§ 3.11 Regulations part of contract.

All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see §5.5(a) of this subtitle.

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

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AUTHORITY: 41 U.S.C. 351 *et seq.*; 41 U.S.C. 38 and 39; 5 U.S.C. 301; Pub. L. 104–188, 2105(b); Pub. L. 110–28, 121 Stat. 112; Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

SOURCE: 48 FR 49762, Oct. 27, 1983, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 4 appear at 61 FR 19984, May 3, 1996.

Subpart A—Service Contract Labor Standards Provisions and Procedures

§ 4.1 Purpose and scope.

This part contains the Department of Labor's rules relating to the administration of the McNamara-O'Hara Service Contract Act of 1965, as amended, referred to hereinafter as the Act. Rules of practice for administrative proceedings under the Act and for the review of wage determinations are contained in parts 6 and 8 of this chapter. See part 1925 of this title for the safety and health standards applicable under the Service Contract Act.

§ 4.1a Definitions and use of terms.

As used in this part, unless otherwise indicated by the context—

(a) *Act*, *Service Contract Act*, McNamara-O'Hara Act, or *Service Contract Act of 1965* shall mean the Service Contract Act of 1965 as amended by Public

Law 92–473, 86 Stat. 789, effective October 9, 1972, Public Law 93–57, 87 Stat. 140, effective July 6, 1973, and Public Law 94–489, 90 Stat. 2358, effective October 13, 1976 and any subsequent amendments thereto.

(b) *Secretary* includes the Secretary of Labor or their authorized representative.

(c) *Wage and Hour Division* means the organizational unit of the Department of Labor to which is assigned the performance of functions of the Secretary under the Service Contract Act of 1965, as amended.

(d) *Administrator* means the Administrator of the Wage and Hour Division, or authorized representative.

(e) *Contract* includes any contract subject wholly or in part to the provisions of the Service Contract Act of 1965 as amended, and any subcontract of any tier thereunder. (See §§4.10–4.134.)

(f) *Contractor* includes a subcontractor whose subcontract is subject to provisions of the Act. Also, the term *employer* means, and is used interchangeably with, the terms *contractor* and *subcontractor* in various sections in this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of compliance with the provisions of the Act.

(g) *Affiliate* or *affiliated person* includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with a contractor or subcontractor as a parent, subsidiary, or otherwise; and an officer or agent of such corporation. An affiliation is also deemed to exist where, directly or indirectly, one business concern or individual controls or has the power to control the other or where a third party controls or has the power to control both.

(h) *Wage determination* includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of sections 2(a) and/or 4(c) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of $2,500 which is subject to the provisions of the Service Contract Act of 1965. A wage determination is effective upon its publication on the WDOL Web site or when a Federal agency receives a response from the Department of Labor to an e98.

(i) *Wage Determinations OnLine (WDOL)* means the Government Internet Web site for both Davis-Bacon Act and Service Contract Act wage determinations available at *http://www.wdol.gov*. In addition, WDOL provides compliance assistance information and a link to submit an e98 or any electronic means the Department of Labor may approve for this purpose. The term will also apply to any other Internet Web site or electronic means that the Department of Labor may approve for these purposes.

(j) The *e98* means a Department of Labor approved electronic application (*http://www.wdol.gov*), whereby a contracting officer submits pertinent information to the Department of Labor and requests a wage determination directly from the Wage and Hour Division. The term will also apply to any other process or system the Department of Labor may establish for this purpose.

[48 FR 49762, Oct. 27, 1983, as amended at 70 FR 50895, Aug. 26, 2005; 81 FR 2224, Jan. 9, 2017]

§4.1b Payment of minimum compensation based on collectively bargained wage rates and fringe benefits applicable to employment under predecessor contract.

(a) Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished in the same locality. Section 4(c) provides that no such contractor or subcontractor shall pay any service employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed

under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement. If, however, the Secretary finds after a hearing in accordance with the regulations set forth in §4.10 of this subpart and parts 6 and 8 of this title that in any of the foregoing circumstances such wages and fringe benefits are substantially at variance with those which prevail for service of a character similar in the locality, those wages and/or fringe benefits in such collective bargaining agreement which are found to be substantially at variance shall not apply, and a new wage determination shall be issued. If the contract has been awarded and work begun prior to a finding that the wages and/or fringe benefits in a collective bargaining agreement are substantially at variance with those prevailing in the locality, the payment obligation of such contractor or subcontractor with respect to the wages and fringe benefits contained in the new wage determination shall be applicable as of the date of the Administrative Law Judge's decision or, where the decision is reviewed by the Administrative Review Board, the date of the decision of the Administrative Review Board. (See also §4.163(c).)

(b) Pursuant to section 4(b) of the Act, the application of section 4(c) is made subject to the following variation in the circumstances and under the conditions described: The wage rates and fringe benefits provided for in any collective bargaining agreement applicable to the performance of work under the predecessor contract which is consummated during the period of performance of such contract shall not be effective for purposes of the successor contract under the provisions of section 4(c) of the Act or under any wage determination implementing such section issued pursuant to section 2(a) of the Act, if—

(1) In the case of a successor contract for which bids have been invited by formal advertising, notice of the terms of such new or changed collective bargaining agreement is received by the contracting agency less than 10 days before the date set for opening of bids, provided that the contracting agency finds that there is not reasonable time still available to notify bidders; or

(2) Notice of the terms of a new or changed collective bargaining agreement is received by the agency after award of a successor contract to be entered into pursuant to negotiations or as a result of the execution of a renewal option or an extension of the initial contract term, provided that the contract start of performance is within 30 days of such award or renewal option or extension. If the contract does not specify a start of performance date which is within 30 days from the award, and/or performance of such procurement does not commence within this 30-day period, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the contract will be effective for purposes of the successor contract under section 4(c); and

(3) The limitations in paragraph (b)(1) or (2) of this section shall apply only if the contracting officer has given both the incumbent (predecessor) contractor and his employees' collective bargaining representative written notification at least 30 days in advance of all applicable estimated procurement dates, including issue of bid solicitation, bid opening, date of award, commencement of negotiations, receipt of proposals, or the commencement date of a contract resulting from a negotiation, option, or extension, as the case may be.

§ 4.2 Payment of minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 under all service contracts.

Section 2(b)(1) of the Service Contract Act of 1965 provides in effect that, regardless of contract amount, no contractor or subcontractor performing work under any Federal contract the principal purpose of which is to furnish services through the use of service employees shall pay any employees engaged in such work less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

[61 FR 68663, Dec. 30, 1996]

§4.3 Wage determinations.

(a) The minimum monetary wages and fringe benefits for service employees which the Act requires to be specified in contracts and bid solicitations subject to section 2(a) thereof will be set forth in wage determinations issued by the Administrator. Wage determinations shall be issued as soon as administratively feasible for all contracts subject to section 2(a) of the Act, and will be issued for all contracts entered into under which more than 5 service employees are to be employed.

(b) As described in subpart B of this part—Wage Determination Procedures, two types of wage determinations are issued under the Act: *Prevailing in the locality* or *Collective Bargaining Agreement (Successorship)* wage determinations. The facts related to a specific solicitation and contract will determine the type of wage determination applicable to that procurement. In addition, different types of prevailing wage determinations may be issued depending upon the nature of the contract. While prevailing wage determinations based upon cross-industry survey data are applicable to most contracts covered by the Act, in some cases the Department of Labor may issue industry specific wage determinations for application to specific types of service contracts. In addition, the geographic scope of contracts is often different and the geographic scope of the underlying survey data for the wage determinations applicable to those contracts may be different.

(c) Such wage determinations will set forth for the various classes of service employees to be employed in furnishing services under such contracts in the appropriate localities, minimum monetary wage rates to be paid and minimum fringe benefits to be furnished them during the periods when they are engaged in the performance of such contracts, including, where appropriate under the Act, provisions for adjustments in such minimum rates and benefits to be placed in effect under such contracts at specified future times. The wage rates and fringe benefits set forth in such wage determinations shall be determined in accordance with the provisions of sections 2(a)(1), (2), and (5), 4(c) and 4(d) of the Act from those prevailing in the locality for such employees, with due consideration of the rates that would be paid for direct Federal employment of any classes of such employees whose wages, if Federally employed, would be determined as provided in 5 U.S.C. 5341 or 5 U.S.C. 5332, or from pertinent collective bargaining agreements with respect to the implementation of section 4(c). The wage rates and fringe benefits so determined for any class of service employees to be engaged in furnishing covered contract services in a locality shall be made applicable by contract to all service employees of such class employed to perform such services in the locality under any contract subject to section 2(a) of the Act which is entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, revision, or supersedure.

(d) Generally, wage determinations issued for solicitations or negotiations for any contract where the place of performance is unknown will contain minimum monetary wages and fringe benefits for the various geographic localities where the work may be performed which were identified in the initial solicitation. (See §4.4(a)(3)(i).)

(e) Wage determinations will be available for public inspection during business hours at the Wage and Hour Division, U.S. Department of Labor, Washington, DC, and copies will be made available upon request at Regional Offices of the Wage and Hour Division. In addition, most prevailing wage determinations are available online from WDOL. Archived versions of SCA wage determinations that are no longer current may be accessed in the ''Archived SCA WD'' database of WDOL for information purposes only. Contracting officers should not use an archived wage determination in a contract action without prior approval of the Department of Labor.

[48 FR 49762, Oct. 27, 1983, as amended at 70 FR 50895, Aug. 26, 2005; 82 FR 2224, Jan. 9, 2017]

§4.4 Obtaining a wage determination.

(a)(1) Sections 2(a)(1) and (2) of the Act require that every contract and

any bid specification therefore in excess of $2,500 contain a wage determination specifying the minimum monetary wages and fringe benefits to be paid to service employees performing work on the contract. The contracting agency, therefore, must obtain a wage determination prior to:

(i) Any invitation for bids;

(ii) Request for proposals;

(iii) Commencement of negotiations;

(iv) Exercise of option or contract extension;

(v) Annual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress; or

(vi) Each biennial anniversary date of a multi-year contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division.

(2) As described in §4.4(b), wage determinations may be obtained from the Department of Labor by electronically submitting an e98 describing the proposed contract and the occupations expected to be employed on the contract. Based upon the information provided on the e98, the Department of Labor will respond with the wage determination or wage determinations that the contracting agency may rely upon as the correct wage determination(s) for the contract described in the e98. Alternatively, contracting agencies may select and obtain a wage determination using WDOL. (See §4.4(c).) Although the WDOL Web site provides assistance to the agency to select the correct wage determination for the contract, the agency remains responsible for the wage determination selected.

(3)(i) Where the place of performance of a contract for services subject to the Act is unknown at the time of solicitation, the solicitation need not initially contain a wage determination. The contracting agency, upon identification of firms participating in the procurement in response to an initial solicitation, shall obtain a wage determination for each location where the work may be performed as indicated by participating firms. An applicable wage determination must be obtained for each firm participating in the bidding for the location in which it would perform the contract. The appropriate wage determination shall be incorporated in the resultant contract documents and shall be applicable to all work performed thereunder (regardless of whether the successful contractor subsequently changes the place(s) of contract performance).

(ii) There may be unusual situations, as determined by the Department of Labor upon consultation with a contracting agency, where the procedure in paragraph (a)(3)(i) of this section is not practicable in a particular situation. In these situations, the Department may authorize a modified procedure that may result in the subsequent issuance of wage determinations for one or more composite localities.

(4) In no event may a contract subject to the Act on which more than five (5) service employees are contemplated to be employed be awarded without an appropriate wage determination. (See section 10 of the Act.)

(b) e98 process—

(1) The e98 is an electronic application used by contracting agencies to request wage determinations directly from the Wage and Hour Division. The Division uses computers to analyze information provided on the e98 and to provide a response while the requester is online, if the analysis determines that an existing wage determination is currently applicable to the procurement. The response will assign a unique serial number to the e98 and the response will provide a link to an electronic copy of the applicable wage determination(s). If the initial computer analysis cannot identify the applicable wage determination for the request, an online response will be provided indicating that the request has been referred to an analyst. Again, the online response will assign a unique serial number to the e98. After an analyst has reviewed the request, a further response will be sent to the email address identified on the e98. In most cases, the further response will provide an attachment with a copy of the applicable wage determination(s). In some cases, however, additional information may be required and the additional information will be requested via email. After an applicable wage determination is sent in response to an e98, the e98 system continues to monitor the request

and if the applicable wage determination is revised in time to affect the procurement, an amended response will be sent to the email address identified on the e98.

(2) When completing an e98, it is important that all information requested be completed accurately and fully. However, several sections are particularly important. Since most responses are provided via email, a correct email address is critically important. Accurate procurement dates are essential for the follow-up response system to operate effectively. An accurate estimate of the number of service employees to be employed under the contract is also important because section 10 of the Act requires that a wage determination be issued for all contracts that involve more than five service employees.

(3) Since the e98 system automatically provides an amended response if the applicable wage determination is revised, the email address listed on the e98 must be monitored during the full solicitation stage of the procurement. Communications sent to the email address provided are deemed to be received by the contracting agency. A contracting agency must update the email address through the ''help'' process identified on the e98, if the agency no longer intends to monitor the email address.

(4) For invitations to bid, if the bid opening date is delayed by more than sixty (60) days, or if contract commencement is delayed by more than sixty (60) days for all other contract actions, the contracting agency shall submit a revised e98.

(5) 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 shall reference the union and the collective bargaining agreement on the e98. The requester will receive an e-mail response giving instructions for submitting a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. After receipt of the collective bargaining agreement, the Wage and Hour Division will provide a further e-mail response attaching a copy of the wage determination based upon the collective bargaining agreement. If the place of contract performance is unknown, the contracting agency will submit the collective bargaining agreement of the incumbent contractor for incorporation into a wage determination applicable to a potential bidder located in the same locality as the predecessor contractor. 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 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 agency 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 at the time of filing the e98.

(6) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall provide a statement in the comments section of the e98 concerning the type of funding and the contemplated term of the proposed contract. Unless otherwise advised by the

Wage and Hour Division that a wage determination must be obtained on the annual anniversary date, a new wage determination shall be obtained 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.

(c) WDOL process—

(1) Contracting agencies may use the WDOL Web site to select the applicable prevailing wage determination for the procurement. The WDOL site provides assistance to the agency in the selection of the correct wage determination. The contracting agency, however, is fully responsible for selecting the correct wage determination. If the Department of Labor subsequently determines that an incorrect wage determination was applied to a specific contract, the contracting agency, in accordance with § 4.5, shall amend the contract to incorporate the correct wage determination as determined by the Department of Labor.

(2) If an applicable prevailing wage determination is not available on the WDOL site, the contracting agency must submit an e98 in accordance with § 4.4(b).

(3) The contracting agency shall monitor the WDOL site to determine whether the applicable wage determination has been revised. Revisions published on the WDOL site or otherwise communicated to the contracting officer within the timeframes prescribed in § 4.5(a)(2) are applicable and must be included in the resulting contract.

(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 agency 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, 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 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; 82 FR 2224, Jan. 9, 2017]

§ 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 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, 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 reduced to any single formula. The approach used may vary from wage determination to wage determination depending on the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

(B) In the case of a contract modification, an exercise of an option or extension of an existing contract, or in any other case where a contractor succeeds a contract under which the classification in question was previously conformed pursuant to this section, a new conformed wage rate and fringe benefits may be assigned to such conformed classification by indexing (i.e., adjusting) the previous conformed rate and fringe benefits by an amount equal to the average (mean) percentage increase (or decrease, where appropriate) between the wages and fringe benefits specified for all classifications to be used on the contract which are listed in the current wage determination, and those specified for the corresponding classifications in the previously applicable wage determination. Where conforming actions are accomplished in accordance with this paragraph prior to the performance of contract work by the unlisted class of employees, the contractor shall advise the contracting officer of the action taken but the other procedures in paragraph (b)(2)(ii) of this section need not be followed.

(C) No employee engaged in performing work on this contract shall in any event be paid less than the currently applicable minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

(v) The wage rate and fringe benefits finally determined pursuant to paragraphs (b)(2)(i) and (ii) of this section shall be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Failure to pay such unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Wage and Hour Division retroactive to the date such class of employees commenced contract work shall be a violation of the Act and this contract.

(vi) Upon discovery of failure to comply with paragraphs (b)(2)(i) through (v) of this section, the Wage and Hour

Division shall make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work.

(3) If, as authorized pursuant to section 4(d) of the Service Contract Act of 1965 as amended, the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees shall be subject to adjustment after 1 year and not less often than once every 2 years, pursuant to wage determinations to be issued by the Wage and Hour Division of the Department of Labor as provided in such Act.

(c) The contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined conformably thereto by furnishing any equivalent combinations of bona fide fringe benefits, or by making equivalent or differential payments in cash in accordance with the applicable rules set forth in subpart D of 29 CFR part 4, and not otherwise.

(d)(1) In the absence of a minimum wage attachment for this contract, neither the contractor nor any subcontractor under this contract shall pay any person performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938. Nothing in this provision shall relieve the contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(2) If this contract succeeds a contract, subject to the Service Contract Act of 1965 as amended, under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. No contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of § 4.1b(b) of 29 CFR part 4 apply or unless the Secretary of Labor or his authorized representative finds, after a hearing as provided in § 4.10 of 29 CFR part 4 that the wages and/or fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality, or determines, as provided in § 4.11 of 29 CFR part 4, that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's-length negotiations. Where it is found in accordance with the review procedures provided in 29 CFR 4.10 and/or 4.11 and parts 6 and 8 that some or all of the wages and/or fringe benefits contained in a predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a character similar in the locality, and/or that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's-length negotiations, the Department will issue a new or revised wage determination setting forth the applicable wage rates and fringe benefits. Such determination shall be made part of the contract or subcontract, in accordance with the decision of the Administrator, the Administrative Law Judge, or the Administrative Review Board, as the case may be, irrespective of whether such issuance occurs prior to or after the award of a contract or subcontract. 53 Comp. Gen. 401 (1973). In the case of a wage determnation issued solely as a result of a finding of

substantial variance, such determination shall be effective as of the date of the final administrative decision.

(e) The contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post the wage determination attached to this contract. The poster provided by the Department of Labor (Publication WH 1313) shall be posted in a prominent and accessible place at the worksite. Failure to comply with this requirement is a violation of section 2(a)(4) of the Act and of this contract.

(f) The contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the contractor or subcontractor which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish these services, and the contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR part 1925.

(g)(1) The contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work records containing the information specified in paragraphs (g)(1)(i) through (vi) of this section for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name and address and social security number of each employee.

(ii) The correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of fringe benefit payments in lieu thereof, and total daily and weekly compensation of each employee.

(iii) The number of daily and weekly hours so worked by each employee.

(iv) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.

(v) A list of monetary wages and fringe benefits for those classes of service employees not included in the wage determination attached to this contract but for which such wage rates or fringe benefits have been determined by the interested parties or by the Administrator or authorized representative pursuant to the labor standards clause in paragraph (b) of this section. A copy of the report required by the clause in paragraph (b)(2)(ii) of this section shall be deemed to be such a list.

(vi) Any list of the predecessor contractor's employees which had been furnished to the contractor pursuant to §4.6(l)(2).

(2) The contractor shall also make available a copy of this contract for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of the Department of Labor and notification of the contractor, shall take action to cause suspension of any further payment or advance of funds until such violation ceases.

(4) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(h) The contractor shall unconditionally pay to each employee subject to the Act all wages due free and clear and without subsequent deduction (except as otherwise provided by law or Regulations, 29 CFR part 4), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Act may not be of any duration longer than semi-monthly.

(i) The contracting officer shall withhold or cause to be withheld from the Government prime contractor under this or any other Government contract with the prime contractor such sums

as an appropriate official of the Department of Labor requests or such sums as the contracting officer decides may be necessary to pay underpaid employees employed by the contractor or subcontractor. In the event of failure to pay any employees subject to the Act all or part of the wages or fringe benefits due under the Act, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of these clauses relating to the Service Contract Act of 1965, may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(j) The contractor agrees to insert these clauses in this section relating to the Service Contract Act of 1965 in all subcontracts subject to the Act. The term *contractor* as used in these clauses in any subcontract, shall be deemed to refer to the subcontractor, except in the term *Government prime contractor*.

(k)(1) As used in these clauses, the term *service employee* means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations. The term *service employee* includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(2) The following statement is included in contracts pursuant to section 2(a)(5) of the Act and is for *informational purposes only:*

The following classes of service employees expected to be employed under the contract with the Government would be subject, if employed by the contracting agency, to the provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332 and would, if so employed, be paid not less than the following rates of wages and fringe benefits:

Employee class	Monetary wage-fringe benefits
.....	.....
.....	.....
.....	.....

(l)(1) If wages to be paid or fringe benefits to be furnished any service employees employed by the Government prime contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the Government prime contractor shall report such fact to the contracting officer, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance, such agreements shall be reported promptly after negotiation thereof.

(2) Not less than 10 days prior to completion of any contract being performed at a Federal facility where service employees may be retained in the performance of the succeeding contract and subject to a wage determination which contains vacation or other benefit provisions based upon length of service with a contractor (predecessor) or successor (§ 4.173 of Regulations, 29 CFR part 4), the incumbent prime contractor shall furnish to the contracting officer a certified list of the names of all service employees on the contractor's or subcontractor's payroll during the last month of contract performance. Such list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each such

service employee. The contracting officer shall turn over such list to the successor contractor at the commencement of the succeeding contract.

(m) Rulings and interpretations of the Service Contract Act of 1965, as amended, are contained in Regulations, 29 CFR part 4.

(n)(1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has a substantial interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Act.

(2) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract pursuant to section 5 of the Act.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(o) Notwithstanding any of the clauses in paragraphs (b) through (m) of this section relating to the Service Contract Act of 1965, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to section 4(b) of the Act prior to its amendment by Public Law 92–473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(1) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical, or mental deficiency or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Service Contract Act without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a)(2) of that Act, in accordance with the conditions and procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator (29 CFR parts 520, 521, 524, and 525).

