

§ 4.5

(4) If the services to be furnished under the proposed contract will be substantially the same as services being furnished in the same locality by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency may prepare a wage determination that references the collective bargaining agreement by incorporating that wage determination, with a complete copy of the collective bargaining agreement attached thereto, into the successor contract action. It need not submit a copy of the collective bargaining agreement to the Department of Labor unless requested to do so. If the place of contract performance is unknown, the contracting agency will prepare a wage determination on WDOL and attach the collective bargaining agreement of the incumbent contractor and make both the wage determination and collective bargaining agreement applicable to a potential bidder located in the same locality as the predecessor contractor. (See section 4.4(a)(3).) If such services are being furnished at more than one locality and the collectively bargained wage rates and fringe benefits are different at different localities or do not apply to one or more localities, the agency shall identify the localities to which such agreements have application. If the collective bargaining agreement does not apply to all service employees under the contract, the agency shall identify the employees and/or work subject to the collective bargaining agreement. In the event the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arm's-length negotiations, a full statement of the facts so indicating shall be transmitted to the Wage and Hour Division with the copy of such agreement. (See § 4.11.) If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agen-

29 CFR Subtitle A (7-1-09 Edition)

cy shall so advise the Wage and Hour Division and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to § 4.10. A wage determination based upon the collective bargaining agreement must be included in the contract until a hearing or a final ruling of the Administrator determines that the collective bargaining agreement was not reached as the result of arm's-length negotiations or was substantially at variance with locally prevailing rates. Any questions regarding timeliness or applicability of collective bargaining agreements must be referred to the Department of Labor for resolution.

(5) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall, unless otherwise advised by the Wage and Hour Division, obtain a new wage determination on each biennial anniversary date of the proposed multi-year contract in the event its term is for a period in excess of two years.

[70 FR 50896, Aug. 26, 2005]

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

(a) Any contract in excess of \$2,500 shall contain, as an attachment, the applicable, currently effective wage determination specifying the minimum wages and fringe benefits for service employees to be employed thereunder, including any information referred to in paragraphs (a)(1) or (2) of this section;

(1) Any wage determination from the Wage and Hour Division, Employment Standards Administration, Department of Labor, responsive to the contracting agency's submission of an e98 or obtained through WDOL under § 4.4; or

(2) Any revision of a wage determination issued prior to the award of the contract or contracts which specifies minimum wage rates or fringe benefits for classes of service employees whose wages or fringe benefits were not previously covered by wage determinations, or which changes previously determined minimum wage rates and fringe benefits for service employees

employed on covered contracts in the locality.

(i) However, revisions received by the Federal agency later than 10 days before the opening of bids, in the case of contracts entered into pursuant to competitive bidding procedures, shall not be effective if the Federal agency finds that there is not a reasonable time still available to notify bidders of the revision.

(ii) In the case of procurements entered into pursuant to negotiations (or in the case of the execution of an option or an extension of the initial contract term), revisions received by the agency after award (or execution of an option or extension of term, as the case may be) of the contract shall not be effective provided that the contract start of performance is within 30 days of such award (or execution of an option or extension of term). Any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective, if:

(A) The contract does not specify a start of performance date which is within 30 days from the award; and/or

(B) Performance of such procurement does not commence within this 30-day period.

(iii) In situations arising under section 4(c) of the Act, the provisions in § 4.1b(b) apply.

(3) For purposes of using WDOL databases containing prevailing wage determinations, the date of receipt by the contracting agency will be the date of publication on the WDOL Web site or on the date the agency receives actual notice of an initial or revised wage determination from the Department of Labor through the e98 process, whichever occurs first.

(b)(1) The following exemption from the compensation requirements of section 2(a) of the Act applies, subject to the limitations set forth in paragraphs (b)(2), (3), and (4) of this section: To avoid serious impairment of the conduct of Government business it has been found necessary and proper to provide exemption from the determined wage and fringe benefits section of the Act (section 2(a)(1), (2)) but not the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (section 2(b) of

this Act), of contracts under which five or less service employees are to be employed, and for which no such wage or fringe benefit determination has been issued;

(2) The exemption provided in paragraph (b)(1) of this section, which was adopted pursuant to section 4(b) of the Act prior to its amendment by Public Law 92-473, does not extend to undetermined wages or fringe benefits in contracts for which one or more, but not all, classes of service employees are the subject of an applicable wage determination. The procedure for determination of wage rates and fringe benefits for any classes of service employees engaged in performing such contracts whose wages and fringe benefits are not specified in the applicable wage determination is set forth in § 4.6(b).

(3) The exemption provided in paragraph (b)(1) of this section does not exempt any contract from the application of the provisions of section 4(c) of the Act as amended, concerning successor contracts.

(4) The exemption provided in paragraph (b)(1) of this section does not apply to any contract for which section 10 of the Act as amended requires an applicable wage determination.

(c) Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by the Department of Labor, shall include in the contract the stipulations contained in § 4.6 and any applicable wage determination issued by the Administrator or his authorized representative through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). With respect to any contract subject to section 10 of the Act, the Administrator may require retroactive application of such wage determination. (See 53

§ 4.6

Comp. Gen. 412, (1973); *Curtiss-Wright Corp. v. McLucas*, 381 F. Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2 v. Military Sealift Command*, 86 CCH Labor Cases ¶33,782 (D DC 1979); *Brinks, Inc. v. Board of Governors of the Federal Reserve System*, 466 F. Supp. 112 (D DC 1979), 466 F. Supp. 116 (D DC 1979).) (See also 32 CFR 1-403.)

(d) In cases where the contracting agency has filed an e98 and has not received a response from the Department of Labor, the contracting agency shall, with respect to any contract for which section 10 to the Act and §4.3 for this part mandate the inclusion of an applicable wage determination, contact the Wage and Hour Division by e-mail or telephone for guidance.

[48 FR 49762, Oct. 27, 1983, as amended at 70 FR 50897, Aug. 26, 2005]

§ 4.6 Labor standards clauses for Federal service contracts exceeding \$2,500.

The clauses set forth in the following paragraphs shall be included in full by the contracting agency in every contract entered into by the United States or the District of Columbia, in excess of \$2,500, or in an indefinite amount, the principal purpose of which is to furnish services through the use of service employees:

(a) Service Contract Act of 1965, as amended: This contract is subject to the Service Contract Act of 1965, as amended (41 U.S.C. 351 *et seq.*) and is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor issued thereunder (29 CFR part 4).

(b)(1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract.

(2)(i) If there is such a wage determination attached to this contract, the contracting officer shall require that any class of service employee which is not listed therein and which is to be

29 CFR Subtitle A (7-1-09 Edition)

employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed class of employees shall be paid the monetary wages and furnished the fringe benefits as are determined pursuant to the procedures in this section.

(ii) Such conforming procedure shall be initiated by the contractor prior to the performance of contract work by such unlisted class of employee. A written report of the proposed conforming action, including information regarding the agreement or disagreement of the authorized representative of the employees involved or, where there is no authorized representative, the employees themselves, shall be submitted by the contractor to the contracting officer no later than 30 days after such unlisted class of employees performs any contract work. The contracting officer shall review the proposed action and promptly submit a report of the action, together with the agency's recommendation and all pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. 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 contracting officer within 30 days of receipt that additional time is necessary.

(iii) The final determination of the conformance action by the Wage and Hour Division shall be transmitted to the contracting officer who shall promptly notify the contractor of the action taken. Each affected employee shall be furnished by the contractor with a written copy of such determination or it shall be posted as a part of the wage determination.

(iv)(A) The process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be