or when employee
    terminates employment
  – May require annual reconciliation if vacation is accrued

• Years of Service is determined by total length of time an
  employee
  – Works continuously for present employer
  – Works continuously for predecessor contractors performing similar
    services at the same facility
Overview of the Act: Contract Price Adjustments

• WD current on anniversary date of multiple year contract or beginning of option shall apply to contract
• When the contract is modified to incorporate new SCA rates, the contractor is entitled to a change in contract price
  – New SCA WD rates should be incorporated at each option extension, substantial change in scope or no less than every two years
• No price adjustment under cost-reimbursable subcontracts
• Under fixed-price contracts, a contract price adjustment can be changed only under the changes clause or the SCA/FLSA Price adjustment clause (FAR 52.222-43)
  – Price will be adjusted to reflect the actual increase or decrease in wages or benefits ...to the extent an increase is made to comply...or decrease is voluntarily made...as a result of a new WD
  – Dilutive adjustment – no application of G&A, overhead or profit
    o Notify Contracting Officer within 30 days after receipt of new WD
Errors Discovered by DOL

- If DOL discovers that the SCA did not apply to the acquisition or failed to include appropriate WD, contractor has right to “equitable adjustment” (FAR 22.1015)
  - Equitable adjustment is different than dilutive adjustment
- CO shall include FAR 52.222-41 and appropriate WD in contract
- DOL may require retroactive application
Labor Mapping

• SCA requires a wage rate for every labor classification employed on a contract
  – Can NOT “split” labor classification duties, create trainees, helpers or intermediate classification levels
• Covered employees must be mapped to a SCA position listed on incorporated WDs/Directory of Occupations
  – Examples include: General Clerk, Word Processor, and Computer Programmer
• Mapping is not always black and white
  – Internal labor categories will not match the job descriptions in the directory
  – Key is function actually performed, not just SCA classification listed in contract or scope of work described in contract
• Employees performing any part of the duties of a classification listed in the Directory of Occupations must be classified in that role
• Companies may request a conformance if no appropriate mapping exists
DoL Audit Risk and Exposure

• SCA enforcement is on the rise:
  – Change in administration has had NO impact on the aggressiveness of local auditors
  – Slow rate of hiring in leadership positions may be
• Increase in targeted vs. complaint driven investigations
• Sanctions for non-compliance can be harsh:
  – Monetary impact: Back pay, interest, etc.
  – Non-monetary impact: Contract termination, company and/or individual debarment, etc.
  – Statutory 3-year debarment absent proof by contractor of “unusual circumstances.”
  – Recent examples of SCA debarment of companies and individuals.
  – Recent Davis Bacon Act criminal case for false certifications of payrolls.
• Voluntary back pay vs. settlement with DOL vs. DOL enforcement proceedings
Common SCA Pitfalls/Issues

• Part time or temporary employees are mistakenly ignored during the assessment of SCA coverage
• Pay stubs commingle wage and benefit amounts
• Benefits are included that are not “bona-fide”
• Lack of communication between departments
• Subcontractors fail to comply with SCA
• Contracts contain the SCA clause, but no incorporated WDs
  – DOL can retroactively apply SCA coverage and require contractor to pay back wages and benefits
  – Back pay reported via the Summary of Unpaid Wages (WH-56)
  – Contractor can subsequently file for an equitable adjustment
• Failure to segregate SCA hours from commercial time
• Employees perform multiple functions
• Waiting for contract adjustment before paying SCA wages
• Classify employees based on contract description vs. actual work performed
• SCA clause in master IDIQ contract but not task order
Common SCA Pitfalls/Issues

• Even where the back pay was not the fault of the contractor, (i.e., Contracting Officer fails to incorporate WD), DOL will issue a WH-56
• This is part of a settlement so costs are allowable
• Contractor agrees to provide back pay
Competitive Landscape

• The manner in which fringe is paid can have a significant impact on price
  – Many contractors choose to pay “cash in lieu’
    o Easiest method to comply with H&W requirements
    o BUT H&W payments paid in this manner are subject to statutory fringes
    o This small amount (7.45%) of H&W dollars can be the difference between winning or losing the contract
    o Not compatible with ACA requirements; you could end up paying twice

• Changing from cash in lieu to providing benefits can result in an employee relations issue
Competitive Landscape

• What is a smart contractor to do?
  – Take advantage of the Q&A process. Level the playing field (i.e., make sure everyone is bidding appropriately)
    o If it looks like an SCA contract but nothing is there, ask
    o If no WD is incorporated, specifically ask for it
    o Ask for an employee census
    o Ask for detailed description of work
  – Educate your customer
    o Help them to understand the labor categories you utilize and WHY!
  – Examine your labor categorizations carefully
    o Can the work be done using a lower labor category, even at the risk of losing experienced employees
  – Carefully consider how you pay H&W
    o Cash in lieu = Additional Employer Cost (especially in light of Affordable Care Act)
    o Failure to provide coverage could result in fines and penalties
Other Related Rules: Minimum Wage

• Effective January 1, 2015 Executive Order 13658 requires contractors and subcontractors to pay employees a minimum of $10.20 per hour for work performed on federal contracts
  – The hourly rate will be revised annually
• Applies to new Federal construction and service contracts that started after 1/1/2015
• Applies to employees entitled to FLSA minimum wage, prevailing wages under the SCA, and prevailing wages under the DBA
• A challenge for contractors is that the rule also extends minimum wage coverage to “employees performing work ‘on’ or ‘in connection’ with covered contracts
  – “In connection with” is defined as any employee spending 20% or more of his or her hours in a given work week performing on covered contracts
  – Example: FLSA-covered security guard monitoring a covered project
Other Related Rules: Non-Displacement of Qualified Workers

• Non-displacement of qualified workers requires contractors to offer predecessor contractor’s employees right of first refusal of employment
  – Final rule effective Jan. 18, 2013
  – Bona Fide, good faith offer of employment to qualified SCA employees
  – Restricts additional screening
  – Job offer may be for a different position
  – Offers not required in very limited situations
Other Related Rules: Pending Regulations and Changes

Fair Pay and Safe Workplaces
• Revoked by congress!

Changes to method for development of SCA WDs
• Dec 8, 2015 All Agency Memorandum
• Impact on existing wage rates?

Paid sick leave EO
• Effective January 2017 for new contracts with the clause
• Impact of contractor heath and welfare fringe benefit practices
• Sick leave must be provided in addition to Vacation and Holiday
Questions?

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Next Month’s Government Contracts Webinar:
Bid Protests
Wednesday, August 16, 2017
12:00 pm – 1:30 pm ET