(2) The Administrator will issue certificates under the Service Contract Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR parts 520, 521, 524, and 525).

(3) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in parts 525 and 528 of title 29 of the Code of Federal Regulations.

(p) Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a State Apprenticeship Agency which is recognized by the U.S. Department of Labor, or if no such recognized agency exists in a State, under a program registered with the Bureau of Apprenticeship and Training, Employment and Training Administration, U.S. Department of Labor. Any employee who is not registered as an apprentice in an approved program shall be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed. The wage rates paid apprentices shall not be less than the wage rate for their level of progress set forth in the registered program, expressed as the appropriate percentage of the journeyman's rate contained in the applicable wage determination. The allowable ratio of apprentices to journeymen employed on the contract work in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program.

(q) Where an employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips, the amount of tips received by the employee may be credited by the employer against the minimum wage required by Section 2(a)(1)

or 2(b)(1) of the Act to the extent permitted by section 3(m) of the Fair Labor Standards Act and Regulations, 29 CFR part 531. To utilize this proviso:

(1) The employer must inform tipped employees about this tip credit allowance before the credit is utilized;

(2) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received);

(3) The employer must be able to show by records that the employee receives at least the applicable Service Contract Act minimum wage through the combination of direct wages and tip credit;

(4) The use of such tip credit must have been permitted under any predecessor collective bargaining agreement applicable by virtue of section 4(c) of the Act.

(r) *Disputes concerning labor standards.* Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 4, 6, and 8. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(The information collection, recordkeeping, and reporting requirements contained in this section have been approved by the Office of Management and Budget under the following numbers:

Paragraph	OMB Control No.
(b)(2)(i)–(iv)	1235–0007
(e)	1235–0007
(g)(1)(i)–(iv)	1235–0007
	1235–0018
(g)(1)(v)–(vi)	1235–0007
(l)(1), (2)	1235–0007
(q)(3)	1235–0007

[48 FR 49762, Oct. 27, 1983; 48 FR 50529, Nov. 2, 1983, as amended at 61 FR 68663, Dec. 30, 1996; 82 FR 2224, Jan. 9, 2017]

§§ 4.7–4.9 [Reserved]

§ 4.10 Substantial variance proceedings under section 4(c) of the Act.

(a) *Statutory provision.* Under section 4(c) of the Act, and under corresponding wage determinations made as provided in section 2(a)(1) and (2) of the Act, contractors and subcontractors performing contracts subject to the Act generally are obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would have been entitled under a collective bargaining agreement if they were employed on like work under a predecessor contract in the same locality. (See §§ 4.1b, 4.3, 4.6(d)(2).) Section 4(c) of the Act provides, however, that ''such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality''.

(b) *Prerequisites for hearing.* (1)(i) A request for a hearing under this section may be made by the contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, and shall include the following:

(A) The number of any wage determination at issue, the name of the contracting agency whose contract is involved, and a brief description of the services to be performed under the contract;

(B) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period;

(C) A statement of the applicant's case, setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages and/or fringe

benefits, attaching available data concerning wages and/or fringe benefits prevailing in the locality;

(D) Names and addresses (to the extent known) of interested parties.

(ii) If the information in paragraph (b)(1)(i) of this section is not submitted with the request, the Administrator may deny the request or request supplementary information, at his/her discretion. No particular form is prescribed for submission of a request under this section.

(2) The Administrator will respond to the party requesting a hearing within 30 days after receipt, granting or denying the request or advising that additional time is necessary for a decision. No hearing will be provided pursuant to this section and section 4(c) of the Act unless the Administrator determines from information available or submitted with a request for such a hearing that there may be a substantial variance between some or all of the wage rates and/or fringe benefits provided for in a collective bargaining agreement to which the service employees would otherwise be entitled by virtue of the provisions of section 4(c) of the Act, and those which prevail for services of a character similar in the locality.

(3) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below, except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c) *Referral to the Chief Administrative Law Judge.* When the Administrator determines from the information available or submitted with a request for a hearing that there may be a substantial variance, the Administrator on his/her own motion or on application of any interested person will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such a fact finding hearing as may be necessary to render a decision solely on the issue of whether the wages and/or fringe benefits contained in the collective bargaining agreement which was the basis for the wage determination at issue are substantially at variance with those which prevail for services of a character similar in the locality. However, in situations where there is also a question as to whether the collective bargaining agreement was reached as a result of ''arm's-length negotiations'' (see §4.11), the referral shall include both issues for resolution in one proceeding. No authority is delegated under this section to hear and/or decide any other issues pertaining to the Service Contract Act. As provided in section 4(a) of the Act, the provisions of section 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR part 6.

(d) The Administrator shall be an interested party and shall have the opportunity to participate in the proceeding to the degree he/she considers appropriate.

[48 FR 49762, Oct. 27, 1983, as amended at 82 FR 2225, Jan. 9, 2017]

§4.11 Arm's length proceedings.

(a) *Statutory provision.* Under section 4(c) of the Act, the wages and fringe benefits provided in the predecessor contractor's collective bargaining agreement must be reached ''as a result of arm's-length negotiations.'' This provision precludes arrangements by parties to a collective bargaining agreement who, either separately or together, act with an intent to take advantage of the wage determination scheme provided for in sections 2(a) and 4(c) of the Act. See *Trinity Services, Inc.* v. *Marshall,* 593 F.2d 1250 (D.C. Cir. 1978). A finding as to whether a collective bargaining agreement or particular wages and fringe benefits therein are reached as a result of arm's-length negotiations may be made through investigation, hearing or otherwise pursuant to the Secretary's authority under section 4(a) of the Act.

(b) *Prerequisites for hearing.* (1) A request for a determination under this

section may be made by a contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. Although no particular form is prescribed for submission of a request under this section, such request shall include the following information:

(i) A statement of the applicant's case setting forth in detail the reasons why the applicant believes that the wages and fringe benefits contained in the collective bargaining agreement were not reached as a result of arm's-length negotiations;

(ii) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period;

(iii) Names and addresses (to the extent known) of interested parties.

(2) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c)(1) The Administrator, on his/her own motion or after receipt of a request for a determination, may make a finding on the issue of arm's-length negotiations.

(2) If the Administrator determines that there may not have been arm's-length negotiations, but finds that there is insufficient evidence to render a final decision thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (d) of this section.

(3)(i) If the Administrator finds that the collective bargaining agreement or wages and fringe benefits at issue were reached as a result of arm's-length negotiations or that arm's-length negotiations did not take place, the interested parties, including the parties to the collective bargaining agreement, will be notified of the Administrator's findings, which shall include the reasons therefor, and such parties shall be afforded an opportunity to request that a hearing be held to render a decision on the issue of arm's-length negotiations.

(ii) Such parties shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(iii) If no hearing is requested within the time mentioned in paragraph (c)(3)(ii) of this section, the Administrator's ruling shall be final, and, in the case of a finding that arm's-length negotiations did not take place, a new wage determination will be issued for the contract. If a hearing is requested, the decision of the Administrator shall be inoperative.

(d) *Referral to the Chief Administrative Law Judge.* The Administrator on his/her own motion, under paragraph (c)(2) of this section or upon a request for a hearing under paragraph (c)(3)(ii) of this section where the Administrator determines that material facts are in dispute, shall by order refer the issue to the Chief Administrative Law Judge for designation of an Administrative Law Judge, who shall conduct such hearings as may be necessary to render a decision solely on the issue of arm's-length negotiations. However, in situations where there is also a question as to whether some or all of the collectively bargained wage rates and/or fringe benefits are substantially at variance (see § 4.10), the referral shall include both issues for resolution in one proceeding. As provided in section 4(a) of the Act, the provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR part 6.

(e) *Referral to the Administrative Review Board.* When a party requests a hearing under paragraph (c)(3)(ii) of this section and the Administrator determines that no material facts are in dispute, the Administrator shall refer the issue and the record compiled thereon to the Administrative Review Board to render a decision solely on the issue of arm's-length negotiations. Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR part 8.

[48 FR 49762, Oct. 27, 1983, as amended at 82 FR 2225, Jan. 9, 2017]

§4.12 Substantial interest proceedings.

(a) *Statutory provision.* Under section 5(a) of the Act, no contract of the United States (or the District of Columbia) shall be awarded to the persons or firms appearing on the list distributed by the Comptroller General giving the names of persons or firms who have been found to have violated the Act until 3 years have elapsed from the date of publication of the list. Section 5(a) further states that ''no contract of the United States shall be awarded * * * to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest * * * .'' A finding as to whether persons or firms whose names appear on the debarred bidders list have a substantial interest in any other firm, corporation, partnership, or association may be made through investigation, hearing, or otherwise pursuant to the Secretary's authority under section 4(a) of the Act.

(b) *Ineligibility.* See §4.188 of this part for the Secretary's rulings and interpretations with respect to substantial interest.

(c)(1) A request for a determination under this section may be made by any interested party, including contractors or prospective contractors, and associations of contractors, representatives of employees, and interested Government agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(2) The request shall include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the debarred bidders list has a substantial interest in any firm, corporation, partnership, or association which is seeking or has been awarded a contract of the United States or the District of Columbia. No particular form is prescribed for the submission of a request under this section.

(d)(1) The Administrator, on his/her own motion or after receipt of a request for a determination, may make a finding on the issue of substantial interest.

(2) If the Administrator determines that there may be a substantial interest, but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (e) of this section.

(3) If the Administrator finds that no substantial interest exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(4)(i) If the Administrator finds that a substantial interest exists, the person or firm affected will be notified of the Administrator's finding, which shall include the reasons therefor, and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue of substantial interest.

(ii) Such person or firm shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(iii) If no hearing is requested within the time mentioned in paragraph (d)(4)(ii) of this section, the Administrator's finding shall be final and the Administrator shall so notify the Comptroller General. If a hearing is requested, the decision of the Administrator shall be inoperative unless and until the Administrative Law Judge or the Administrative Review Board issues an order that there is a substantial interest.

(e) *Referral to the Chief Administrative Law Judge.* The Administrator on his/her own motion, or upon a request for a hearing where the Administrator determines that relevant facts are in dispute, shall by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such hearings as may be necessary to render a decision solely on the issue of substantial interest. As provided in section 4(a) of the Act, the provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceedings, which shall be conducted in accordance with the procedures set forth at 29 CFR part 6.

(f) *Referral to the Administrative Review Board.* When the person or firm requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Administrative Review Board to render a decision solely on the issue of substantial interest. Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR part 8.

[48 FR 49762, Oct. 27, 1983, as amended at 82 FR 2225, Jan. 9, 2017]

Subpart B—Wage Determination Procedures

§ 4.50 Types of wage and fringe benefit determinations.

The Administrator specifies the minimum monetary wages and fringe benefits to be paid as required under the Act in two types of determinations:

(a) *Prevailing in the locality.* (1) Determinations that set forth minimum monetary wages and fringe benefits determined to be prevailing for various classes of service employees in the locality (sections 2(a)(1) and 2(a)(2) of the Act) after giving ''due consideration'' to the rates applicable to such service employees if directly hired by the Federal Government (section 2(a)(5) of the Act).

(2) The prevailing wage determinations applicable to most contracts covered by the Act are based upon cross-industry survey data. However, in some cases the Department of Labor may issue industry specific wage determinations for application to specific types of service contracts. In addition, the geographic scope of contracts is often different and the geographic scope of the underlying survey data for the wage determinations applicable to those contracts may be different. Therefore, a variety of different prevailing wage determinations may be applicable in a particular locality. The application of these different prevailing wage determinations will depend upon the nature of the contracts to which they are applied.

(b) *Collective Bargaining Agreement—(Successorship).* Determinations that set forth the wage rates and fringe benefits, including accrued and prospective increases, contained in a collective bargaining agreement applicable to the service employees who performed on a predecessor contract in the same locality. (See sections 2(a)(1) and (2) as well as 4(c) of the Act.)

[70 FR 50898, Aug. 26, 2005]

§ 4.51 Prevailing in the locality determinations.

(a) *Information considered.* The minimum monetary wages and fringe benefits set forth in determinations of the Secretary are based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made. Such information is most frequently derived from area surveys made by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel. Information may also be obtained from Government contracting officers and from other available sources, including employees and their representatives and employers and their associations. The determinations may be based on the wage rates and fringe benefits contained in collective bargaining agreements where they have been determined to prevail in a locality for specified occupational class(es) of employees.

(b) *Determination of prevailing rates.* Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to prevail. The wage rates and fringe benefits in a

collective bargaining agreement covering 2,001 janitors in a locality, for example, prevail if it is determined that no more than 4,000 workers are engaged in such janitorial work in that locality. In the case of information developed from surveys, statistical measurements of central tendency such as a median (a point in a distribution of wage rates where 50 percent of the surveyed workers receive that or a higher rate and an equal number receive a lesser rate) or the mean (average) are considered reliable indicators of the prevailing rate. Which of these statistical measurements will be applied in a given case will be determined after a careful analysis of the overall survey, separate classification data, patterns existing between survey periods, and the way the separate classification data interrelate. Use of the median is the general rule. However, the mean (average) rate may be used in situations where, after analysis, it is determined that the median is not a reliable indicator. Examples where the mean may be used include situations where:

(1) The number of workers studied for the job classification constitutes a relatively small sample and the computed median results in an actual rate that is paid to few of the studied workers in the class;

(2) Statistical deviation such as a skewed (bimodal or multimodal) frequency distribution biases the median rate due to large concentrations of workers toward either end of the distribution curve and the computed median results in an actual rate that is paid to few of the studied workers in the class; or

(3) The computed median rate distorts historic wage relationships between job levels within a classification family (i.e., Electronic Technician Classes A, B, and C levels within the Electronic technician classification family), between classifications of different skill levels (i.e., a maintenance electrician as compared with a maintenance carpenter), or, for example, yields a wage movement inconsistent with the pattern shown by the survey overall or with related and/or similarly skilled job classifications.

(c) *Slotting wage rates.* In some instances, a wage survey for a particular locality may result in insufficient data for one or more job classifications that are required in the performance of a contract. Establishment of a prevailing wage rate for certain such classifications may be accomplished through a ''slotting'' procedure, such as that used under the Federal pay system. Under this procedure, wage rates are derived for a classification based on a comparison of equivalent or similar job duty and skill characteristics between the classifications studied and those for which no survey data is available. As an example, a wage rate found prevailing for the janitorial classification may be adopted for the classification of mess attendant if the skill and duties attributed to each classification are known to be rated similarly under pay classification schemes. (Both classifications are assigned the same wage grade under the Coordinated Federal Wage System and are paid at the Wage Board grade 2 when hired directly by a Federal agency.)

(d) *Due consideration.* In making wage and fringe benefit determinations, section 2(a)(5) of the Act requires that due consideration be given to the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5 U.S.C., were applicable to them. Section 5341 refers to the Wage Board or Coordinated Federal Wage System for ''blue collar'' workers and section 5332 refers to the General Schedule pay system for ''white collar'' workers. The term *due consideration* implies the exercise of discretion on the basis of the facts and circumstances surrounding each determination, recognizing the legislative objective of narrowing the gap between the wage rates and fringe benefits prevailing for service employees and those established for Federal employees. Each wage determination is based on a survey or other information on the wage rates and fringe benefits being paid in a particular locality and also takes into account those wage rates and fringe benefits which would be paid under Federal pay systems.

§ 4.52 Fringe benefit determinations.

(a) Wage determinations issued pursuant to the Service Contract Act ordinarily contain provisions for vacation and holiday benefits prevailing in the locality. In addition, wage determinations contain a prescribed minimum rate for all other benefits, such as insurance, pension, etc., which are not required as a matter of law (i.e., excluding Social Security, unemployment insurance, and workers' compensation payments and similar statutory benefits), based upon the sum of the benefits contained in the U.S. Bureau of Labor Statistics, Employment Cost Index (ECI), for all employees in private industry, nationwide (and excluding ECI components for supplemental pay, such as shift differential, which are considered wages rather than fringe benefits under SCA). Pursuant to Section 4(b) of the Act and § 4.123, the Secretary has determined that it is necessary and proper in the public interest, and in accord with remedial purposes of the Act to protect prevailing labor standards, to issue a variation from the Act's requirement that fringe benefits be determined for various classes of service employees in the locality.

(b) The minimum rate for all benefits (other than holidays and vacation) which are not legally required, as prescribed in paragraph (a) of this section, shall be phased in over a four-year period beginning June 1, 1997. The first year the rate will be $.90 per hour plus one-fourth of the difference between $.90 per hour and the rate prescribed in paragraph (a) of this section; the second year the rate will be increased by one-third of the difference between the rate set the first year and the rate prescribed; the third year the rate will be increased by one-half of the difference between the rate set in the second year and the rate prescribed; and the fourth year and thereafter the rate will be the rate prescribed in paragraph (a) of this section.

(c) Where it is determined pursuant to § 4.51(b) that a single fringe benefit rate is paid with respect to a majority of the workers in a class of service employees engaged in similar work in a locality, that rate will be determined to prevail notwithstanding the rate which would otherwise be prescribed pursuant to this section. Ordinarily, it will be found that a majority of workers receive fringe benefits at a single level where those workers are subject to a collective bargaining agreement whose provisions have been found to prevail in the locality.

(d) A significant number of contracts contain a prevailing fringe benefit rate of $2.56 per hour. Generally, these contracts are large base support contracts, contracts requiring competition from large corporations, contracts requiring highly technical services, and contracts solicited pursuant to A–76 procedures (displacement of Federal employees), as well as successor contracts thereto. The $2.56 benefit rate shall continue to be issued for all contracts containing the $2.56 benefit rate, as well as resolicitations and other successor contracts for substantially the same services, until the fringe benefit rate determined in accordance with paragraphs (a) and (b) of this section equals or exceeds $2.56 per hour.

(e) *Variance procedure.* (1) The Department will consider variations requested by contracting agencies pursuant to Section 4(b) of the Act and § 4.123, from the methodology described in paragraph (a) of this section for determining prevailing fringe benefit rates. This variation procedure will not be utilized to routinely permit separate fringe benefit packages for classes of employees and industries, but rather will be limited to the narrow circumstances set forth herein where special needs of contracting agencies require this procedure. Such variations will be considered where the agency demonstrates that because of the special circumstances of the particular industry, the variation is necessary and proper in the public interest or to avoid the serious impairment of government business. Such a demonstration might be made, for example, where an agency is unable to obtain contractors willing to bid on a contract because the service will be performed at the contractor's facility by employees performing work for the Government and other customers, and as a result, paying the required SCA fringe benefits would cause undue disruption

to the contractor's own work force and pay practices.

(2) It will also be necessary for the agency to demonstrate that a variance is in accordance with the remedial purpose of the Act to protect prevailing labor standards, by providing comprehensive data from a valid survey demonstrating the prevailing fringe benefits for the specific industry. If the agency does not continue to provide current data in subsequent years, the variance will be withdrawn and the rate prescribed in paragraph (a) of this section will be issued for the contract.

[61 FR 68664, Dec. 30, 1996]

§4.53 Collective bargaining agreement (successorship) determinations.

Determinations based on the collective bargaining agreement of a predecessor contractor set forth by job classification each provision relating to wages (such as the established straight time hourly or salary rate, cost-of-living allowance, and any shift, hazardous, and other similar pay differentials) and to fringe benefits (such as holiday pay, vacation pay, sick leave pay, life, accidental death, disability, medical, and dental insurance plans, retirement or pension plans, severance pay, supplemental unemployment benefits, saving and thrift plans, stock-option plans, funeral leave, jury/witness leave, or military leave) contained in the predecessor's collective bargaining agreement, as well as conditions governing the payment of such wages and fringe benefits. Accrued wages and fringe benefits and prospective increases therein are also included. Each wage determination is limited in application to a specific contract succeeding a contract which had been performed in the same locality by a contractor with a collective bargaining agreement, and contains a notice to prospective bidders regarding their obligations under section 4(c) of the Act.

[48 FR 49762, Oct. 27, 1983. Redesignated at 61 FR 68664, Dec. 30, 1996]

§4.54 Locality basis of wage and fringe benefit determinations.

(a) Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine the minimum monetary wages and fringe benefits prevailing for various classes of service employees ''in the locality''. Although the term *locality* has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a ''locality'' that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination. Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area. For example, a survey by the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the same geographic area included within the scope of the survey. Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used. In addition, in *Southern Packaging & Storage Co.* v. *United States*, 618 F.2d 1088 (4th Cir. 1980), the court held that a nationwide wage determination normally is not permissible under the Act, but postulated that ''there may be the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition''.

(b) Where the services are to be performed for a Federal agency at the site

of the successful bidder, in contrast to services to be performed at a specific Federal facility or installation, or in the locality of such installation, the location where the work will be performed often cannot be ascertained at the time of bid advertisement or solicitation. In such instances, wage determinations will generally be issued for the various localities identified by the agency as set forth in § 4.4(a)(3)(i).

(c) Where the wage rates and fringe benefits contained in a collective bargaining agreement applicable to the predecessor contract are set forth in a determination, locality in such a determination is typically described as the geographic area in which the predecessor contract was performed. The determination applies to any successor contractor which performs the contract in the same locality. However, see § 4.163(i).

[48 FR 49762, Oct. 27, 1983. Redesignated at 61 FR 68664, Dec. 30, 1996, and amended at 70 FR 50898, Aug. 26, 2005]

§ 4.55 Issuance and revision of wage determinations.

(a) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in revised determinations. For example, in a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement(s) applicable in that locality, and such agreement(s) specifies increases in such rates to be effective on specific dates, the determinations would be revised to reflect such changes as they become effective. Revised determinations shall be applicable to contracts in accordance with the provisions of § 4.5(a) of subpart A.

(b) Determinations issued by the Wage and Hour Division with respect to particular contracts are required to be incorporated in the invitations for bids or requests for proposals or quotations issued by the contracting agencies, and are to be incorporated in the contract specifications in accordance with § 4.5 of subpart A. In this manner, prospective contractors and subcontractors are advised of the minimum monetary wages and fringe benefits required under the most recently applicable determination to be paid the service employees who perform the contract work. These requirements are the same for all bidders so none will be placed at a competitive disadvantage.

(c) Determinations issued by the Wage and Hour Division with respect to particular contracts are required to be incorporated in the invitations for bids or requests for proposals or quotations issued by the contracting agencies, and are to be incorporated in the contract specifications in accordance with § 4.5 of subpart A. In this manner, prospective contractors and subcontractors are advised of the minimum monetary wages and fringe benefits required under the most recently applicable determination to be paid the service employees who perform the contract work. These requirements are, of course, the same for all bidders so none will be placed at a competitive disadvantage.

[48 FR 49762, Oct. 27, 1983. Redesignated at 61 FR 68664, Dec. 30, 1996; 70 FR 50898, Aug. 26, 2005]

§ 4.56 Review and reconsideration of wage determinations.

(a) *Review by the Administrator.* (1) Any interested party affected by a wage determination issued under section 2(a) of the Act may request review and reconsideration by the Administrator. A request for review and reconsideration may be made by the contracting agency or other interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Any such request must be accompanied by supporting evidence. In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or, later than 10 days before commencement of a contract in the case of a negotiated procurement, exercise of a contract option or extension. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

(2) The Administrator shall, upon receipt of a request for reconsideration,

review the data sources relied upon as a basis for the wage determination, the evidence furnished by the party requesting review or reconsideration, and, if necessary to resolve the matter, any additional information found to be relevant to determining prevailing wage rates and fringe benefits in a particular locality. The Administrator, pursuant to a review of available information, may issue a new wage determination, may cause the wage determination to be revised, or may affirm the wage determination issued, and will notify the requesting party in writing of the action taken. The Administrator will render a decision within 30 days of receipt of the request or will notify the requesting party in writing within 30 days of receipt that additional time is necessary.

(b) *Review by the Administrative Review Board.* Any decision of the Administrator under paragraph (a) of this section may be appealed to the Administrative Review Board within 20 days of issuance of the Administrator's decision. Any such appeal shall be in accordance with the provisions of part 8 of this title.

[48 FR 49762, Oct. 27, 1983. Redesignated at 61 FR 68664, Dec. 30, 1996]

Subpart C—Application of the McNamara-O'Hara Service Contract Act

INTRODUCTORY

§4.101 Official rulings and interpretations in this subpart.

(a) The purpose of this subpart is to provide, pursuant to the authority cited in §4.102, official rulings and interpretations with respect to the application of the McNamara-O'Hara Service Contract Act for the guidance of the agencies of the United States and the District of Columbia which may enter into and administer contracts subject to its provisions, the persons desiring to enter into such contracts with these agencies, and the contractors, subcontractors, and employees who perform work under such contracts.

(b) These rulings and interpretations are intended to indicate the construction of the law and regulations which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress or by authoritative ruling of the courts, or if it is concluded upon reexamination of an interpretation that it is incorrect. See for example, *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); *Roland Co.* v. *Walling*, 326 U.S. 657 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507–509 (1943); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128 (1940); *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956). The Department of Labor (and not the contracting agencies) has the primary and final authority and responsibility for administering and interpreting the Act, including making determinations of coverage. See *Woodside Village* v. *Secretary of Labor*, 611 F. 2d 312 (9th Cir. 1980); *Nello L. Teer Co.* v. *United States*, 348 F.2d 533, 539–540 (Ct. Cl. 1965), cert. denied, 383 U.S. 934; *North Georgia Building & Construction Trades Council* v. *U.S. Department of Transportation*, 399 F. Supp. 58, 63 (N.D. Ga. 1975) (Davis-Bacon Act); *Curtiss-Wright Corp.* v. *McLucas*, 364 F. Supp. 750, 769–72 (D.N.J. 1973); and 43 Atty. Gen. Ops. ____ (March 9, 1979); 53 Comp. Gen. 647, 649–51 (1974); 57 Comp. Gen. 501, 506 (1978).

(c) Court decisions arising under the Act (as well as under related remedial labor standards laws such as the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Fair Labor Standards Act) which support policies and interpretations contained in this part are cited where it is believed that they may be helpful. On matters which have not been authoritatively determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). In order that these positions may be made known to persons who may be affected by them, official interpretations and rulings are issued by the Administrator with the advice of the Solicitor of Labor, as authorized by the Secretary (Secretary's Order

No. 16–75, Nov. 21, 1975, 40 FR 55913; Employment Standards Order No. 2–76, Feb. 23, 1976, 41 FR 9016). These interpretations are a proper exercise of the Secretary's authority. *Idaho Sheet Metal Works* v. *Wirtz,* 383 U.S. 190, 208 (1966), reh. den. 383 U.S. 963 (1966). References to pertinent legislative history, decisions of the Comptroller General and of the Attorney General, and Administrative Law Judges' decisions are also made in this part where it appears they will contribute to a better understanding of the stated interpretations and policies.

(d) The interpretations of the law contained in this part are official interpretations which may be relied upon. The Supreme Court has recognized that such interpretations of the Act ''provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it'' and ''constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'' (*Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). Interpretations of the agency charged with administering an Act are generally afforded deference by the courts. (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–34 (1971); *Udall* v. *Tallman*, 380 U.S. 1 (1965).) Some of the interpretations in this part relating to the application of the Act are interpretations of provisions which appeared in the original Act before its amendments in 1972 and 1976. Accordingly, the Department of Labor considers these interpretations to be correct, since there were no amendments of the statutory provisions which they interpret. (*United States* v. *Davison Fuel & Dock Co.*, 371 F.2d 705, 711–12 (C.A. 4, 1967).)

(e) The interpretations contained herein shall be in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces certain interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as part 4 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part, to the extent they are inconsistent with the rules herein stated, are superseded, rescinded, and withdrawn.

(f) Principles governing the application of the Act as set forth in this subpart are clarified or amplified in particular instances by illustrations and examples based on specific fact situations. Since such illustrations and examples cannot and are not intended to be exhaustive, or to provide guidance on every problem which may arise under the Act, no inference should be drawn from the fact that a subject or illustration is omitted.

(g) It should not be assumed that the lack of discussion of a particular subject in this subpart indicates the adoption of any particular position by the Department of Labor with respect to such matter or to constitute an interpretation, practice, or enforcement policy. If doubt arises or a question exists, inquiries with respect to matters other than safety and health standards should be directed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, or any regional office of the Wage and Hour Division. Safety and health inquiries should be addressed to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210, or to any OSHA regional office. A full description of the facts and any relevant documents should be submitted if an official ruling is desired.

[48 FR 49762, Oct. 27, 1983, as amended at 82 FR 2225, Jan. 9, 2017]

§ 4.102 Administration of the Act.

As provided by section 4 of the Act and under provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 38, 39), which are made expressly applicable for the purpose, the Secretary of Labor is authorized and directed to administer and enforce the provisions of the McNamara-O'Hara Service Contract Act, to make rules and regulations, issue orders, make decisions, and take other appropriate action under the Act. The Secretary is also authorized to make reasonable limitations and to

make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from provisions of the Act (except section 10), but only in special circumstances where it is determined that such action is necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business and is in accord with the remedial purposes of the Act to protect prevailing labor standards. The authority and enforcement powers of the Secretary under the Act are coextensive with the authority and powers under the Walsh-Healey Act. *Curtiss Wright Corp.* v. *McLucas* 364 F. Supp. 750, 769 (D NJ 1973).

§4.103 The Act.

The McNamara-O'Hara Service Contract Act of 1965 (Pub. L. 89–286, 79 Stat. 1034, 41 U.S.C. 351 *et seq.*), hereinafter referred to as the Act, was approved by the President on October 22, 1965 (1 Weekly Compilation of Presidential Documents 428). It establishes standards for minimum compensation and safety and health protection of employees performing work for contractors and subcontractors on service contracts entered into with the Federal Government and the District of Columbia. It applies to contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after January 20, 1966. It has been amended by Public Law 92–473, 86 Stat. 798; by Public Law 93–57, 87 Stat. 140; and by Public Law 94–489, 90 Stat. 2358.

§4.104 What the Act provides, generally.

The provisions of the Act apply to contracts, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees. Under its provisions, every contract subject to the Act (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 must contain stipulations as set forth in §4.6 of this part requiring: (a) That specified minimum monetary wages and fringe benefits determined by the Secretary of Labor (based on wage rates and fringe benefits prevailing in the locality or, in specified circumstances, the wage rates and fringe benefits contained in a collective bargaining agreement applicable to employees who performed on a predecessor contract) be paid to service employees employed by the contractor or any subcontractor in performing the services contracted for; (b) that working conditions of such employees which are under the control of the contractor or subcontractor meet safety and health standards; and (c) that notice be given to such employees of the compensation due them under the minimum wage and fringe benefits provisions of the contract. Contractors performing work subject to the Act thus enter into competition to obtain Government business on terms of which they are fairly forewarned by inclusion in the contract. (*Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507 (1943).) The Act's purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment. (See H.R. Rep. No. 948, 89th Cong., 1st Sess. 2–3 (1965); S. Rep. No. 798, 89th Cong., 1st Sess. 3–4 (1965).) The Act does not permit the monetary wage rates specified in such a contract to be less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, as amended (29 U.S.C. 206(a)(1)). In addition, it is a violation of the Act for any contractor or subcontractor under a Federal contract subject to the Act, regardless of the amount of the contract, to pay any of his employees engaged in performing work on the contract less than such Fair Labor Standards Act minimum wage. Contracts of $2,500 or less are not, however, required to contain the stipulations described above. These provisions of the Service Contract Act are implemented by the regulations contained in this part 4 and are discussed in more detail in subsequent sections of subparts C, D, and E.

§4.105 The Act as amended.

(a) The provisions of the Act (see §§4.102–4.103) were amended, effective October 9, 1972, by Public Law 92–473, signed into law by the President on that date. By virtue of amendments

made to paragraphs (1) and (2) of section 2(a) and the addition to section 4 of a new subsection (c), the compensation standards of the Act (see §§ 4.159–4.179) were revised to impose on successor contractors certain requirements (see § 4.1b) with respect to payment of wage rates and fringe benefits based on those agreed upon for substantially the same services in the same locality in collective bargaining agreements entered into by their predecessor contractors (unless such agreed compensation is substantially at variance with that locally prevailing or the agreement was not negotiated at arm's length). The Secretary of Labor is to give effect to the provisions of such collective bargaining agreements in his wage determinations under section 2 of the Act. A new paragraph (5) added to section 2(a) of the Act requires a statement in the government service contract of the rates that would be paid by the contracting agency in the event of its direct employment of those classes of service employees to be employed on the contract work who, if directly employed by the agency, would receive wages determined as provided in 5 U.S.C. 5341. The Secretary of Labor is directed to give due consideration to such rates in determining prevailing monetary wages and fringe benefits under the Act's provisions. Other provisions of the 1972 amendments include the addition of a new section 10 to the Act to insure that wage determinations are issued by the Secretary for substantially all service contracts subject to section 2(a) of the Act at the earliest administratively feasible time; an amendment to section 4(b) of the Act to provide, in addition to the conditions previously specified for issuance of administrative limitations, variations, tolerances, and exemptions (see § 4.123), that administrative action in this regard shall be taken only in special circumstances where the Secretary determines that it is in accord with the remedial purpose of the Act to protect prevailing labor standards; and a new subsection (d) added to section 4 of the Act providing for the award of service contracts for terms not more than 5 years with provision for periodic adjustment of minimum wage rates and fringe benefits payable thereunder by the issuance of wage determinations by the Secretary of Labor during the term of the contract. A further amendment to section 5(a) of the Act requires the names of contractors found to have violated the Act to be submitted for the debarment list (see § 4.188) not later than 90 days after the hearing examiner's finding of violation unless the Secretary recommends relief, and provides that such recommendations shall be made only because of unusual circumstances.

(b) The provisions of the Act were amended by Public Law 93–57, 87 Stat. 140, effective July 6, 1973, to extend the Act's coverage to Canton Island.

(c) The provisions of the Act were amended by Public Law 94–489, 90 Stat. 2358, approved October 13, 1976, to extend the Act's coverage to white collar workers. Accordingly, the minimum wage protection of the Act now extends to all workers, both blue collar and white collar, other than persons employed in a bona fide executive, administrative, or professional capacity as those terms are used in the Fair Labor Standards Act and in part 541 of title 29. Public Law 94–489 accomplished this change by adding to section 2(a)(5) of the Act a reference to 5 U.S.C. 5332, which deals with white collar workers, and by amending the definition of service contract employee in section 8(b) of the Act.

(d) Included in this part 4 and in parts 6 and 8 of this subtitle are provisions to give effect to the amendments mentioned in this section.

§ 4.106 [Reserved]

Agencies Whose Contracts May Be Covered

§ 4.107 Federal contracts.

(a) Section 2(a) of the Act covers contracts (and any bid specification therefor) ''entered into by the United States'' and section 2(b) applies to contracts entered into ''with the Federal Government.'' Within the meaning of these provisions, contracts entered into by the United States and contracts with the Federal Government include generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party pursuant to authority derived from the

Constitution and laws of the United States. The Act does not authorize any distinction in this respect between such agencies and instrumentalities on the basis of their inclusion in or independence from the executive, legislative, or judicial branches of the Government, the fact that they may be corporate in form, or the fact that payment for the contract services is not made from appropriated funds. Thus, contracts of wholly owned Government corporations, such as the Postal Service, and those of nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces, or of other Federal agencies, such as Federal Reserve Banks, are included among those subject to the general coverage of the Act. (*Brinks, Inc.* v. *Board of Governors of the Federal Reserve System*, 466 F. Supp. 116 (D DC 1979); 43 Atty. Gen. Ops. _____ (September 26, 1978).) Contracts with the Federal Government and contracts entered into ''by the United States'' within the meaning of the Act do not, however, include contracts for services entered into on their own behalf by agencies or instrumentalities of other Governments within the United States, such as those of the several States and their political subdivisions, or of Puerto Rico, the Virgin Islands, Guam, or American Samoa.

(b) Where a Federal agency exercises its contracting authority to procure services desired by the Government, the method of procurement utilized by the contracting agency is not controlling in determining coverage of the contract as one entered into by the United States. Such contracts may be entered into by the United States either through a direct award by a Federal agency or through the exercise by another agency (whether governmental or private) of authority granted to it to procure services for or on behalf of a Federal agency. Thus, sometimes authority to enter into service contracts of the character described in the Act for and on behalf of the Government and on a cost-reimbursable basis may be delegated, for the convenience of the contracting agency, to a prime contractor which has the responsibility for all work to be done in connection with the operation and management of a Federal plant, installation, facility, or program, together with the legal authority to act as agency for and on behalf of the Government and to obligate Government funds in the procurement of all services and supplies necessary to carry out the entire program of operation. The contracts entered into by such a prime contractor with secondary contractors for and on behalf of the Federal agency pursuant to such delegated authority, which have such services as their principal purpose, are deemed to be contracts entered into by the United States and contracts with the Federal Government within the meaning of the Act. However, service contracts entered into by State or local public bodies with purveyors of services are not deemed to be entered into by the United States merely because such services are paid for with funds of the public body which have been received from the Federal Government as a grant under a Federal program. For example, a contract entered into by a municipal housing authority for tree trimming, tree removal, and landscaping for an urban renewal project financed by Federal funds is not a contract entered into by the United States and is not covered by the Service Contract Act. Similarly, contracts let under the Medicaid program which are financed by federally-assisted grants to the States, and contracts which provide for insurance benefits to a third party under the Medicare program are not subject to the Act.

§4.108 District of Columbia contracts.

Section 2(a) of the Act covers contracts (and any bid specification therefor) in excess of $2,500 which are ''entered into by the * * * District of Columbia.'' The contracts of all agencies and instrumentalities which procure contract services for or on behalf of the District or under the authority of the District Government are contracts entered into by the District of Columbia within the meaning of this provision. Such contracts are also considered contracts entered into with the Federal Government or the United States within the meaning of section 2(b), section 5, and the other provisions of the Act.

The legislative history indicates no intent to distinguish District of Columbia contracts from the other contracts made subject to the Act, and traditionally, under other statutes, District Government contracts have been made subject to the same labor standards provisions as contracts of agencies and instrumentalities of the United States.

[48 FR 49762, Oct. 27, 1983; 48 FR 50529, Nov. 2, 1983]

§ 4.109 [Reserved]

COVERED CONTRACTS GENERALLY

§ 4.110 What contracts are covered.

The Act covers service contracts of the Federal agencies described in §§ 4.107–4.108. Except as otherwise specifically provided (see §§ 4.115 *et seq.*), all such contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, are subject to its terms. This is true of contracts entered into by such agencies with States or their political subdivisions, as well as such contracts entered into with private employers. Contracts between a Federal or District of Columbia agency and another such agency are not within the purview of the Act; however, ''subcontracts'' awarded under ''prime contracts'' between the Small Business Administration and another Federal agency pursuant to various preferential set-aside programs, such as the 8(a) program, are covered by the Act. It makes no difference in the coverage of a contract whether the contract services are procured through negotiation or through advertising for bids. Also, the mere fact that an agreement is not reduced to writing does not mean that the contract is not within the coverage of the Act. The amount of the contract is not determinative of the Act's coverage, although the requirements are different for contracts in excess of $2,500 and for contracts of a lesser amount. The Act is applicable to the contract if the principal purpose of the contract is to furnish services, if such services are to be furnished in the United States, and if service employees will be used in providing such services. These elements of coverage will be discussed separately in the following sections.

§ 4.111 Contracts "to furnish services."

(a) *''Principal purpose'' as criterion.* Under its terms, the Act applies to a ''contract * * * the principal purpose of which is to furnish services * * *.'' If the principal purpose is to provide something other than services of the character contemplated by the Act and any such services which may be performed are only incidental to the performance of a contract for another purpose, the Act does not apply. However, as will be seen by examining the illustrative examples of covered contracts in §§ 4.130 *et seq.*, no hard and fast rule can be laid down as to the precise meaning of the term *principal purpose*. This remedial Act is intended to be applied to a wide variety of contracts, and the Act does not define or limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services. Further, the nomenclature, type, or particular form of contract used by procurement agencies is not determinative of coverage. Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. Even where tangible items of substantial value are important elements of the subject matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case. This principle is illustrated by the examples set forth in § 4.131.

(b) *Determining whether a contract is for ''services'', generally.* Except indirectly through the definition of *service employee* the Act does not define, or limit, the types of *services* which may be contracted for under a contract ''the principal purpose of which is to furnish services''. As stated in the congressional committee reports on the legislation, the types of service contracts covered by its provisions are varied. Among the examples cited are contracts for laundry and dry cleaning, for transportation of the mail, for custodial, janitorial, or guard service, for packing and crating, for food service,

and for miscellaneous housekeeping services. Covered contracts for services would also include those for other types of services which may be performed through the use of the various classes of service employees included in the definition in section 8(b) of the Act (see §4.113). Examples of some such contracts are set forth in §§4.130 *et seq*. In determining questions of contract coverage, due regard must be given to the apparent legislative intent to include generally as contracts for *services* those contracts which have as their principal purpose the procurement of something other than the construction activity described in the Davis-Bacon Act or the materials, supplies, articles, and equipment described in the Walsh-Healey Act. The Committee reports in both the House and Senate, and statements made on the floor of the House, took note of the labor standards protections afforded by these two Acts to employees engaged in the performance of construction and supply contracts and observed: ''The service contract is now the only remaining category of Federal contracts to which no labor standards protections apply'' (H. Rept. 948, 89th Cong., 1st Sess., p. 1; see also S. Rept. 798, 89th Cong., 1st Sess., p. 1; daily Congressional Record, Sept. 20, 1965, p. 23497). A similar understanding of contracts principally for *services* as embracing contracts other than those for construction or supplies is reflected in the statement of President Johnson upon signing the Act (1 Weekly Compilation of Presidential Documents, p. 428).

§4.112 Contracts to furnish services "in the United States."

(a) The Act and the provisions of this part apply to contract services furnished ''in the United States,'' including any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. The definition expressly excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country. Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in this paragraph would not be services furnished ''in the United States'' within the meaning of the Act.

(b) A service contract to be performed in its entirety outside the geographical limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act. However, if a service contract is to be performed in part within and in part outside these geographic limits, the stipulations required by §4.6 or §4.7, as appropriate, must be included in the invitation for bids or negotiation documents and in the contract, and the labor standards must be observed with respect to that part of the contract services that is performed within these geographic limits. In such a case the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

[61 FR 68664, Dec. 30, 1996]

§4.113 Contracts to furnish services "through the use of service employees."

(a) *Use of ''service employees'' in a contract performance.* (1) As indicated in §4.110, the Act covers service contracts only where ''service employees'' will be used in performing the services which it is the purpose of the contract to procure. A contract principally for services ordinarily will meet this condition if any of the services will be furnished through the use of any service employee or employees. Where it is contemplated that the services (of the kind performed by service employees) will be performed individually by the contractor, and the contracting officer knows when advertising for bids or concluding negotiations that service employees will in no event be used by the contractor in providing the contract services, the Act will not be deemed applicable to the contract and the contract clauses required by §4.6 or §4.7 may be omitted. The fact that the required services will be performed by municipal employees or employees of a State would not remove the contract from the purview of the Act, as this

Act does not contain any exemption for contracts performed by such employees. Also, as discussed in paragraph (a)(3) of this section, where the services the Government wants under the contract are of a type that will require the use of service employees as defined in section 8(b) of the Act, the contract is not taken out of the purview of the Act by the fact that the manner in which the services of such employees are performed will be subject to the continuing overall supervision of bona fide executive, administrative, or professional personnel to whom the Act does not apply.

(2) The coverage of the Act does not extend to contracts for services to be performed exclusively by persons who are not service employees, i.e., persons who are bona fide executive, administrative or professional personnel as defined in part 541 of this title (see paragraph (b) of this section). A contract for medical services furnished by professional personnel is an example of such a contract.

(3) In addition, the Department does not require application of the Act to any contract for services which is performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in the performance of the contract. However, the Act would apply to a contract for services which may involve the use of service employees to a significant or substantial extent even though there is some use of bona fide executive, administrative, or professional employees in the performance of the contract. For example, contracts for drafting or data processing services are often performed by drafters, computer operators, or other service employees and are subject to the Act even though the work of such employees may be performed under the direction and supervision of bona fide professional employees.

(4) In close cases involving a decision as to whether a contract will involve a significant use of service employees, the Department of Labor should be consulted, since such situations require consideration of other factors such as the nature of the contract work, the type of work performed by service employees, how necessary the work is to contract performance, the amount of contract work performed by service employees vis-a-vis professional employees, and the total number of service employees employed on the contract.

(b) *''Service employees'' defined.* In determining whether or not any of the contract services will be performed by service employees, the definition of *service employee* in section 8(b) of the Act is controlling. It provides:

> The term *service employee* means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

It will be noted that the definition expressly excludes those employees who are employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title and as discussed further in § 4.156. Some of the specific types of service employees who may be employed on service contracts are noted in other sections which discuss the application of the Act to employees.

[48 FR 49762, Oct. 27, 1983; 48 FR 50529, Nov. 2, 1983]

§ 4.114 Subcontracts.

(a) *''Contractor'' as including ''subcontractor.''* Except where otherwise noted or where the term *Government prime contractor* is used, the term *contractor* as used in this part 4 shall be deemed to include a subcontractor. The term *contractor* as used in the contract clauses required by subpart A in any subcontract under a covered contract shall be deemed to refer to the subcontractor, or, if in a subcontract entered into by such a subcontractor, shall be deemed to refer to the lower level subcontractor. (See § 4.1a(f).)

(b) *Liability of prime contractor.* When a contractor undertakes a contract subject to the Act, the contractor agrees to assume the obligation that

the Act's labor standards will be observed in furnishing the required services. This obligation may not be relieved by shifting all or part of the work to another, and the prime contractor is jointly and severally liable with any subcontractor for any underpayments on the part of a subcontractor which would constitute a violation of the prime contract. The prime contractor is required to include the prescribed contract clauses (§§4.6–4.7) and applicable wage determination in all subcontracts. The appropriate enforcement sanctions provided under the Act may be invoked against both the prime contractor and the subcontractor in the event of failure to comply with any of the Act's requirements where appropriate under the circumstances of the case.

SPECIFIC EXCLUSIONS

§4.115 Exemptions and exceptions, generally.

(a) The Act, in section 7, specifically excludes from its coverage certain contracts and work which might otherwise come within its terms as procurements the principal purpose of which is to furnish services through the use of service employees.

(b) The statutory exemptions in section 7 of the Act are as follows:

(1) Any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting and decorating of public buildings or public works;

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect;

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals;

(7) Any contract with the Post Office Department, (now the U.S. Postal Service) the principal purpose of which is the operation of postal contract stations.

§4.116 Contracts for construction activity.

(a) *General scope of exemption.* The Act, in paragraph (1) of section 7, exempts from its provisions ''any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works.'' This language corresponds to the language used in the Davis-Bacon Act to describe its coverage (40 U.S.C. 276a). The legislative history of the McNamara-O'Hara Service Contract Act indicates that the purpose of the provision is to avoid overlapping coverage of the two acts by excluding from the application of the McNamara-O'Hara Act those contracts to which the Davis-Bacon Act is applicable and in the performance of which the labor standards of that Act are intended to govern the compensation payable to the employees of contractors and subcontractors on the work. (See H. Rept. 798, pp. 2, 5, and H. Rept. 948, pp. 1, 5, also Hearing, Special Subcommittee on Labor, House Committee on Education and Labor, p. 9 (89th Cong., 1st sess.).) The intent of section 7(1) is simply to exclude from the provisions of the Act those construction contracts which involve the employment of persons whose wage rates and fringe benefits are determinable under the Davis-Bacon Act.

(b) *Contracts not within exemption.* Section 7(1) does not exempt contracts which, for purposes of the Davis-Bacon Act, are not considered to be of the character described by the corresponding language in that Act, and to which the provisions of the Davis-Bacon Act are therefore not applied. Such contracts are accordingly subject to the McNamara-O'Hara Act where their principal purpose is to furnish services in the United States through the use of service employees. For example, a contract for clearing timber or brush from land or for the demolition or dismantling of buildings or other structures located thereon may

be a contract for construction activity subject to the Davis-Bacon Act where it appears that the clearing of the site is to be followed by the construction of a public building or public work at the same location. If, however, no further construction activity at the site is contemplated the Davis-Bacon Act is considered inapplicable to such clearing, demolition, or dismantling work. In such event, the exemption in section 7(1) of the McNamara-O'Hara Act has no application and the contract may be subject to the Act in accordance with its general coverage provisions. It should be noted that the fact that a contract may be labeled as one for the sale and removal of property, such as salvage material, does not negate coverage under the Act even though title to the removable property passes to the contractor. While the value of the property being sold in relation to the services performed under the contract is a factor to be considered in determining coverage, where the facts show that the principal purpose of removal, dismantling, and demolition contracts is to furnish services through the use of service employees, these contracts are subject to the Act. (See also § 4.131.)

(c) *Partially exempt contracts.* (1) Instances may arise in which, for the convenience of the Government, instead of awarding separate contracts for construction work subject to the Davis-Bacon Act and for services of a different type to be performed by service employees, the contracting officer may include separate specifications for each type of work in a single contract calling for the performance of both types of work. For example, a contracting agency may invite bids for the installation of a plumbing system or for the installation of a security alarm system in a public building and for the maintenance of the system for one year. In such a case, if the contract is principally for services, the exemption provided by section 7(1) will be deemed applicable only to that portion of the contract which calls for construction activity subject to the Davis-Bacon Act. The contract documents are required to contain the clauses prescribed by § 4.6 for application to the contract obligation to furnish services through the use of service employees, and the provisions of the McNamara-O'Hara Act will apply to that portion of the contract.

(2) *Service or maintenance contracts involving construction work.* The provisions of both the Davis-Bacon Act and the Service Contract Act would generally apply to contracts involving construction and service work where such contracts are principally for services. The Davis-Bacon Act, and thus the exemption provided by section 7(1) of the Act, would be applicable to construction contract work in such hybrid contracts where:

(i) The contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work (hereinafter referred to as construction) or it is ascertainable that a substantial amount of construction work will be necessary for the performance of the contract (the word ''substantial'' relates to the type and quantity of construction work to be performed and not merely to the total value of construction work (whether in absolute dollars or cost percentages) as compared to the total value of the contract); and

(ii) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract.

[48 FR 49762, Oct. 27, 1983; 48 FR 50529, Nov. 2, 1983]

§ 4.117 Work subject to requirements of Walsh-Healey Act.

(a) The Act, in paragraph (2) of section 7, exempts from its provisions ''any work required to be done in accordance with the provision of the Walsh-Healey Public Contracts Act'' (49 Stat. 2036, 41 U.S.C. 35 *et seq.*). It will be noted that like the similar provision in the Contract Work Hours and Safety Standards Act (40 U.S.C. 329(b)), this is an exemption for ''work'', i.e., specifications or requirements, rather than for ''contracts'' subject to the Walsh-Healey Act. The purpose of the exemption was to eliminate possible overlapping of the differing labor standards of the two Acts, which otherwise might be applied to employees performing work on a contract covered

by the Service Contract Act if such contract and their work under it should also be deemed to be covered by the Walsh-Healey Act. The Walsh-Healey Act applies to contracts in excess of $10,000 for the manufacture or furnishing of materials, supplies, articles or equipment. Thus, there is no overlap if the principal purpose of the contract is the manufacture or furnishing of such materials etc., rather than the furnishing of services of the character referred to in the Service Contract Act, for such a contract is not within the general coverage of the Service Contract Act. In such cases the exemption in section 7(2) is not pertinent. See, for example, the discussion in §§4.131 and 4.132.

(b) Further, contracts principally for remanufacturing of equipment which is so extensive as to be equivalent to manufacturing are subject to the Walsh-Healey Act. Remanufacturing shall be deemed to be manufacturing when the criteria in paragraph (b)(1) or (2) of this section are met.

(1) Major overhaul of an item, piece of equipment, or materiel which is degraded or inoperable, and under which all of the following conditions exist:

(i) The item or equipment is required to be completely or substantially torn down into individual components parts; and

(ii) Substantially all of the parts are reworked, rehabilitated, altered and/or replaced; and

(iii) The parts are reassembled so as to furnish a totally rebuilt item or piece of equipment; and

(iv) Manufacturing processes similar to those which were used in the manufacturing of the item or piece of equipment are utilized; and

(v) The disassembled componets, if usable (except for situations where the number of items or pieces of equipment involved are too few to make it practicable) are commingled with existing inventory and, as such, lose their identification with respect to a particular piece of equipment; and

(vi) The items or equipment overhauled are restored to original life expectancy, or nearly so; and

(vii) Such work is performed in a facility owned or operated by the contractor.

(2) Major modification of an item, piece of equipment, or materiel which is wholly or partially obsolete, and under which all of the following conditions exist:

(i) The item or equipment is required to be completely or substantially torn down; and

(ii) Outmoded parts are replaced; and

(iii) The item or equipment is rebuilt or reassembled; and

(iv) The contract work results in the furnishing of a substantially modified item in a usable and serviceable condition; and

(v) The work is performed in a facility owned or operated by the contractor.

(3) Remanufacturing does not include the repair of damaged or broken equipment which does not require a complete teardown, overhaul, and rebuild as described in paragraphs (b)(1) and (2) of this section, or the periodic and routine maintenance, preservation, care, adjustment, upkeep, or servicing of equipment to keep it in usable, serviceable, working order. Such contracts typically are billed on an hourly rate (labor plus materials and parts) basis. Any contract principally for the work described in this paragraph (b)(3) is subject to the Service Contract Act. Examples of such work include:

(i) Repair of an automobile, truck, or other vehicle, construction equipment, tractor, crane, aerospace, air conditioning and refrigeration equipment, electric motors, and ground powered industrial or vehicular equipment;

(ii) Repair of typewriters and other office equipment (see §4.123(e));

(iii) Repair of appliances, radios television, calculators, and other electronic equipment;

(iv) Inspecting, testing, calibration, painting, packaging, lubrication, tune-up, or replacement of internal parts of equipment listed in paragraphs (b)(3)(i), (ii), and (iii) of this section; and

(v) Reupholstering, reconditioning, repair, and refinishing of furniture.

(4) Application of the Service Contract Act or the Walsh-Healey Act to any similar type of contract not decided above will be decided on a case-by-case basis by the Administrator.

§ 4.118 Contracts for carriage subject to published tariff rates.

The Act, in paragraph (3) of section 7, exempts from its provisions ''any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect''. In order for this exemption to be applicable, the contract must be for such carriage by a common carrier described by the terms used. It does not, for example, apply to contracts for taxicab or ambulance service, because taxicab and ambulance companies are not among the common carriers specified by the statute. Also, a contract for transportation service does not come within this exemption unless the service contracted for is actually governed by published tariff rates in effect pursuant to State or Federal law for such carriage. The contracts excluded from the reach of the Act by this exemption are typically those where there is on file with the Interstate Commerce Commission or an appropriate State or local regulatory body a tariff rate applicable to the transportation involved, and the transportation contract between the Government and the carrier is evidenced by a Government bill of lading citing the published tariff rate. An administrative exemption has been provided for certain contracts where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act and is in accordance with applicable regulations governing such rates. See § 4.123(d). However, only contracts principally for the carriage of ''freight or personnel'' are exempt. Thus, the exemption cannot apply where the principal purpose of the contract is packing, crating, handling, loading, and/or storage of goods prior to or following line-haul transportation. The fact that substantial local drayage to and from the contractor's establishment (such as a warehouse) may be required in such contracts does not alter the fact that their principal purpose is other than the carriage of freight. Also, this exemption does not exclude any contracts for the transportation of mail from the application of the Act, because the term *freight* does not include the mail. (For an administrative exemption of certain contracts with common carriers for carriage of mail, see § 4.123(d).)

§ 4.119 Contracts for services of communications companies.

The Act, in paragraph (4) of section 7, exempts from its provisions ''any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934.'' This exemption is applicable to contracts with such companies for communication services regulated under the Communications Act. It does not exempt from the Act any contracts with such companies to furnish any other kinds of services through the use of service employees.

§ 4.120 Contracts for public utility services.

The Act, in paragraph (5) of section 7, exempts from its provisions ''any contract for public utility services, including electric light and power, water, steam, and gas.'' This exemption is applicable to contracts for such services with companies whose rates therefor are regulated under State, local, or Federal law governing operations of public utility enterprises. Contracts entered into with public utility companies to furnish services through the use of service employees, other than those subject to such rate regulation, are not exempt from the Act. Among the contracts included in the exemption would be those between Federal electric power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities and State agencies engaged in the transmission and sale of electric power and energy.

(See H. Rept. No. 948, 89th Cong., 1st sess., p. 4)

§ 4.121 Contracts for individual services.

The Act, in paragraph (6) of section 7, exempts from its provisions ''any employment contract providing for direct services to a Federal agency by an individual or individuals.'' This exemption, which applies only to an ''employment contract'' for ''direct services,'' makes it clear that the Act's application to

Federal contracts for services is intended to be limited to service contracts entered into with independent contractors. If a contract to furnish services (to be performed by a service employee as defined in the Act) provides that they will be furnished directly to the Federal agency by the individual under conditions or circumstances which will make him an employee of the agency in providing the contract service, the exemption applies and the contract will not be subject to the Act's provisions. The exemption does not exclude from the Act any contract for services of the kind performed by service employees which is entered into with an independent contractor whose individual services will be used in performing the contract, but as noted earlier in §4.113, such a contract would be outside the general coverage of the Act if only the contractor's individual services would be furnished and no service employee would in any event be used in its performance.

§4.122 Contracts for operation of postal contract stations.

The Act, in paragraph (7) of section 7, exempts from its provisions ''any contract with the Post Office Department, [now the U.S. Postal Service], the principal purpose of which is the operation of postal contract stations.'' The exemption is limited to postal service contracts having the operation of such stations as their principal purpose. A provision of the legislation which would also have exempted contracts with the U.S. Postal Service having as their principal purpose the transportation, handling, or delivery of the mails was eliminated from the bill during its consideration by the House Committee on Education and Labor (H. Rept. 948, 89th Cong., 1st sess., p. 1).

§4.123 Administrative limitations, variances, tolerances, and exemptions.

(a) *Authority of the Secretary.* Section 4(b) of the Act as amended in 1972 authorizes the Secretary to ''provide such reasonable limitations'' and to ''make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than §10), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.'' This authority is similar to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331).

(b) *Administrative action under section 4(b) of the Act.* The authority conferred on the Secretary by section 4(b) of the Act will be exercised with due regard to the remedial purpose of the statute to protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards, and whose saving in labor cost therefrom enables them to offer a lower price to the Government than can be offered by the fair employers who maintain the prevailing standards. Administrative action consistent with this statutory purpose may be taken under section 4(b) with or without a request therefor, when found necessary and proper in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action. However, a request for exemption from the Act's provisions will be granted only upon a strong and affirmative showing that it is necessary and proper in the public interest or to avoid serious impairment of Government business, and is in accord with the remedial purpose of the Act to protect prevailing labor standards. If the request for administrative action under section 4(b) is not made by the headquarters office of the contracting agency to which the contract services are to be provided, the views of such office on the matter should be obtained and submitted with the request or the contracting officer may forward such a request through channels to the agency headquarters for submission with the latter's views to the Administrator of the Wage and Hour Division, Department of Labor, whenever any wage

payment issues are involved. Any request relating to an occupational safety or health issue shall be submitted to the Assistant Secretary for Occupational Safety and Health, Department of Labor.

(c) *Documentation of official action under section 4(b).* All papers and documents made a part of the official record of administrative action pursuant to section 4(b) of the Act are available for public inspection in accordance with the regulations in 29 CFR part 70. Limitations, variations, tolerances and exemptions of general applicability and legal effect promulgated pursuant to such authority are published in the FEDERAL REGISTER and made a part of the rules incorporated in this part 4. For convenience in use of the rules, they are generally set forth in the sections of this part covering the subject matter to which they relate. (See, for example, §§ 4.5(b), 4.6(o), 4.112 and 4.113.) Any rules that are promulgated under section 4(b) of the Act relating to subject matter not dealt with elsewhere in this part 4 will be set forth immediately following this paragraph.

(d) In addition to the statutory exemptions in section 7 of the Act (see § 4.115(b)), the following types of contracts have been exempted from all the provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, prior to its amendment by Public Law 92–473, which exemptions the Secretary of Labor found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom;

(2) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident; and

(3) Contracts for the carriage of freight or personnel where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

(e) The following types of contracts have been exempted from all the provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor found are necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business, and are in accord with the remedial purpose of the Act to protect prevailing labor standards:

(1)(i) Prime contracts or subcontracts principally for the maintenance, calibration, and/or repair of:

(A) Automated data processing equipment and office information/word processing systems;

(B) Scientific equipment and medical apparatus or equipment where the application of microelectronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, ''Medical Diagnostic Equipment''; Class 6525, ''X-Ray Equipment''; FSC Group 66, Class 6630, ''Chemical Analysis Instruments''; Class 6665, ''Geographical and Astronomical Instruments'', are largely composed of the types of equipment exempted under this paragraph);

(C) Office/business machines not otherwise exempt pursuant to paragraph (e)(1)(i)(A) of this section, where such services are performed by the manufacturer or supplier of the equipment.

(ii) The exemptions set forth in this paragraph (e)(1) shall apply only under the following circumstances:

(A) The items of equipment are commercial items which are used regularly for other than Government purposes, and are sold or traded by the contractor (or subcontractor in the case of an exempt subcontract) in substantial quantities to the general public in the course of normal business operations;

(B) The prime contract or subcontract services are furnished at

prices which are, or are based on, established catalog or market prices for the maintenance, calibration, and/or repair of such commercial items. An ''established catalog price'' is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An ''established market price'' is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor; and

(C) The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers;

(D) The contractor certifies to the provisions in this paragraph (e)(1)(ii). Certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. The certification shall be included in the prime contract or subcontract.

(iii)(A) Determinations of the applicability of this exemption to prime contracts shall be made in the first instance by the contracting officer on or before contract award. In making a judgment that the exemption applies, the contracting officer shall consider all factors and make an affirmative determination that all of the conditions in paragraph (e)(1) of this section have been met.

(B) Determinations of the applicability of this exemption to subcontracts shall be made by the prime contractor on or before subcontract award. In making a judgment that the exemption applies, the prime contractor shall consider all factors and make an affirmative determination that all of the conditions in paragraph (e)(1) have been met.

(iv)(A) If the Administrator determines after award of the prime contract that any of the requirements in paragraph (e)(1) of this section for exemption has not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Administrator's determination. In such case, the corrective procedures in §4.5(c) shall be followed.

(B) The prime contractor is responsible for compliance with the requirements of the Service Contract Act by its subcontractors, including compliance with all of the requirements of this exemption (see §4.114(b)). If the Administrator determines that any of the requirements in paragraph (e)(1) for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable, and the prime contractor may be responsible for compliance with the Act effective as of the date of contract award.

(2)(i) Prime contracts or subcontracts principally for the following services where the services under the contract or subcontract meet all of the criteria set forth in paragraph (e)(2)(ii) of this section and are not excluded by paragraph (e)(2)(iii):

(A) Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts to operate a Government motor pool or similar facility);

(B) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services);

(C) Contracts with hotels/motels for conferences, including lodging and/or meals which are part of the contract for the conference (which shall not include ongoing contracts for lodging on an as needed or continuing basis);

(D) Maintenance, calibration, repair and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in §4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis;

(E) Transportation by common carrier of persons by air, motor vehicle,

rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services);

(F) Real estate services, including real property appraisal services, related to housing federal agencies or disposing of real property owned by the Federal Government; and

(G) Relocation services, including services of real estate brokers and appraisers, to assist federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

(ii) The exemption set forth in this paragraph (e)(2) shall apply to the services listed in paragraph (e)(2)(i) only when all of the following criteria are met:

(A) The services under the prime contract or subcontract are commercial—*i.e.*, they are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

(B) The prime contract or subcontract will be awarded on a sole source basis or the contractor or subcontractor will be selected for award on the basis of other factors in addition to price. In such cases, price must be equal to or less important than the combination of other non-price or cost factors in selecting the contractor.

(C) The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices. An established price is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the contractor or subcontractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(D) Each service employee who will perform services under the Government contract or subcontract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the government contract or subcontract.

(E) The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract or subcontract as the contractor uses for these employees and for equivalent employees servicing commercial customers.

(F) The contracting officer (or prime contractor with respect to a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the requirements in paragraph (e)(2)(ii) of this section. Where the services are currently being performed under contract, the contracting officer or prime contractor shall consider the practices of the existing contractor in making a determination regarding the requirements in paragraph (e)(2)(ii). If upon receipt of offers, the contracting officer finds that he or she did not correctly determine that all or nearly all offerors would meet the requirements, the Service Contract Act shall apply to the procurement, even if the successful offeror has certified in accordance with paragraph (e)(2)(ii)(G) of this section.

(G) The contractor certifies in the prime contract or subcontract, as applicable, to the provisions in paragraph (e)(2)(ii)(A) and (C) through (E) of this section. Certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the prime contract or subcontract.

(iii)(A) If the Administrator determines after award of the prime contract that any of the requirements in paragraph (e)(2) of this section for exemption has not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the corrective procedures in §4.5(c) shall be followed.

(B) The prime contractor is responsible for compliance with the requirements of the Service Contract Act by its subcontractors, including compliance with all of the requirements of this exemption (see §4.114(b)). If the Department of Labor determines that any of the requirements in paragraph (e)(2) for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable, and the prime contractor may be responsible for compliance with the Act, as of the date of contract award.

(iv) The exemption set forth in this paragraph (e)(2) does not apply to solicitations and contracts:

(A) Entered into under the Javits-Wagner-O'Day Act, 41 U.S.C. 47;

(B) For the operation of a Government facility or portion thereof (but may be applicable to subcontracts for services set forth in paragraph (e)(2)(ii) that meet all of the criteria of paragraph (e)(2)(ii)); or

(C) Subject to section 4(c) of the Service Contract Act, as well as any options or extensions under such contract.

[48 FR 49762, Oct. 27, 1983, as amended 66 FR 5134, Jan. 18, 2001; 70 FR 50899, Aug. 26, 2005]

§§4.124–4.129 [Reserved]

PARTICULAR APPLICATION OF CONTRACT COVERAGE PRINCIPLES

§4.130 Types of covered service contracts illustrated.

(a) The types of contracts, the principal purpose of which is to furnish services through the use of service employees, are too numerous and varied to permit an exhaustive listing. The following list is illustrative, however, of the types of services called for by such contracts that have been found to come within the coverage of the Act. Other examples of covered contracts are discussed in other sections of this subpart.

(1) Aerial spraying.

(2) Aerial reconnaissance for fire detection.

(3) Ambulance service.

(4) Barber and beauty shop services.

(5) Cafeteria and food service.

(6) Carpet laying (other than part of construction) and cleaning.

(7) Cataloging services.

(8) Chemical testing and analysis.

(9) Clothing alteration and repair.

(10) Computer services.

(11) Concessionaire services.

(12) Custodial, janitorial, and housekeeping services.

(13) Data collection, processing, and/or analysis services.

(14) Drafting and illustrating.

(15) Electronic equipment maintenance and operation and engineering support services.

(16) Exploratory drilling (other than part of construction).

(17) Film processing.

(18) Fire fighting and protection.

(19) Fueling services.

(20) Furniture repair and rehabilitation.

(21) Geological field surveys and testing.

(22) Grounds maintenance.

(23) Guard and watchman security service.

(24) Inventory services.

(25) Keypunching and keyverifying contracts.

(26) Laboratory analysis services.

(27) Landscaping (other than part of construction).

(28) Laundry and dry cleaning.

(29) Linen supply services.

(30) Lodging and/or meals.

(31) Mail hauling.

(32) Mailing and addressing services.

(33) Maintenance and repair of all types of equipment, e.g., aircraft, engines, electrical motors, vehicles, and electronic, telecommunications, office and related business, and construction equipment (See §4.123(e).).

(34) Mess attendant services.

(35) Mortuary services.

(36) Motor pool operation.

(37) Nursing home services.

(38) Operation, maintenance, or logistic support of a Federal facility.

(39) Packing and crating.

(40) Parking services.
(41) Pest control.
(42) Property management.
(43) Snow removal.
(44) Stenographic reporting.
(45) Support services at military installations.
(46) Surveying and mapping services (not directly related to construction).
(47) Taxicab services.
(48) Telephone and field interview services.
(49) Tire and tube repairs.
(50) Transporting property or personnel (except as explained in § 4.118).
(51) Trash and garbage removal.
(52) Tree planting and thinning, clearing timber or brush, etc. (See also §§ 4.116(b) and 4.131(f).).
(53) Vending machine services.
(54) Visual and graphic arts.
(55) Warehousing or storage.

§ 4.131 Furnishing services involving more than use of labor.

(a) If the principal purpose of a contract is to furnish services in the performance of which service employees will be used, the Act will apply to the contract, in the absence of an exemption, even though the use or furnishing of nonlabor items may be an important element in the furnishing of the services called for by its terms. The Act is concerned with protecting the labor standards of workers engaged in performing such contracts, and is applicable if the statutory coverage test is met, regardless of the form in which the contract is drafted. The proportion of the labor cost to the total cost of the contract and the necessity of furnishing or receiving tangible nonlabor items in performing the contract obligations will be considered but are not necessarily determinative. A procurement that requires tangible items to be supplied to the Government or the contractor as a part of the service furnished is covered by the Act so long as the facts show that the contract is chiefly for services, and that the furnishing of tangible items is of secondary importance.

(b) Some examples of covered contracts illustrating these principles may be helpful. One such example is a contract for the maintenance and repair of typewriters. Such a contract may require the contractor to furnish typewriter parts, as the need arises, in performing the contract services. Since this does not change the principal purpose of the contract, which is to furnish the maintenance and repair services through the use of service employees, the contract remains subject to the Act.

(c) Another example of the application of the above principle is a contract for the recurrent supply to a Government agency of freshly laundered items on a rental basis. It is plain from the legislative history that such a contract is typical of those intended to be covered by the Act. S. Rept. 798, 89th Cong., 1st Sess., p. 2; H. Rept. 948, 89th Cong., 1st Sess., p. 2. Although tangible items owned by the contractor are provided on a rental basis for the use of the Government, the service furnished by the contractor in making them available for such use when and where they are needed, through the use of service employees who launder and deliver them, is the principal purpose of the contract.

(d) Similarly, a contract in the form of rental of equipment with operators for the plowing and reseeding of a park area is a service contract. The Act applies to it because its principal purpose is the service of plowing and reseeding, which will be performed by service employees, although as a necessary incident the contractor is required to furnish equipment. For like reasons the contracts for aerial spraying and aerial reconnaissance listed in § 4.130 are covered, even though the use of airplanes, an expensive item of equipment, is essential in performing such services. In general, contracts under which the contractor agrees to provide the Government with vehicles or equipment on a rental basis with drivers or operators for the purpose of furnishing services are covered by the Act. Such contracts are not considered contracts for furnishing equipment within the meaning of the Walsh-Healey Public Contracts Act. On the other hand, contracts under which the contractor provides equipment with operators for the purpose of construction of a public building or public work, such as road resurfacing or dike repair, even where the

work is performed under the supervision of Government employees, would be within the exemption in section 7(1) of the Act as contracts for construction subject to the Davis-Bacon Act. (See §4.116.)

(e) Contracts for data collection, surveys, computer services, and the like are within the general coverage of the Act even though the contractor may be required to furnish such tangible items as written reports or computer printouts, since items of this nature are considered to be of secondary importance to the services which it is the principal purpose of the contract to procure.

(f) Contracts under which the contractor receives tangible items from the Government in return for furnishing services (which items are in lieu of or in addition to monetary consideration granted by either party) are covered by the Act where the facts show that the furnishing of such services is the principal purpose of the contracts. For example, property removal or disposal contracts which involve demolition of buildings or other structures are subject to the Act when their principal purpose is dismantling and removal (and no further construction activity at the site is contemplated). However, removal or dismantling contracts whose principal purpose is sales are not covered. So-called ''timber sales'' contracts generally are not subject to the Act because normally the services provided under such contracts are incidental to the principal purpose of the contracts. (See also §§4.111(a) and 4.116(b).)

§4.132 Services and other items to be furnished under a single contract.

If the principal purpose of a contract is to furnish services through the use of service employees within the meaning of the Act, the contract to furnish such services is not removed from the Act's coverage merely because, as a matter of convenience in procurement, the service specifications are combined in a single contract document with specifications for the procurement of different or unrelated items. In such case, the Act would apply to service specifications but would not apply to any specifications subject to the Walsh-Healey Act or to the Davis-Bacon Act. With respect to contracts which contain separate specifications for the furnishing of services and construction activity, see §4.116(c).

§4.133 Beneficiary of contract services.

(a) The Act does not say to whom the services under a covered contract must be furnished. So far as its language is concerned, it is enough if the contract is ''entered into'' by and with the Government and if its principal purpose is ''to furnish services in the United States through the use of service employees''. It is clear that Congress intended to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose needs it is necessary or desirable for the Government to make provision for such services. For example, the legislative history makes specific reference to such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations. Furthermore, there is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the Government, as distinguished from the general public, are subject to the Act. Therefore, where the principal purpose of the Government contract is to provide services through the use of service employees, the contract is covered by the Act, regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. The fact that the contract requires or permits the contractor to provide the services directly to individual personnel as a concessionaire, rather than through the contracting agency, does not negate coverage by the Act.

(b) The Department of Labor, pursuant to section 4(b) of the Act, exempts from the provisions of the Act certain kinds of concession contracts providing services to the general public, as provided herein. Specifically, concession contracts (such as those entered into

by the National Park Service) principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt. This exemption is necessary and proper in the public interest and is in accord with the remedial purpose of the Act. Where concession contracts, however, include substantial requirements for services other than those stated, those services are not exempt. The exemption provided does not affect a concession contractor's obligation to comply with the labor standards provisions of any other statutes such as the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 *et seq.*), the Davis-Bacon Act (40 U.S.C. 276a *et seq.;* see part 5 of this title) and the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

§ 4.134 Contracts outside the Act's coverage.

(a) Contracts entered into by agencies other than those of the Federal Government or the District of Columbia as described in §§ 4.107–4.108 are not within the purview of the Act. Thus, the Act does not cover service contracts entered into with any agencies of Puerto Rico, the Virgin Islands, American Samoa, or Guam acting in behalf of their respective local governments. Similarly, it does not cover service contracts entered into by agencies of States or local public bodies, not acting as agents for or on behalf of the United States or the District of Columbia, even though Federal financial assistance may be provided for such contracts under Federal law or the terms and conditions specified in Federal law may govern the award and operation of the contract.

(b) Further, as already noted in §§ 4.111 through 4.113, the Act does not apply to Government contracts which do not have as their principal purpose the furnishing of services, or which call for no services to be furnished within the United States or through the use of service employees as those terms are defined in the Act. Clearly outside the Act's coverage for these reasons are such contracts as those for the purchase of tangible products which the Government needs (e.g. vehicles, office equipment, and supplies), for the logistic support of an air base in a foreign country, or for the services of a lawyer to examine the title to land. Similarly, where the Government contracts for a lease of building space for Government occupancy and the building owner furnishes general janitorial and other building services on an incidental basis through the use of service employees, the leasing of the space rather than the furnishing of the building services is the principal purpose of the contract, and the Act does not apply. Another type of contract which is outside the coverage of the Act because it is not for the principal purpose of furnishing services may be illustrated by a contract for the rental of parking space under which the Government agency is simply given a lease or license to use the contractor's real property. Such a contract is to be distinguished from contracts for the storage of vehicles which are delivered into the possession or custody of the contractor, who will provide the required services including the parking or retrieval of the vehicles.

(c) There are a number of types of contracts which, while outside the Act's coverage in the usual case, may be subject to its provisions under the conditions and circumstances of a particular procurement, because these may be such as to require a different view of the principal purpose of the contract. Thus, the ordinary contract for the recapping of tires would have as its principal purpose the manufacture and furnishing of rebuilt tires for the Government rather than the furnishing of services through the use of service employees, and thus would be outside the Act's coverage. Similarly, contracts calling for printing, reproduction, and duplicating ordinarily would appear to have as their principal purpose the furnishing in quantity of printed, reproduced or duplicated written materials rather than the furnishing of reproduction services through the use of service employees. However, in a particular case, the terms, conditions, and circumstances of the procurement may be such that the facts would show its purpose to be chiefly the furnishing of services (e.g.

repair services, typesetting, photocopying, editing, etc.), and where such services require the use of service employees the contract would be subject to the Act unless excluded therefrom for some other reason.

§§4.135–4.139 [Reserved]

DETERMINING AMOUNT OF CONTRACT

§4.140 Significance of contract amount.

As set forth in §4.104 and in the requirements of §§4.6–4.7, the obligations of a contractor with respect to labor standards differ in the case of a covered and nonexempt contract, depending on whether the contract is or is not in excess of $2,500. Rules for resolving questions that may arise as to whether a contract is or is not in excess of this figure are set forth in the following sections.

§4.141 General criteria for measuring amount.

(a) In general, the contract amount is measured by the consideration agreed to be paid, whether in money or other valuable consideration, in return for the obligations assumed under the contract. Thus, even though a contractor, such as a wrecker entering into a contract with the Government to raze a building on a site which will remain vacant, may not be entitled to receive any money from the Government for such work under his contract or may even agree to pay the Government in return for the right to dispose of the salvaged materials, the contract will be deemed one in excess of $2,500 if the value of the property obtained by the contractor, less anything he might pay the Government, is in excess of such amount. In addition, concession contracts are considered to be contracts in excess of $2,500 if the contractor's gross receipts under the contract may exceed $2,500.

(b) All bids from the same person on the same invitation for bids will constitute a single offer, and the total award to such person will determine the amount involved for purposes of the Act. Where the procurement is made without formal advertising, in arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising. Therefore, if an agency procures continuing services through the issuance of monthly purchase orders, the amount of the contract for purposes of application of the Act is not measured by the amount of an individual purchase order. In such cases, if the continuing services were procured through formal advertising, the contract term would typically be for one year, and the monthly purchase orders must be grouped together to determine whether the yearly amount may exceed $2,500. However, a purchase order for services which are not continuing but are performed on a one-time or sporadic basis and which are not performed under a requirements contract or under the terms of a basic ordering agreement or similar agreement need not be equated to a yearly amount. (See §4.142(b).) In addition, where an invitation is for services in an amount in excess of $2,500 and bidders are permitted to bid on a portion of the services not amounting to more than $2,500, the amounts of the contracts awarded separately to individual and unrelated bidders will be measured by the portions of the services covered by their respective contracts.

(c) Where a contract is issued in an amount in excess of $2,500 this amount will govern for purposes of application of the Act even though penalty deductions, deductions for prompt payment, and similar deductions may reduce the amount actually expended by the Government to $2,500 or less.

§4.142 Contracts in an indefinite amount.

(a) Every contract subject to this Act which is indefinite in amount is required to contain the clauses prescribed in §4.6 for contracts in excess of $2,500, unless the contracting officer has definite knowledge in advance that the contract will not exceed $2,500 in any event.

(b) Where contracts or agreements between a Government agency and prospective purveyors of services are negotiated which provide terms and conditions under which services will be furnished through the use of service employees in response to individual purchase orders or calls, if any, which may be issued by the agency during the life of the agreement, these agreements would ordinarily constitute contracts within the intendment of the Act under principles judicially established in *United Biscuit Co.* v. *Wirtz*, 17 WH Cases 146 (C.A.D.C.), a case arising under the Walsh-Healey Public Contracts Act. Such a contract, which may be in the nature of a bilateral option contract or basic ordering agreement and not obligate the Government to order any services or the contractor to furnish any, nevertheless governs any procurement of services that may be made through purchase orders or calls issued under its terms. Since the amount of the contract is indefinite, it is subject to the rule stated in paragraph (a) of this section. The amount of the contract is not determined by the amount of any individual call or purchase order.

CHANGES IN CONTRACT COVERAGE

§ 4.143 Effects of changes or extensions of contracts, generally.

(a) Sometimes an existing service contract is modified, amended, or extended in such a manner that the changed contract is considered to be a new contract for purposes of the application of the Act's provisions. The general rule with respect to such contracts is that, whenever changes affecting the labor requirements are made in the terms of the contract, the provisions of the Act and the regulations thereunder will apply to the changed contract in the same manner and to the same extent as they would to a wholly new contract. However, contract modifications or amendments (other than contract extensions) that are unrelated to the labor requirements of a contract will not be deemed to create a new contract for purposes of the Act. In addition, only significant changes related to labor requirements will be considered as creating new contracts. This limitation on the application of the Act has been found to be in accordance with the provisions of section 4(b) of the Act.

(b) Also, whenever the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time, rather than being granted extra time to fulfill his original commitment, the contract extension is considered to be a new contract for purposes of the application of the Act's provisions. All such ''new'' contracts as discussed above require the insertion of a new or revised wage determination in the contract as provided in § 4.5.

§ 4.144 Contract modifications affecting amount.

Where a contract that was originally issued in an amount not in excess of $2,500 is later modified so that its amount may exceed that figure, all the provisions of section 2(a) of the Act, and the regulations thereunder, are applicable from the date of modification to the date of contract completion. In the event of such modification, the contracting officer shall immediately obtain a wage determination from the Department of Labor using the e98 application or directly from WDOL, and insert the required contract clauses and any wage determination issued into the contract. In the event that a contract for services subject to the Act in excess of $2,500 is modified so that it cannot exceed $2,500, compliance with the provisions of section 2(a) of the Act and the contract clauses required thereunder ceases to be an obligation of the contractor when such modification becomes effective.

[70 FR 50899, Aug. 26, 2005]

§ 4.145 Extended term contracts.

(a) Sometimes service contracts are entered into for an extended term exceeding one year; however, their continuation in effect is subject to the appropriation by Congress of funds for each new fiscal year. In such event, for purposes of this Act, a contract shall be deemed entered into upon the contract anniversary date which occurs in each new fiscal year during which the terms of the original contract are made effective by an appropriation for that

purpose. In other cases a service contract, entered into for a specified term by a Government agency, may contain a provision such as an option clause under which the agency may unilaterally extend the contract for a period of the same length or other stipulated period. Since the exercise of the option results in the rendition of services for a new or different period not included in the term for which the contractor is obligated to furnish services or for which the Government is obligated to pay under the original contract in the absence of such action to extend it, the contract for the additional period is a wholly new contract with respect to application of the Act's provisions and the regulations thereunder (see §4.143(b)).

(b) With respect to multi-year service contracts which are not subject to annual appropriations (for example, concession contracts which are funded through the concessionaire's sales, certain operations and maintenance contracts which are funded with so-called ''no year money'' or contracts awarded by instrumentalities of the United States, such as the Federal Reserve Banks, which do not receive appropriated funds), section 4(d) of the Act allows such contracts to be awarded for a period of up to five years on the condition that the multi-year contracts will be amended no less often than once every two years to incorporate any new Service Contract Act wage determination which may be applicable. Accordingly, unless the contracting agency is notified to the contrary (see §4.4(d)), such contracts are treated as wholly new contracts for purposes of the application of the Act's provisions and regulations thereunder at the end of the second year and again at the end of the fourth year, etc. The two-year period is considered to begin on the date that the contractor commences performance on the contract (i.e., anniversary date) rather than on the date of contract award.

PERIOD OF COVERAGE

§4.146 Contract obligations after award, generally.

A contractor's obligation to observe the provisions of the Act arises on the date the contractor is informed that award of the contract has been made, and not necessarily on the date of formal execution. However, the contractor is required to comply with the provisions of the Act and regulations thereunder only while the employees are performing on the contract, provided the contractor's records make clear the period of such performance. (See also §4.179.) If employees of the contractor are required by the contract to complete certain preliminary training or testing prior to the commencement of the contract services, or if there is a phase-in period which allows the new contractor's employees to familiarize themselves with the contract work so as to provide a smooth transition between contractors, the time spent by employees undertaking such training or phase-in work is considered to be hours worked on the contract and must be compensated for even though the principal contract services may not commence until a later date.

§§4.147–4.149 [Reserved]

EMPLOYEES COVERED BY THE ACT

§4.150 Employee coverage, generally.

The Act, in section 2(b), makes it clear that its provisions apply generally to all service employees engaged in performing work on a covered contract entered into by the contractor with the Federal Government, regardless of whether they are the contractor's employees or those of any subcontractor under such contract. All service employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Act unless a specific exemption (see §§4.115 *et seq.*) is applicable. All such employees must be paid wages at a rate not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)), as amended. Payment of a higher minimum monetary wage and the furnishing of fringe benefits may be required under the contract, pursuant to the provisions of sections 2 (a)(1), (2), and 4(c) of the Act.

§ 4.151 Employees covered by provisions of section 2(a).

The provisions of sections 2(a) and 4(c) of the Act prescribe labor standards requirements applicable, except as otherwise specifically provided, to every contract in excess of $2,500 which is entered into by the United States or the District of Columbia for the principal purpose of furnishing services in the United States through the use of service employees. These provisions apply to all service employees engaged in the performance of such a contract or any subcontract thereunder. The Act, in section 8(b) defines the term *service employee*. The general scope of the definition is considered in § 4.113(b) of this subpart.

§ 4.152 Employees subject to prevailing compensation provisions of sections 2(a)(1) and (2) and 4(c).

(a) Under sections 2(a)(1) and (2) and 4(c) of the Act, minimum monetary wages and fringe benefits to be paid or furnished the various classes of service employees performing such contract work are determined by the Secretary of Labor or his authorized representative in accordance with prevailing rates and fringe benefits for such employees in the locality or in accordance with the rates contained in a predecessor contractor's collective bargaining agreement, as appropriate, and are required to be specified in such contracts and subcontracts thereunder. All service employees of the classes who actually perform the specific services called for by the contract (e.g., janitors performing on a contract for office cleaning; stenographers performing on a contract for stenographic reporting) are covered by the provisions specifying such minimum monetary wages and fringe benefits for such classes of service employees and must be paid not less than the applicable rate established for the classification(s) of work performed. Pursuant to section 4.6(b)(2), conforming procedures are required to be observed for all such classes of service employees not listed in the wage determination incorporated in the contract.

(b) The duties which an employee actually performs govern the classification and the rate of pay to which the employee is entitled under the applicable wage determination. Some job classifications listed in an applicable wage determination are descriptive by title and have commonly understood meanings (e.g., janitors, security guards, pilots, etc.). In such situations, detailed position descriptions may not be included in the wage determination. However, in cases where additional descriptive information is needed to inform users of the scope of duties included in the classification, the wage determination will generally contain detailed position descriptions based on the data source relied upon for the issuance of the wage determination.

(c)(1) Some wage determinations will list a series of classes within a job classification family, e.g., Computer Operators, Class A, B, and C, or Electronic Technicians, Class A, B, and C, or Clerk Typist, Class A and B. Generally, the lowest level listed for a job classification family is considered to be the entry level and establishment of a lower level through conformance (§ 4.6(b)(2)) is not permissible. Further, trainee classifications cannot be conformed. Helpers in skilled maintenance trades (e.g., electricians, machinists, automobile mechanics, etc.) whose duties constitute, in fact, separate and distinct jobs, may also be used if listed on the wage determination, but cannot be conformed. Conformance may not be used to artificially split or subdivide classifications listed in the wage determination. However, conforming procedures may be used if the work which an employee performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title.

(2) Subminimum rates for apprentices, student learners, and handicapped workers are permissible under the conditions discussed in § 4.6 (o) and (p).

§ 4.153 Inapplicability of prevailing compensation provisions to some employees.

There may be employees used by a contractor or subcontractor in performing a service contract in excess of $2,500 which is subject to the Act, whose services, although necessary to the performance of the contract, are

not subject to minimum monetary wage or fringe benefit provisions contained in the contract pursuant to section 2(a) because such employees are not directly engaged in performing the specified contract services. An example might be a laundry contractor's billing clerk performing billing work with respect to the items laundered. In all such situations, the employees who are necessary to the performance of the contract but not directly engaged in the performance of the specified contract services, are nevertheless subject to the minimum wage provision of section 2(b) (see §4.150) requiring payment of not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act to all employees working on a covered contract, unless specifically exempt. However, in situations where minimum monetary wages and fringe benefits for a particular class or classes of service employees actually performing the services called for by the contract have not been specified in the contract because the wage and fringe benefit determination applicable to the contract has been made only for other classes of service employees who will perform the contract work, the employer will be required to pay the monetary wages and fringe benefits which may be specified for such classes of employees pursuant to the conformance procedures provided in §4.6(b).

§4.154 Employees covered by sections 2(a)(3) and (4).

The safety and health standards of section 2(a)(3) and the notice requirements of section 2(a)(4) of the Act (see §4.183) are applicable, in the absence of a specific exemption, to every service employee engaged by a contractor or subcontractor to furnish services under a contract subject to section 2(a) of the Act.

§4.155 Employee coverage does not depend on form of employment contract.

The Act, in section 8(b), makes it plain that the coverage of service employees depends on whether their work for the contractor or subcontractor on a covered contract is that of a service employee as defined in section 8(b) and not on any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. In other words, any person, except those discussed in §4.156 below, who performs work called for by a contract or that portion of a contract subject to the Act is, per se, a service employee. Thus, for example, a person's status as an ''owner-operator'' or an ''independent contractor'' is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.

§4.156 Employees in bona fide executive, administrative, or professional capacity.

The term *service employee* as defined in section 8(b) of the Act does not include persons employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541. Employees within the definition of service employee who are employed in an executive, administrative, or professional capacity are not excluded from coverage, however, even though they are highly paid, if they fail to meet the tests set forth in 29 CFR part 541. Thus, such employees as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations in part 541 of this title, are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations.

§§4.157–4.158 [Reserved]

Subpart D—Compensation Standards

§4.159 General minimum wage.

The Act, in section 2(b)(1), provides generally that no contractor or subcontractor under any Federal contract subject to the Act shall pay any employee engaged in performing work on such a contract less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act. Section 2(a)(1) provides that the minimum

monetary wage specified in any such contract exceeding $2,500 shall in no case be lower than this Fair Labor Standards Act minimum wage. Section 2(b)(1) is a statutory provision which applies to the contractor or subcontractor without regard to whether it is incorporated in the contract; however, §§ 4.6 and 4.7 provide for inclusion of its requirements in covered contracts and subcontracts. Because this statutory requirement specifies no fixed monetary wage rate and refers only to the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, and because its application does not depend on provisions of the contract, any increase in such Fair Labor Standards Act minimum wage during the life of the contract is, on its effective date, also effective to increase the minimum wage payable under section 2(b)(1) to employees engaged in performing work on the contract.

[48 FR 49762, Oct. 27, 1983, as amended at 76 FR 18854, Apr. 5, 2011]

§ 4.160 Effect of section 6(e) of the Fair Labor Standards Act.

Contractors and subcontractors performing work on contracts subject to the Service Contract Act are required to pay all employees, including those employees who are not performing work on or in connection with such contracts, not less than the general minimum wage standard provided in section 6(a)(1) of the Fair Labor Standards Act, as amended (Pub. L. 95–151).

§ 4.161 Minimum monetary wages under contracts exceeding $2,500.

The standards established pursuant to the Act for minimum monetary wages to be paid by contractors and subcontractors under service contracts in excess of $2,500 to service employees engaged in performance of the contract or subcontract are required to be specified in the contract and in all subcontracts (see § 4.6). Pursuant to the statutory scheme provided by sections 2(a)(1) and 4(c) of the Act, every covered contract (and any bid specification therefor) which is in excess of $2,500 shall contain a provision specifying the minimum monetary wages to be paid the various classes of service employees engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative in accordance with prevailing rates for such employees in the locality, or, where a collective bargaining agreement applied to the employees of a predecessor contractor in the same locality, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases as provided in such agreement as a result of arm's-length negotiations. In no case may such wages be lower than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. (For a detailed discussion of the application of section 4(c) of the Act, see § 4.163.) If some or all of the determined wages in a contract fall below the level of the Fair Labor Standards Act minimum by reason of a change in that rate by amendment of the law, these rates become obsolete and the employer is obligated under section 2(b)(1) of the Service Contract Act to pay the minimum wage rate established by the amendment as of the date it becomes effective. A change in the Fair Labor Standards Act minimum by operation of law would also have the same effect on advertised specifications or negotiations for covered service contracts, i.e., it would make ineffective and would supplant any lower rate or rates included in such specifications or negotiations whether or not determined. However, unless affected by such a change in the Fair Labor Standards Act minimum wage, by contract changes necessitating the insertion of new wage provisions (see §§ 4.5(c) and 4.143–4.145) or by the requirements of section 4(c) of the Act (see § 4.163), the minimum monetary wage rate specified in the contract for each of the classes of service employees for which wage determinations have been made under section 2(a)(1) will continue to apply throughout the period of contract performance. No change in the obligation of the contractor or subcontractor with respect to minimum monetary wages will result from the mere fact that higher or lower wage rates may be determined to be prevailing for such employees in the locality after the award and before completion of the

contract. Such wage determinations are effective for contracts not yet awarded, as provided in §4.5(a).

§4.162 Fringe benefits under contracts exceeding $2,500.

(a) Pursuant to the statutory scheme provided by sections 2(a)(2) and 4(c) of the Act, every covered contract in excess of $2,500 shall contain a provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality or, where a collective bargaining agreement applied to the employees of a predecessor contractor in the same locality, the various classes of service employees engaged in the performance of the contract or any subcontract must be provided the fringe benefits, including prospective or accrued fringe benefit increases, provided for in such agreement as a result of arm's-length negotiations. (For a detailed discussion of section 4(c) of the Act, see §4.163.) As provided by section 2(a)(2) of the Act, fringe benefits include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.

(b) Under this provision, the fringe benefits, if any, which the contractor or subcontractor is required to furnish the service employees engaged in the performance of the contract are specified in the contract documents (see §4.6). How the contractor may satisfy this obligation is dealt with in §§4.170 through 4.177 of this part. A change in the fringe benefits required by the contract provision will not result from the mere fact that other or additional fringe benefits are determined to be prevailing for such employees in the locality at a time subsequent to the award but before completion of the contract. Such fringe benefit determinations are effective for contracts not yet awarded (see §4.5(a)), or in the event that changes in an existing contract requiring their insertion for prospective application have occurred (see §§4.143 through 4.145). However, none of the provisions of this paragraph may be construed as altering a successor contractor's obligations under section 4(c) of the Act. (See §4.163.)

§4.163 Section 4(c) of the Act.

(a) Section 4(c) of the Act provides that no ''contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.'' Under this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaining agreement (i.e., irrespective of whether the successor's employees were or were not employed by the predecessor contractor). The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.

(b) *Section 4(c) is self-executing.* Under section 4(c), a successor contractor in

the same locality as the predecessor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which were contained in the predecessor contractor's collective bargaining agreement. This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement. Pursuant to section 4(b) of the Act, a variation has been granted which limits the self-executing application of section 4(c) in the circumstances and under the conditions described in §4.1b(b) of this part. It must be emphasized, however, that the variation in §4.1b(b) is applicable only if the contracting officer has given both the incumbent (predecessor) contractor and the employees' collective bargaining representative notification at least 30 days in advance of any estimated procurement date.

(c) *Variance hearings.* The regulations and procedures for hearings pursuant to section 4(c) of the Act are contained in §4.10 of subpart A and parts 6 and 8 of this title. If, as the result of such hearing, some or all of the wage rate and/or fringe benefit provisions of a predecessor contractor's collective bargaining agreement are found to be substantially at variance with the wage rates and/or fringe benefits prevailing in the locality, the Administrator will cause a new wage determination to be issued in accordance with the decision of the Administrative Law Judge or the Administrative Review Board, as appropriate. Since ''it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved'' (53 Comp. Gen. 401, 402, 1973), the solicitation, or the contract if already awarded, must be amended to incorporate the newly issued wage determination. Such new wage determination shall be made applicable to the contract as of the date of the Administrative Law Judge's decision or, where the decision is reviewed by the Administrative Review Board, the date of that decision. The legislative history of the 1972 Amendments makes clear that the collectively bargained ''wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after a hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services'' (S. Rept. 92–1131, 92nd Cong., 2d Sess. 5). Thus, variance decisions do not have application retroactive to the commencement of the contract.

(d) *Sections 2(a) and 4(c) must be read in conjunction.* The Senate report accompanying the bill which amended the Act in 1972 states that ''Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme.'' (S. Rept. 92–1131, 92nd Cong., 2nd Sess. 4.) Therefore, since section 4(c) refers only to the predecessor contractor's collective bargaining agreement, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement. The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract nor does it negate the application of a prevailing wage determination issued pursuant to section 2(a) where there was no applicable predecessor collective bargaining agreement. 48 Comp. Gen. 22, 23–24 (1968). In addition, because section 2(a) only applies to covered contracts in excess of $2,500, the requirements of section 4(c) likewise apply only to successor contracts which may be in excess of $2,500. However, if the successor contract is in excess of $2,500, section 4(c) applies regardless of the amount of the predecessor contract. (See §§4.141–4.142 for determining contract amount.)

(e) *The operative words of section 4(c) refer to ''contract'' not ''contractor''.* Section 4(c) begins with the language, ''[n]o contractor or subcontractor under a *contract, which succeeds a contract* subject to this Act'' (emphasis supplied). Thus, the statute is applicable by its terms to a successor contract

without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc. (See §§4.143–4.145.) Further, since sections 2(a) and 4(c) must be read in harmony to reflect the statutory scheme, it is clear that the provisions of section 4(c) apply whenever the Act or the regulations require that a new wage determination be incorporated into the contract (53 Comp. Gen. 401, 404–6 (1973)).

(f) *Collective bargaining agreement must be applicable to work performed on the predecessor contract.* Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, section 4(c) would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the predecessor contract. Likewise, the requirements of section 4(c) would not apply if the predecessor contractor's collective bargaining agreement applied only to other employees of the firm and not to the employees working on the contract.

(g) *Contract reconfigurations.* As a result of changing priorities, mission requirements, or other considerations, contracting agencies may decide to restructure their support contracts. Thus, specific contract requirements from one contract may be broken out and placed in a new contract or combined with requirements from other contracts into a consolidated contract. The protections afforded service employees under section 4(c) are not lost or negated because of such contract reconfigurations, and the predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts, provided that the new or consolidated contract is for services which were furnished in the same locality under a predecessor contract. See §4.163(i). However, where there is more than one predecessor contract to the new or consolidated contract, and where the predecessor contracts involve the same or similar function(s) of work, using substantially the same job classifications, the predecessor contract which covers the greater portion of the work in such function(s) shall be deemed to be the predecessor contract for purposes of section 4(c), and the collectively bargained wages and fringe benefits under that contract, if any, shall be applicable to such function(s). This limitation on the application of section 4(c) is necessary and proper in the public interest and is in accord with the remedial purpose of the Act to protect prevailing labor standards.

(h) *Interruption of contract services.* Other than the requirement that substantially the same services be furnished, the requirement for arm's-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c). Thus, the application of section 4(c) is not negated because the contracting authority may change and the successor contract is awarded by a different contracting agency. Also, there is no requirement that the successor contract commence immediately after the completion or termination of the predecessor contract, and an interruption of contract services does not negate the application of section 4(c). Contract services may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract or because a bid protest has halted a contract award requiring the Government to perform the services with its own employees. In all such cases, the requirements of section 4(c) would apply to any successor contract which may be awarded after the temporary interruption or hiatus. The basic principle in all of the preceding examples is that successorship provisions of section 4(c) apply to the full term successor contract. Therefore, temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of section 4(c) to a full term successor contract.

(i) *Place of performance.* The successorship requirements of section 4(c) apply to all contracts for substantially the same services as were furnished under a predecessor contract in the same locality. As stated in §4.4(a)(2), a wage determination incorporated in the contract shall be applicable thereto regardless of whether the successful contractor subsequently changes the place(s) of contract performance. Similarly, the application of section 4(c) (and any wage determination issued pursuant to section 4(c) and included in the contract) is not negated by the fact that a successor prime contractor subsequently changes the place(s) of contract performance or subcontracts any part of the contract work to a firm which performs the work in a different locality.

(j) *Interpretation of wage and fringe benefit provisions of wage determinations issued pursuant to sections 2(a) and 4(c).* Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective bargaining agreement. However, failure to include in the wage determination any job classification, wage rate, or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirement to comply at a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned. Since the successor's obligations are governed by the terms of the collective bargaining agreement, any interpretation of the wage and fringe benefit provisions of the collective bargaining agreement where its provisions are unclear must be based on the intent of the parties to the collective bargaining agreement, provided that such interpretation is not violative of law. Therefore, some of the principles discussed in §§4.170 through 4.177 regarding specific interpretations of the fringe benefit provisions of prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). As provided in section 2(a)(2), a contractor may satisfy its fringe benefit obligations under any wage determination ''by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash'' in accordance with the rules and regulations set forth in §4.177 of this subpart.

(k) No provision of this section shall be construed as permitting a successor contractor to pay its employees less than the wages and fringe benefits to which such employees would have been entitled under the predecessor contractor's collective bargaining agreement. Thus, some of the principles discussed in §4.167 may not be applicable in section 4(c) successorship situations. For example, unless the predecessor contractor's collective bargaining agreement allowed the deduction from employees' wages of the reasonable cost or fair value for providing board, lodging, or other facilities, the successor may not include such costs as part of the applicable minimum wage specified in the wage determination. Likewise, unless the predecessor contractor's agreement allowed a tip credit (§4.6(q)), the successor contractor may not take a tip credit toward satisfying the minimum wage requirements under sections 2(a)(1) and 4(c).

§4.164 [Reserved]

COMPLIANCE WITH COMPENSATION STANDARDS

§4.165 Wage payments and fringe benefits—in general.

(a)(1) Monetary wages specified under the Act shall be paid to the employees to whom they are due promptly and in no event later than one pay period following the end of the pay period in which they are earned. No deduction, rebate, or refund is permitted, except as hereinafter stated. The same rules apply to cash payments authorized to be paid with the statutory monetary wages as equivalents of determined fringe benefits (see §4.177).

(2) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions. (See §4.176 regarding

fringe benefit payments to temporary and part-time employees.)

(b) The Act does not prescribe the length of the pay period. However, for purposes of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods, and the records must be kept on this basis. It is appropriate to use this workweek for the pay period. A bi-weekly or semimonthly, pay period may, however, be used if advance notification is given to the affected employees. A pay period longer than semimonthly is not recognized as appropriate for service employees and wage payments at greater intervals will not be considered as constituting proper payments in compliance with the Act.

(c) The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in excess of those determined to be prevailing in the particular locality. Nor does the Act affect or require the changing of any provisions of union contracts specifying higher monetary wages or fringe benefits than those contained in an applicable determination. However, if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination.

§4.166 Wage payments—unit of payment.

The standard by which monetary wage payments are measured under the Act is the wage rate per hour. An hourly wage rate is not, however, the only unit for payment of wages that may be used for employees subject to the Act. Employees may be paid on a daily, weekly, or other time basis, or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that will fulfill the statutory requirement. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance with the Act by reallocating portions of payments made for other hours which are in excess of the specified minimum.

§4.167 Wage payments—medium of payment.

The wage payment requirements under the Act for monetary wages specified under its provisions will be satisfied by the timely payment of such wages to the employee either in cash or negotiable instrument payable at par. Such payment must be made finally and unconditionally and ''free and clear.'' Scrip, tokens, credit cards, ''dope checks'', coupons, salvage material, and similar devices which permit the employer to retain and prevent the employee from acquiring control of money due for the work until some time after the pay day for the period in which it was earned, are not proper mediums of payment under the Act. If, as is permissible, they are used as a convenient device for measuring earnings or allowable deductions during a single pay period, the employee cannot be charged with the loss or destruction of any of them and the employer may not, because the employee has not actually redeemed them, credit itself with any which remain outstanding on the pay day in determining whether it has met the requirements of the Act. The employer may not include the cost of fringe benefits or equivalents furnished as required under section 2(a)(2) of the Act, as a credit toward the monetary wages it is required to pay under section 2(a)(1) or 2(b) of the Act (see §4.170). However, the employer may generally include, as a part of the applicable minimum wage which it is required to pay under the Act, the reasonable cost or fair value, as determined by the Administrator, of furnishing an employee with ''board, lodging, or other facilities,'' as defined in part 531 of this title, in situations where such facilities are customarily

furnished to employees, for the convenience of the employees, not primarily for the benefit of the employer, and the employees' acceptance of them is voluntary and uncoerced. (See also § 4.163(k).) The determination of reasonable cost or fair value will be in accordance with the Administrator's regulations under the Fair Labor Standards Act, contained in such part 531 of this title. While employment on contracts subject to the Act would not ordinarily involve situations in which service employees would receive tips from third persons, the treatment of tips for wage purposes in the situations where this may occur should be understood. For purposes of this Act, tips may generally be included in wages in accordance with the regulations under the Fair Labor Standards Act, contained in part 531. (See also § 4.6(q) and § 4.163(k).) The general rule under that Act provides, when determining the wage an employer is required to pay a tipped employee, the maximum allowable hourly tip credit is limited to the difference between $2.13 and the applicable minimum wage specified in section 6(a)(1) of that Act. (*See* § 4.163(k) for exceptions in section 4(c) situations.) In no event shall the sum credited as tips exceed the value of tips actually received by the employee. The tip credit is not available to an employer unless the employer has informed the employee of the tip credit provisions and all tips received by the employee have been retained by the employee (other than as part of a valid tip pooling arrangement among employees who customarily and regularly receive tips; *see* section 3(m) of the Fair Labor Standards Act).

[48 FR 49762, Oct. 27, 1983; 48 FR 50529, Nov. 2, 1983, as amended at 76 FR 18854, Apr. 5, 2011]

§ 4.168 Wage payments—deductions from wages paid.

(a) The wage requirements of the Act will not be met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under the provisions of the Act and the regulations thereunder, or where the employee fails to receive such amounts free and clear because he ''kicks back'' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to him. Authorized deductions are limited to those required by law, such as taxes payable by employees required to be withheld by the employer and amounts due employees which the employer is required by court order to pay to another; deductions allowable for the reasonable cost or fair value of board, lodging, and facilities furnished as set forth in § 4.167; and deductions of amounts which are authorized to be paid to third persons for the employee's account and benefit pursuant to his voluntary assignment or order or a collective bargaining agreement with bona fide representatives of employees which is applicable to the employer. Deductions for amounts paid to third persons on the employee's account which are not so authorized or are contrary to law or from which the contractor, subcontractor or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they cut into the wage required to be paid under the Act. The principles applied in determining the permissibility of deductions for payments made to third persons are explained in more detail in §§ 531.38–531.40 of this title.

(b) *Cost of maintaining and furnishing uniforms.* (1) If the employees are required to wear uniforms either by the employer, the nature of the job, or the Government contract, then the cost of furnishing and maintaining the uniforms is deemed to be a business expense of the employer and such cost may not be borne by the employees to the extent that to do so would reduce the employees' compensation below that required by the Act. Since it may be administratively difficult and burdensome for employers to determine the actual cost incurred by all employees for maintaining their own uniforms, payment in accordance with the following standards is considered sufficient for the contractor to satisfy its wage obligations under the Act:

(i) The contractor furnishes all employees with an adequate number of uniforms without cost to the employees or reimburses employees for the actual cost of the uniforms.

(ii) Where uniform cleaning and maintenance is made the responsibility of the employee, the contractor reimburses all employees for such cleaning and maintenance at the rate of $3.35 a week (or 67 cents a day). Since employees are generally required to wear a clean uniform each day regardless of the number of hours the employee may work that day, the preceding weekly amount generally may be reduced to the stated daily equivalent but not to an hourly equivalent. A contractor may reimburse employees at a different rate if the contractor furnishes affirmative proof as to the actual cost to the employees of maintaining their uniforms or if a different rate is provided for in a bona fide collective bargaining agreement covering the employees working on the contract.

(2) However, there generally is no requirement that employees be reimbursed for uniform maintenance costs in those instances where the uniforms furnished are made of ''wash and wear'' materials which may be routinely washed and dried with other personal garments, and do not generally require daily washing, dry cleaning, commercial laundering, or any other special treatment because of heavy soiling in work usage or in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work. This limitation does not apply where a different provision has been set forth on the applicable wage determination. In the case of wage determinations issued under section 4(c) of the Act for successor contracts, the amount established by the parties to the predecessor collective bargaining agreement is deemed to be the cost of laundering wash and wear uniforms.

(c) Stipends, allowances or other payments made directly to an employee by a party other than the employer (such as a stipend for training paid by the Veterans Administration) are not part of ''wages'' and the employer may not claim credit for such payments toward its monetary obligations under the Act.

§4.169 Wage payments—work subject to different rates.

If an employee during a workweek works in different capacities in the performance of the contract and two or more rates of compensation under section 2 of the Act are applicable to the classes of work which he or she performs, the employee must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer's records or other affirmative proof which of such hours were included in the periods spent in each class of work. The rule is the same where such an employee is employed for a portion of the workweek in work not subject to the Act, for which compensation at a lower rate would be proper if the employer by his records or other affirmative proof, segregated the worktime thus spent.

§4.170 Furnishing fringe benefits or equivalents.

(a) *General.* Fringe benefits required under the Act shall be furnished, separate from and in addition to the specified monetary wages, by the contractor or subcontractor to the employees engaged in performance of the contract, as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents. Section 2(a)(2) of the Act provides that the obligation to furnish the specified benefits ''may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.'' The governing rules and regulations for furnishing such equivalents are set forth in §4.177 of this subpart. An employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.

(b) *Meeting the requirement, in general.* The various fringe benefits listed in the Act and in §4.162(a) are illustrative of those which may be found to be prevailing for service employees in a particular locality. The benefits which an

employer will be required to furnish employees performing on a particular contract will be specified in the contract documents. A contractor may dispose of certain of the fringe benefit obligations which may be required by an applicable fringe benefit determination, such as pension, retirement, or health insurance, by irrevocably paying the specified contributions for fringe benefits to an independent trustee or other third person pursuant to an existing ''bona fide'' fund, plan, or program on behalf of employees engaged in work subject to the Act's provisions. Where such a plan or fund does not exist, a contractor must discharge his obligation relating to fringe benefits by furnishing either an equivalent combination of ''bona fide'' fringe benefits or by making equivalent payments in cash to the employee, in accordance with the regulations in § 4.177.

§ 4.171 "Bona fide" fringe benefits.

(a) To be considered a ''bona fide'' fringe benefit for purposes of the Act, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets the following criteria:

(1) The provisions of a plan, fund, or program adopted by the contractor, or by contract as a result of collective bargaining, must be specified in writing, and must be communicated in writing to the affected employees. Contributions must be made pursuant to the terms of such plan, fund, or program. The plan may be either contractor-financed or a joint contractor-employee contributory plan. For example, employer contributions to Individual Retirement Accounts (IRAs) approved by IRS are permissible. However, any contributions made by employees must be voluntary, and if such contributions are made through payroll deductions, such deductions must be made in accordance with § 4.168. No contribution toward fringe benefits made by the employees themselves, or fringe benefits provided from monies deducted from the employee's wages may be included or used by an employer in satisfying any part of any fringe benefit obligation under the Act.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental unemployment benefits, and the like.

(3) The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan.

(4) Except as provided in paragraph (b), the contractor's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that the contractor will not be able to recapture any of the contributions paid in nor in any way divert the funds to its own use or benefit.

(5) Benefit plans or trusts of the types listed in 26 U.S.C. 401(a) which are disapproved by the Internal Revenue Service as not satisfying the requirements of section 401(a) of the Internal Revenue Code or which do not meet the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, *et seq.* and regulations thereunder, are not deemed to be ''bona fide'' plans for purposes of the Service Contract Act.

(6) It should also be noted that such plans must meet certain other criteria as set forth in § 778.215 of 29 CFR part 778 in order for any contributions to be excluded from computation of the regular rate of pay for overtime purposes under the Fair Labor Standards Act (§§ 4.180–4.182).

(b)(1) Unfunded self-insured fringe benefit plans (other than fringe benefits such as vacations and holidays which by their nature are normally unfunded) under which contractors allegedly make ''out of pocket'' payments to provide benefits as expenses may arise, rather than making irrevocable contributions to a trust or other funded arrangement as required under § 4.171(a)(4), are not normally considered ''bona fide'' plans or equivalent benefits for purposes of the Act.

(2) A contractor may request approval by the Administrator of an unfunded self-insured plan in order to allow credit for payments under the plan to meet the fringe benefit requirements of the Act. In considering whether such a plan is bona fide, the Administrator will consider such factors as whether it could be reasonably anticipated to provide the prescribed benefits, whether it represents a legally enforceable commitment to provide such benefits, whether it is carried out under a financially responsible program, and whether the plan has been communicated to the employees in writing. The Administrator in his/her discretion may direct that assets be set aside and preserved in an escrow account or that other protections be afforded to meet the plan's future obligation.

(c) No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a fringe benefit for purposes of the Act.

(d) The furnishing to an employee of board, lodging, or other facilities under the circumstances described in §4.167, the cost or value of which is creditable toward the monetary wages specified under the Act, may not be used to offset any fringe benefit obligations, as such items and facilities are not fringe benefits or equivalent benefits for purposes of the Act.

(e) The furnishing of facilities which are primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor is not the furnishing of a ''bona fide'' fringe benefit or equivalent benefit or the payment of wages. This would be true of such items, for example, as relocation expenses, travel and transportation expenses incident to employment, incentive or suggestion awards, and recruitment bonuses, as well as tools and other materials and services incidental to the employer's performance of the contract and the carrying on of his business, and the cost of furnishing, laundering, and maintaining uniforms and/or related apparel or equipment where employees are required by the contractor, by the contractor's Government contract, by law, or by the nature of the work to wear such items. See also §4.168.

(f) Contributions by contractors for such items as social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc. (sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional association or club dues, may not be used to offset any wages or fringe benefits specified in the contract, as such items are not ''bona fide'' wages or fringe benefits or equivalent benefits for purposes of the Act.

§4.172 Meeting requirements for particular fringe benefits—in general.

Where a fringe benefit determination specifies the amount of the employer's contribution to provide the benefit, the amount specified is the actual minimum cash amount that must be provided by the employer for the employee. No deduction from the specified amount may be made to cover any administrative costs which may be incurred by the contractor in providing the benefits, as such costs are properly a business expense of the employer. If prevailing fringe benefits for insurance or retirement are determined in a stated amount, and the employer provides such benefits through contribution in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides. Unless otherwise specified in the particular wage determination, such as one reflecting collectively bargained fringe benefit requirements, issued pursuant to section 4(c) of the Act, every employee performing on a covered contract must be furnished the fringe benefits required by that determination for all hours spent working on that contract up to a maximum of 40 hours per week and 2,080 (i.e., 52 weeks of 40 hours each) per year, as these are the typical number of nonovertime hours of work in a week, and in a year, respectively. Since the Act's fringe benefit requirements are applicable on a contract-by-contract basis, employees performing on more than one contract subject to the Act must be furnished the full amount of fringe benefits to

which they are entitled under each contract and applicable wage determination. Where a fringe benefit determination has been made requiring employer contributions for a specified fringe benefit in a stated amount per hour, a contractor employing employees part of the time on contract work and part of the time on other work, may only credit against the hourly amount required for the hours spent on the contract work, the corresponding proportionate part of a weekly, monthly, or other amount contributed by him for such fringe benefits or equivalent benefits for such employees. If, for example, the determination requires health and welfare benefits in the amount of 30 cents an hour and the employer provides hospitalization insurance for such employees at a cost of $10.00 a week, the employer may credit 25 cents an hour ($10.00 ÷ 40) toward his fringe benefit obligation for such employees. If an employee works 25 hours on the contract work and 15 hours on other work, the employer cannot allocate the entire $10.00 to the 25 hours spent on contract work and take credit for 30 cents per hour in that manner, but must spread the cost over the full forty hours.

§ 4.173 Meeting requirements for vacation fringe benefits.

(a) *Determining length of service for vacation eligibility.* It has been found that for many types of service contracts performed at Federal facilities a successor contractor will utilize the employees of the previous contractor in the performance of the contract. The employees typically work at the same location providing the same services to the same clientele over a period of years, with periodic, often annual, changes of employer. The incumbent contractor, when bidding on a contract, must consider his liability for vacation benefits for those workers in his employ. If prospective contractors who plan to employ the same personnel were not required to furnish these employees with the same prevailing vacation benefits, it would place the incumbent contractor at a distinct competitive disadvantage as well as denying such employees entitlement to prevailing vacation benefits.

(1) Accordingly, most vacation fringe benefit determinations issued under the Act require an employer to furnish to employees working on the contract a specified amount of paid vacation upon completion of a specified length of service with a contractor or successor. This requirement may be stated in the determination, for example, as ''one week paid vacation after one year of service with a contractor or successor'' or by a determination which calls for ''one week's paid vacation after one year of service''. Unless specified otherwise in an applicable fringe benefit determination, an employer must take the following two factors into consideration in determining when an employee has completed the required length of service to be eligible for vacation benefits:

(i) The total length of time spent by an employee in any capacity in the continuous service of the present (successor) contractor, including both the time spent in performing on regular commercial work and the time spent in performing on the Government contract itself, and

(ii) Where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same Federal facility.

(2) The application of these principles may be illustrated by the example given above of a fringe benefit determination calling for ''one week paid vacation after one year of service with a contractor or successor''. In that example, if a contractor has an employee who has worked for him for 18 months on regular commercial work and only for 6 months on a Government service contract, that employee would be eligible for the one week vacation since his total service with the employer adds up to more than 1 year. Similarly, if a contractor has an employee who worked for 16 months under a janitorial service contract at a particular Federal base for two different predecessor contractors, and only 8 months with the present employer, that employee would also be considered as meeting the ''after one year of service'' test and would thus be eligible for the specified vacation.

(3) The ''contractor or successor'' requirement set forth in paragraph (a)(1) of this section is not affected by the fact that a different contracting agency may have contracted for the services previously or by the agency's dividing and/or combining the contract services. However, prior service as a Federal employee is not counted toward an employee's eligibility for vacation benefits under fringe benefit determinations issued pursuant to the Act.

(4) Some fringe benefit determinations may require an employer to furnish a specified amount of paid vacation upon completion of a specified length of service *with the employer*, for example, ''one week paid vacation after one year of service with an employer''. Under such determinations, only the time spent in performing on commercial work and on Government contract work in the employment of the present contractor need be considered in computing the length of service for purposes of determining vacation eligibility.

(5) Whether or not the predecessor contract(s) was covered by a fringe benefit determination is immaterial in determining whether the one year of service test has been met. This qualification refers to work performed before, as well as after, an applicable fringe benefit determination is incorporated into a contract. Also, the fact that the labor standards in predecessor service contract(s) were only those required under the Fair Labor Standards Act has no effect on the applicable fringe benefit determination contained in a current contract.

(b) *Eligibility requirement—continuous service.* Under the principles set forth above, if an employee's total length of service adds up to at least one year, the employee is eligible for vacation with pay. However, such service must have been rendered continuously for a period of not less than one year for vacation eligibility. The term ''continuous service'' does not require the combination of two entirely separate periods of employment. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. No fixed time period has been established for determining whether an employee has a break in service. Rather, as illustrated below, the reason(s) for an employee's absence from work is the primary factor in determining whether a break in service occurred.

(1) In cases where employees have been granted leave with or without pay by their employer, or are otherwise absent with permission for such reasons as sickness or injury, or otherwise perform no work on the contract because of reasons beyond their control, there would not be a break in service. Likewise, the absence from work for a few days, with or without notice, does not constitute a break in service, without a formal termination of employment. The following specific examples are illustrative situations where it has been determined that a break in service did not occur:

(i) An employee absent for five months due to illness but employed continuously for three years.

(ii) A strike after which employees returned to work.

(iii) An interim period of three months between contracts caused by delays in the procurement process during which time personnel hired directly by the Government performed the necessary services. However, the successor contractor in this case was not held liable for vacation benefits for those employees who had anniversary dates of employment during the interim period because no employment relationship existed during such period.

(iv) A mess hall closed three months for renovation. Contractor employees were considered to be on temporary layoff during the renovation period and did not have a break in service.

(2) Where an employee quits, is fired for cause, or is otherwise terminated (except for temporary layoffs), there would be a break in service even if the employee were rehired at a later date. However, an employee may not be discharged and rehired as a subterfuge to evade the vacation requirement.

(c) *Vesting and payment of vacation benefits.* (1) In the example given in paragraph (a)(1) of this section of a fringe benefit determination calling for ''one week paid vacation after 1 year of

service with a contractor or successor'', an employee who renders the ''one year of service'' continuously becomes eligible for the ''one week paid vacation'' (i.e., 40 hours of paid vacation, unless otherwise specified in an applicable wage determination) upon his anniversary date of employment and upon each succeeding anniversary date thereafter. However, there is no accrual or vesting of vacation eligibility before the employee's anniversary date of employment, and no segment of time smaller than one year need be considered in computing the employer's vacation liability, unless specifically provided for in a particular fringe benefit determination. For example, an employee who has worked 13 months for an employer subject to such stipulations and is separated without receiving any vacation benefit is entitled only to one full week's (40 hours) paid vacation. He would not be entitled to the additional fraction of one-twelfth of one week's paid vacation for the month he worked in the second year unless otherwise stated in the applicable wage determination. An employee who has not met the ''one year of service'' requirement would not be entitled to any portion of the ''one week paid vacation''.

(2) Eligibility for vacation benefits specified in a particular wage determination is based on completion of the stated period of past service. The individual employee's anniversary date (and each annual anniversary date of employment thereafter) is the reference point for vesting of vacation eligibility, but does not necessarily mean that the employee must be given the vacation or paid for it on the date on which it is vested. The vacation may be scheduled according to a reasonable plan mutually agreed to and communicated to the employees. A ''reasonable'' plan may be interpreted to be a plan which allows the employer to maintain uninterrupted contract services but allows the employee some choice, by seniority or similar factor, in the scheduling of vacations. However, the required vacation must be given or payment made in lieu thereof before the next anniversary date, before completion of the current contract, or before the employee terminates employment, whichever occurs first.

(d) *Contractor liability for vacation benefits.* (1) The liability for an employee's vacation is not prorated among contractors unless specifically provided for under a particular fringe benefit determination. The contractor by whom a person is employed at the time the vacation right vests, i.e., on the employee's anniversary date of employment, must provide the full benefit required by the determination which is applicable on that date. For example, an employee, who had not previously performed similar contract work at the same facility, was first hired by a predecessor contractor on July 1, 1978. July 1 is the employee's anniversary date. The predecessor's contract ended June 30, 1979, but the employee continued working on the contract for the successor. Since the employee did not have an anniversary date of employment during the predecessor's contract, the predecessor would not have any vacation liability with respect to this employee. However, on July 1, 1979 the employee's entitlement to the full vacation benefit vested and the successor contractor would be liable for the full amount of the employee's vacation benefit.

(2) The requirements for furnishing data relative to employee hiring dates in situations where such employees worked for ''predecessor'' contractors are set forth in § 4.6. However, a contractor is not relieved from any obligation to provide vacation benefits because of any difficulty in obtaining such data.

(e) *Rate applicable to computation of vacation benefits.* (1) If an applicable wage determination requires that the hourly wage rate be increased during the period of the contract, the rate applicable to the computation of any required vacation benefits is the hourly rate in effect in the workweek in which the actual paid vacation is provided or the equivalent is paid, as the case may be, and would not be the average of the two hourly rates. This rule would not apply to situations where a wage determination specified the method of computation and the rate to be used.

(2) As set forth in § 4.172, unless specified otherwise in an applicable fringe

benefit determination, service employees must be furnished the required amount of fringe benefits for all hours paid for up to a maximum of 40 hours per week and 2,080 hours per year. Thus, an employee on paid vacation leave would accrue and must be compensated for any other applicable fringe benefits specified in the fringe benefit determination, and if any of the other benefits are furnished in the form of cash equivalents, such equivalents must be included with the applicable hourly wage rate in computing vacation benefits or a cash equivalent therefor. The rules and regulations for computing cash equivalents are set forth in §4.177.

§4.174 Meeting requirements for holiday fringe benefits.

(a) *Determining eligibility for holiday benefits—in general.* (1) Most fringe benefit determinations list a specific number of named holidays for which payment is required. Unless specified otherwise in an applicable determination, an employee who performs any work during the workweek in which a named holiday occurs is entitled to the holiday benefit, regardless of whether the named holiday falls on a Sunday, another day during the workweek on which the employee is not normally scheduled to work, or on the employee's day off. In addition, holiday benefits cannot be denied because the employee has not been employed by the contractor for a designated period prior to the named holiday or because the employee did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination.

(2) An employee who performs no work during the workweek in which a named holiday occurs is generally not entitled to the holiday benefit. However, an employee who performs no work during the workweek because he is on paid vacation or sick leave in accordance with the terms of the applicable fringe benefit determination is entitled to holiday pay or another day off with pay to substitute for the named holiday. In addition, an employee who performs no work during the workweek because of a layoff does not forfeit his entitlement to holiday benefits if the layoff is merely a subterfuge by the contractor to avoid the payment of such benefits.

(3) The obligation to furnish holiday pay for the named holiday may be discharged if the contractor furnishes another day off with pay in accordance with a plan communicated to the employees involved. However, in such instances the holidays named in the fringe benefit determination are the reference points for determining whether an employee is eligible to receive holiday benefits. In other words, if an employee worked in a workweek in which a listed holiday occurred, the employee is entitled to pay for that holiday. Some determinations may provide for a specific number of holidays without naming them. In such instances the contractor is free to select the holidays to be taken in accordance with a plan communicated to the employees involved, and the agreed-upon holidays are the reference points for determining whether an employee is eligible to receive holiday benefits.

(b) *Determining eligibility for holiday benefits—newly hired employees.* The contractor generally is not required to compensate a newly hired employee for the holiday occurring prior to the hiring of the employee. However, in the one situation where a named holiday falls in the first week of a contract, all employees who work during the first week would be entitled to holiday pay for that day. For example, if a contract to provide services for the period January 1 through December 31 contained a fringe benefit determination listing New Year's Day as a named holiday, and if New Year's Day were officially celebrated on January 2 in the year in question because January 1 fell on a Sunday, employees hired to begin work on January 3 would be entitled to holiday pay for New Year's Day.

(c) *Payment of holiday benefits.* (1) A full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours unless a different standard is used in the fringe benefit determination, such as one reflecting collectively bargained holiday benefit requirements issued pursuant to section 4(c) of the Act or a different historic practice in

an industry or locality. Thus, for example, a contractor must furnish 7 hours of holiday pay to a full-time employee whose scheduled workday consists of 7 hours. An employee whose scheduled workday is 10 hours would be entitled to a holiday payment of 8 hours unless a different standard is used in the determination. As discussed in § 4.172, such holiday pay must include the full amount of other fringe benefits to which the employee is entitled.

(2) Unless a different standard is used in the wage determination, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours or be furnished another day off with pay.

(3) If the fringe benefit determination lists the employee's birthday as a paid holiday and that day coincides with another listed holiday, the contractor may discharge his obligation to furnish payment for the second holiday by either substituting another day off with pay with the consent of the employee, furnishing holiday benefits of an extra day's pay, or if the employee works on the holiday in question, furnish holiday benefits of two extra days' pay.

(4) As stated in paragraph (a)(1) of this section, an employee's entitlement to holiday pay fully vests by working in the workweek in which the named holiday occurs. Accordingly, any employee who is terminated before receiving the full amount of holiday benefits due him must be paid the holiday benefits as a final cash payment.

(5) The rules and regulations for furnishing holiday pay to temporary and part-time employees are discussed in § 4.176.

(6) The rules and regulations for furnishing equivalent fringe benefits or cash equivalents in lieu of holiday pay are discussed in § 4.177.

§ 4.175 Meeting requirements for health, welfare, and/or pension benefits.

(a) *Determining the required amount of benefits.* (1) Most fringe benefit determinations containing health and welfare and/or pension requirements specify a fixed payment per hour on behalf of each service employee. These payments are usually also stated as weekly or monthly amounts. As set forth in § 4.172, unless specified otherwise in the applicable determination such payments are due for all hours paid for, including paid vacation, sick leave, and holiday hours, up to a maximum of 40 hours per week and 2,080 hours per year on each contract. The application of this rule can be illustrated by the following examples:

(i) An employee who works 4 days a week, 10 hours a day is entitled to 40 hours of health and welfare and/or pension fringe benefits. If an employee works 3 days a week, 12 hours a day, then such employee is entitled to 36 hours of these benefits.

(ii) An employee who works 32 hours in a workweek and also receives 8 hours of holiday pay is entitled to the maximum of 40 hours of health and welfare and/or pension payments in that workweek. If the employee works more than 32 hours and also received 8 hours of holiday pay, the employee is still only entitled to the maximum of 40 hours of health and welfare and/or pension payments.

(iii) If an employee is off work for two weeks on vacation and received 80 hours of vacation pay, the employee must also receive payment for the 80 hours of health and welfare and/or pension benefits which accrue during the vacation period.

(iv) An employee entitled to two weeks paid vacation who instead works the full 52 weeks in the year, receiving the full 2,080 hours worth of health and welfare and/or pension benefits, would be due an extra 80 hours of vacation pay in lieu of actually taking the vacation; however, such an employee would not be entitled to have an additional 80 hours of health and welfare and/or pension benefits included in his vacation pay.

(2) A fringe benefit determination calling for a specified benefit such as health insurance contemplates a fixed and definite contribution to a ''bona fide'' plan (as that term is defined in § 4.171) by an employer on behalf of each employee, based on the monetary cost to the employer rather than on

the level of benefits provided. Therefore, in determining compliance with an applicable fringe benefit determination, the amount of the employer's contribution on behalf of each individual employee governs. Thus, as set forth in §4.172, if a determination should require a contribution to a plan providing a specified fringe benefit and that benefit can be obtained for less than the required contribution, it would be necessary for the employer to make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. The following illustrates the application of this principle: A fringe benefit determination requires a rate of $36.40 per month per employee for a health insurance plan. The employer obtains the health insurance coverage specified at a rate of $20.45 per month for a single employee, $30.60 for an employee with spouse, and $40.90 for an employee with a family. The employer is required to make up the difference in cash or equivalent benefits to the first two classes of employees in order to satisfy the determination, notwithstanding that coverage for an employee would be automatically changed by the employer if the employee's status should change (e.g., single to married) and notwithstanding that the employer's average contribution per employee may be equal to or in excess of $36.40 per month.

(3) In determining eligibility for benefits under certain wage determinations containing hours or length of service requirements (such as having to work 40 hours in the preceding month), the contractor must take into account time spent by employees on commercial work as well as time spent on the Government contract.

(b) Some fringe benefit determinations specifically provide for health and welfare and/or pension benefits in terms of average cost. Under this concept, a contractor's contributions per employee to a ''bona fide'' fringe benefit plan are permitted to vary depending upon the individual employee's marital or employment status. However, the firm's total contributions for all service employees enrolled in the plan must average at least the fringe benefit determination requirement per hour per service employee. If the contractor's contributions average less than the amount required by the determination, then the firm must make up the deficiency by making cash equivalent payments or equivalent fringe benefit payments to all service employees in the plan who worked on the contract during the payment period. Where such deficiencies are made up by means of cash equivalent payments, the payments must be made promptly on the following payday. The following illustrates the application of this principle: The determination requires an average contribution of $0.84 an hour. The contractor makes payments to bona fide fringe benefit plans on a monthly basis. During a month the firm contributes $15,000 for the service employees employed on the contract who are enrolled in the plan, and a total of 20,000 man-hours had been worked by all service employees during the month. Accordingly, the firm's average cost would have been $15,000÷20,000 hours or $0.75 per hour, resulting in a deficiency of $0.09 per hour. Therefore, the contractor owes the service employees in the plan who worked on the contract during the month an additional $0.09 an hour for each hour worked on the contract, payable on the next regular payday for wages. Unless otherwise provided in the applicable wage determination, contributions made by the employer for non-service employees may not be credited toward meeting Service Contract Act fringe benefit obligations.

(c) *Employees not enrolled in or excluded from participating in fringe benefit plans.* (1) Some health and welfare and pension plans contain eligibility exclusions for certain employees. For example, temporary and part-time employees may be excluded from participating in such plans. Also, employees receiving benefits through participation in plans of an employer other than the Government contractor or by a spouse's employer may be prevented from receiving benefits from the contractor's plan because of prohibitions against ''double coverage''. While such exclusions do not invalidate an otherwise bona fide insurance plan, employer contributions to such a plan

cannot be considered to be made on behalf of the excluded employees. Accordingly, under fringe benefit determination requirements as described in paragraph (a)(2) of this section, the employees excluded from participation in the health insurance plan must be furnished equivalent bona fide fringe benefits or be paid a cash equivalent payment during the period that they are not eligible to participate in the plan.

(2) It is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from that plan at all times. For example, under some plans, newly hired employees who are eligible to participate in an insurance plan from their first day of employment may be prohibited from receiving benefits from the plan during a specified ''waiting period''. Contributions made on behalf of such employees would serve to discharge the contractor's obligation to furnish the fringe benefit. However, if no contributions are made for such employees, no credit may be taken toward the contractor's fringe benefit obligations.

(d) *Payment of health and welfare and pension benefits.* (1) Health and welfare and/or pension payments to a ''bona fide'' insurance plan or trust program may be made on a periodic payment basis which is not less often than quarterly. However, where fringe benefit determinations contemplate a fixed contribution on behalf of each employee, and a contractor exercises his option to make hourly cash equivalent or differential payments, such payments must be made promptly on the regular payday for wages. (See § 4.165.)

(2) The rules and regulations for furnishing health and welfare and pension benefits to temporary and part-time employees are discussed in § 4.176.

(3) The rules and regulations for furnishing equivalent fringe benefits or cash equivalents in lieu of health and welfare and pension benefits are discussed in § 4.177.

§ 4.176 Payment of fringe benefits to temporary and part-time employees.

(a) As set forth in § 4.165(a)(2), the Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees. Accordingly, in the absence of express limitations, the provisions of an applicable fringe benefit determination apply to all temporary and part-time service employees engaged in covered work. However, in general, such temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination which is proportionate to the amount of time spent in covered work. The application of these principles may be illustrated by the following examples:

(1) Assuming the paid vacation for full-time employees is one week of 40 hours, a part-time employee working a regularly scheduled workweek of 16 hours is entitled to 16 hours of paid vacation time or its equivalent each year, if all other qualifications are met.

(2) In the case of holidays, a part-time employee working a regularly scheduled workweek of 16 hours would be entitled to two-fifths of the holiday pay due full-time employees. It is immaterial whether or not the holiday falls on a normal workday of the part-time employee. Except as provided in § 4.174(b), a temporary or casual employee hired during a holiday week, but after the holiday, would be due no holiday benefits for that week.

(3) Holiday or vacation pay obligations to temporary and part-time employees working an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday or vacation benefits due full-time employees based on the number of hours each such employee worked in the workweek prior to the workweek in which the holiday occurs or, with respect to vacations, the number of hours which the employee worked in the year preceding the employee's anniversary date of employment. For example:

(i) An employee works 10 hours during the week preceding July 4, a designated holiday. The employee is entitled to 10/40 of the holiday pay to which a full-time employee is entitled (i.e., 10/40 times 8 = 2 hours holiday pay).

(ii) A part-time employee works 520 hours during the 12 months preceding the employee's anniversary date. Since the typical number of nonovertime hours in a year of work is 2,080, if a full-time employee would be entitled to

one week (40 hours) paid vacation under the applicable fringe benefit determination, then the part-time employee would be entitled to 520/2,080 times 40 = 10 hours paid vacation.

(4) A part-time employee working a regularly scheduled workweek of 20 hours would be entitled to one-half of the health and welfare and/or pension benefits specified in the applicable fringe benefit determination. Thus, if the determination requires $36.40 per month for health insurance, the contractor could discharge his obligation towards the employee in question by providing a health insurance policy costing $18.20 per month.

(b) A contractor's obligation to furnish the specified fringe benefits to temporary and part-time employees may be discharged by furnishing equivalent benefits, cash equivalents, or a combination thereof in accordance with the rules and regulations set forth in §4.177.

§4.177 Discharging fringe benefit obligations by equivalent means.

(a) *In general.* (1) Section 2(a)(2) of the Act, which provides for fringe benefits that are separate from and in addition to the monetary compensation required under section 2(a)(1), permits an employer to discharge his obligation to furnish the fringe benefits specified in an applicable fringe benefit determination by furnishing any equivalent combinations of ''bona fide'' fringe benefits or by making equivalent or differential payments in cash. However, credit for such payments is limited to the employer's fringe benefit obligations under section 2(a)(2), since the Act does not authorize any part of the monetary wage required by section 2(a)(1) and specified in the wage determination and the contract, to be offset by the fringe benefit payments or equivalents which are furnished or paid pursuant to section 2(a)(2).

(2) When a contractor substitutes fringe benefits not specified in the fringe benefit determination contained in the contract for fringe benefits which are so specified, the substituted fringe benefits, like those for which the contract provisions are prescribed, must be ''bona fide'' fringe benefits, as that term is defined in §4.171.

(3) When a contractor discharges his fringe benefit obligation by furnishing, in lieu of those benefits specified in the applicable fringe benefit determination, other ''bona fide'' fringe benefits, cash payments, or a combination thereof, the substituted fringe benefits and/or cash payments must be ''equivalent'' to the benefits specified in the determination. As used in this subpart, the terms *equivalent fringe benefit* and *cash equivalent* mean equal in terms of monetary cost to the contractor. Thus, as set forth in §4.172, if an applicable fringe benefit determination calls for a particular fringe benefit in a stated amount and the contractor furnished this benefit through contributions in a lesser amount, the contractor must furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefit which the contractor provides. This principle may be illustrated by the example given in §4.175(a)(2).

(b) *Furnishing equivalent fringe benefits.* (1) A contractor's obligation to furnish fringe benefits which are stated in a specified cash amount may be discharged by furnishing any combination of ''bona fide'' fringe benefits costing an equal amount. Thus, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if, instead, hospitalization benefits costing not less than 20 cents per hour are provided. The same obligation will be met if hospitalization benefits costing 10 cents an hour and life insurance benefits costing 10 cents an hour are provided. As set forth in §4.171(c), no benefit required to be furnished the employee by any other law, such as workers' compensation, may be credited toward satisfying the fringe benefit requirements of the Act.

(2) A contractor who wishes to furnish equivalent fringe benefits in lieu of those benefits which are not stated in a specified cash amount, such as ''one week paid vacation'', must first determine the equivalent cash value of such benefits in accordance with the rules set forth in paragraph (c) of this section.

(c) *Furnishing cash equivalents.* (1) Fringe benefit obligations may be discharged by paying to the employee on his regular payday, in addition to the monetary wage required, a cash amount per hour in lieu of the specified fringe benefits, provided such amount is equivalent to the cost of the fringe benefits required. If, for example, an employee's monetary rate under an applicable determination is $4.50 an hour, and the fringe benefits to be furnished are hospitalization benefits costing 20 cents an hour and retirement benefits costing 20 cents an hour, the fringe benefit obligation is discharged if instead of furnishing the required fringe benefits, the employer pays the employee, in cash, 40 cents per hour as the cash equivalent of the fringe benefits in addition to the $4.50 per hour wage rate required under the applicable wage determination.

(2) The hourly cash equivalent of those fringe benefits which are not stated in the applicable determination in terms of hourly cash amounts may be obtained by mathematical computation through the use of pertinent factors such as the monetary wages paid the employee and the hours of work attributable to the period, if any, by which fringe benefits are measured in the determination. If the employee's regular rate of pay is greater than the minimum monetary wage specified in the wage determination and the contract, the former must be used for this computation, and if the fringe benefit determination does not specify any daily or weekly hours of work by which benefits are to be measured, a standard 8-hour day and 40-hour week will be considered applicable. The application of these rules in typical situations is illustrated in paragraphs (c)(3) through (7) of this section.

(3) Where fringe benefits are stated as a percentage of the monetary rate, the hourly cash equivalent is determined by multiplying the stated percentage by the employees' regular or basic (i.e., wage determination) rate of pay, whichever is greater. For example, if the determination calls for a 5 percent pension fund payment and the employee is paid a monetary rate of $4.50 an hour, or if the employee earns $4.50 an hour on a piece-work basis in a particular workweek, the cash equivalent of that payment would be 22½ cents an hour.

(4) If the determination lists a particular fringe benefit in such terms as $8 a week, the hourly cash equivalent is determined by dividing the amount stated in the determination by the number of working hours to which the amount is attributable. For example, if a determination lists a fringe benefit as ''pension—$8 a week'', and does not specify weekly hours, the hourly cash equivalent is 20 cents per hour, i.e., $8 divided by 40, the standard number of non-overtime working hours in a week.

(5) In determining the hourly cash equivalent of those fringe benefits which are not stated in the determination in terms of a cash amount, but are stated, for example, as ''nine paid holidays per year'' or ''1 week paid vacation after one year of service'', the employee's hourly monetary rate of pay is multiplied by the number of hours making up the paid holidays or vacation. Unless the hours contemplated in the fringe benefit are specified in the determination, a standard 8-hour day and 40-hour week is considered applicable. The total annual cost so determined is divided by 2,080, the standard number of non-overtime hours in a year of work, to arrive at the hourly cash equivalent. This principle may be illustrated by the following examples:

(i) If a particular determination lists as a fringe benefit ''nine holidays per year'' and the employee's hourly rate of pay is $4.50, the $4.50 is multiplied by 72 (9 days of 8 hours each) and the result, $324, is then divided by 2,080 to arrive at the hourly cash equivalent, $0.1557 an hour. See § 4.174(c)(4).

(ii) If the determination requires ''one week paid vacation after one year of service'', and the employee's hourly rate of pay is $4.50, the $4.50 is multiplied by 40 and the result, $180.00, is then divided by 2,080 to arrive at the hourly cash equivalent, $0.0865 an hour.

(6) Where an employer elects to pay an hourly cash equivalent in lieu of a paid vacation, which is computed in accordance with paragraph (c)(5) of this section, such payments need commence only after the employee has satisfied the ''after one year of service'' requirement. However, should the employee

terminate employment for any reason before receiving the full amount of vested vacation benefits due, the employee must be paid the full amount of any difference remaining as the final cash payment. For example, an employee becomes eligible for a week's vacation pay on March 1. The employer elects to pay this employee an hourly cash equivalent beginning that date; the employee terminates employment on March 31. Accordingly, as this employee has received only 1/12 of the vacation pay to which he/she is entitled, the employee is due the remaining 11/12 upon termination. As set forth in §4.173(e), the rate applicable to the computation of cash equivalents for vacation benefits is the hourly wage rate in effect at the time such equivalent payments are actually made.

(d) *Furnishing a combination of equivalent fringe benefits and cash payments.* Fringe benefit obligations may be discharged by furnishing any combination of cash or fringe benefits as illustrated in the preceding paragraphs of this section, in monetary amounts the total of which is equivalent, under the rules therein stated, to the determined fringe benefits specified in the contract. For example, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if instead, hospitalization benefits costing 15 cents an hour and a cash equivalent payment of 5 cents an hour are provided.

(e) *Effect of equivalents in computing overtime pay.* Section 6 of the Act excludes from the regular or basic hourly rate of an employee, for purposes of determining the overtime pay to which the employee is entitled under any other Federal law, those fringe benefit payments computed under the Act which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e) (formerly designated as section 7(d)) of that Act (29 U.S.C. 207(e)). Fringe benefit payments which qualify for such exclusion are described in subpart C of Regulations, 29 CFR part 778. When such fringe benefits are required to be furnished to service employees engaged in contract performance, the right to compute overtime pay in accordance with the above rule is not lost to a contractor or subcontractor because it discharges its obligation under this Act to furnish such fringe benefits through alternative equivalents as provided in this section. If it furnishes equivalent benefits or makes cash payments, or both, to such an employee as authorized herein, the amounts thereof, which discharge the employer's obligation to furnish such specified fringe benefits, may be excluded pursuant to this Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under any other Federal law. No such exclusion can operate, however, to reduce an employee's regular or basic rate of pay below the monetary wage rate specified as the applicable minimum wage rates under sections 2(a)(1), 2(b), or 4(c) of this Act or under other law or an employment contract.

§4.178 Computation of hours worked.

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked in each workweek when such work under the contract is performed is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in part 785 of this title which is incorporated herein by reference. In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. The hours worked which are subject to the compensation provisions of the Act are those in which the employee is engaged in performing work on contracts subject to the Act. However, unless such hours are adequately segregated, as indicated in §4.179, compensation in accordance with the Act will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract, in the absence of affirmative proof to

the contrary that such work did not continue throughout the workweek.

§ 4.179 Identification of contract work.

Contractors and subcontractors under contracts subject to the Act are required to comply with its compensation requirements throughout the period of performance on the contract and to do so with respect to all employees who in any workweek are engaged in performing work on such contracts. If such a contractor during any workweek is not exclusively engaged in performing such contracts, or if while so engaged it has employees who spend a portion but not all of their worktime in the workweek in performing work on such contracts, it is necessary for the contractor to identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each such employee performed work on such contracts. In cases where contractors are not exclusively engaged in Government contract work, and there are adequate records segregating the periods in which work was performed on contracts subject to the Act from periods in which other work was performed, the compensation specified under the Act need not be paid for hours spent on non-contract work. However, in the absence of records adequately segregating noncovered work from the work performed on or in connection with the contract, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absence of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. Even where a contractor can segregate Government from non-Government work, it is necessary that the contractor comply with the requirements of section 6(e) of the FLSA discussed in § 4.160.

OVERTIME PAY OF COVERED EMPLOYEES

§ 4.180 Overtime pay—in general.

The Act does not provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 recognizes, however, that other Federal laws may require such compensation to be paid to employees working on or in connection with contracts subject to the Act (see § 4.181) and prescribes, for purposes of such laws, the manner in which fringe benefits furnished pursuant to the Act shall be treated in computing such overtime compensation as follows: ''In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) [now section 7(e)] thereof.'' Fringe benefit payments which qualify for such exclusion are described in part 778, subpart C of this title. The interpretations there set forth will be applied in determining the overtime pay to which covered service employees are entitled under other Federal statutes. The effect of section 6 of the Act in situations where equivalent fringe benefits or cash payments are provided in lieu of the specified fringe benefits is stated in § 4.177(e) of this part, and illustrated in § 4.182.

§ 4.181 Overtime pay provisions of other Acts.

(a) *Fair Labor Standards Act.* Although provision has not been made for insertion in Government contracts of stipulations requiring compliance with the overtime provisions of the Fair Labor Standards Act, contractors and subcontractors performing contracts subject to the McNamara-O'Hara Service Contract Act may be required to compensate their employees working on or in connection with such contracts for overtime work pursuant to the overtime pay standards of the Fair Labor Standards Act. This is true with respect to employees engaged in interstate or foreign commerce or in the production of goods for such commerce (including occupations and processes

closely related and directly essential to such production) and employees employed in enterprises which are so engaged, subject to the definitions and exceptions provided in such Act. Such employees, except as otherwise specifically provided in such Act, must receive overtime compensation at a rate of not less than 1½ times their regular rate of pay for all hours worked in excess of the applicable standard in a workweek. See part 778 of this title. However, the Fair Labor Standards Act provides no overtime pay requirements for employees, not within such interstate commerce coverage of the Act, who are subject to its minimum wage provisions only by virtue of the provisions of section 6(e), as explained in §4.180.

(b) *Contract Work Hours and Safety Standards Act.* (1) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327–332) applies generally to Government contracts, including service contracts in excess of $100,000, which may require or involve the employment of laborers and mechanics. Guards, watchmen, and many other classes of service employees are laborers or mechanics within the meaning of such Act. However, employees rendering only professional services, seamen, and as a general rule those whose work is only clerical or supervisory or nonmanual in nature, are not deemed laborers or mechanics for purposes of the Act. The wages of every laborer and mechanic for performance of work on such contracts must include compensation at a rate not less than 1½ times the employees' basic rate of pay for all hours worked in any workweek in excess of 40. Exemptions are provided for certain transportation and communications contracts, contracts for the purchase of supplies ordinarily available in the open market, and work, required to be done in accordance with the provisions of the Walsh-Healey Act.

(2) Regulations concerning this Act are contained in 29 CFR part 5 which permit overtime pay to be computed in the same manner as under the Fair Labor Standards Act.

(c) *Walsh-Healey Public Contracts Act.* As pointed out in §4.117, while some Government contracts may be subject both to the McNamara-O'Hara Service Contract Act and to the Walsh-Healey Public Contracts Act, the employees performing work on the contract which is subject to the latter Act are, when so engaged, exempt from the provisions of the former. They are, however, subject to the overtime provisions of the Walsh-Healey Act if, in any workweek, any of the work performed for the employer is subject to such Act and if, in such workweek, the total hours worked by the employee for the employer (whether wholly or only partly on such work) exceed 40 hours in the workweek. In any such workweek the Walsh-Healey Act requires payment of overtime compensation at a rate not less than 1½ times the employee's basic rate for such weekly overtime hours. The overtime pay provisions of the Walsh-Healey Act are discussed in greater detail in 41 CFR part 50–201.

[48 FR 49762, Oct. 27, 1983, as amended at 51 FR 12265, Apr. 9, 1986; 61 FR 40716, Aug. 5, 1996]

§4.182 Overtime pay of service employees entitled to fringe benefits.

Reference is made in §4.180 to the rules prescribed by section 6 of the Act which permit exclusion of certain fringe benefits and equivalents provided pursuant to section 2(a)(2) of the Act from the regular or basic rate of pay when computing overtime compensation of a service employee under the provisions of any other Federal law. As provided in §4.177, not only those fringe benefits excludable under section 6 as benefits determined and specified under section 2(a)(2), but also equivalent fringe benefits and cash payments furnished in lieu of the specified benefits may be excluded from the regular or basic rate of such an employee. The application of this rule may be illustrated by the following examples:

(a) The A company pays a service employee $4.50 an hour in cash under a wage determination which requires a monetary rate of not less than $4 and a fringe benefit contribution of 50 cents which would qualify for exclusion from the regular rate under section 7(e) of the Fair Labor Standards Act. The contractor pays the 50 cents in cash because he made no contributions for

fringe benefits specified in the determination and the contract. Overtime compensation in this case would be computed on a regular or basic rate of $4 an hour.

(b) The B company has for some time been paying $4.25 an hour to a service employee as his basic cash wage plus 25 cents an hour as a contribution to a welfare and pension plan, which contribution qualifies for exclusion from the regular rate under the Fair Labor Standards Act. For performance of work under a contract subject to the Act a monetary rate of $4 and a fringe benefit contribution of 50 cents (also qualifying for such exclusion) are specified because they are found to be prevailing for such employees in the locality. The contractor may credit the 25 cent welfare and pension contribution toward the discharge of his fringe benefit obligation under the contract but must also make an additional contribution of 25 cents for the specified or equivalent fringe benefits or pay the employee an additional 25 cents in cash. These contributions or equivalent payments may be excluded from the employee's regular rate which remains $4.25, the rate agreed upon as the basic cash wage.

(c) The C company has been paying $4 an hour as its basic cash wage on which the firm has been computing overtime compensation. For performance of work on a contract subject to the Act the same rate of monetary wages and a fringe benefit contribution of 50 cents an hour (qualifying for exclusion from the regular rate under the Fair Labor Standards Act) are specified in accordance with a determination that these are the monetary wages and fringe benefits prevailing for such employees in the locality. The contractor is required to continue to pay at least $4 an hour in monetary wages and at least this amount must be included in the employee's regular or basic rate for overtime purposes under applicable Federal law. The fringe benefit obligation under the contract would be discharged if 50 cents of the contributions for fringe benefits were for the fringe benefits specified in the contract or equivalent benefits as defined in § 4.177. The company may exclude such fringe benefit contributions from the regular or basic rate of pay of the service employee in computing overtime pay due.

NOTICE TO EMPLOYEES

§ 4.183 Employees must be notified of compensation required.

The Act, in section 2(a)(4), and the regulations thereunder in § 4.6(e), require all contracts subject to the Act which are in excess of $2,500 to contain a clause requiring the contractor or subcontractor to notify each employee commencing work on a contract to which the Act applies of the compensation required to be paid such employee under section 2(a)(1) and the fringe benefits required to be furnished under section 2(a)(2). A notice form (WH Publication 1313 and any applicable wage determination) provided by the Wage and Hour Division is to be used for this purpose. It may be delivered to the employee or posted as stated in § 4.184.

§ 4.184 Posting of notice.

Posting of the notice provided by the Wage and Hour Division shall be in a prominent and accessible place at the worksite, as required by § 4.6(e). The display of the notice in a place where it may be seen by employees performing on the contract will satisfy the requirement that it be in a ''prominent and accessible place''. Should display be necessary at more than one site, in order to assure that it is seen by such employees, additional copies of the poster may be obtained without cost from the Division. The contractor or subcontractor is required to notify each employee of the compensation due or attach to the poster any applicable wage determination specified in the contract listing all minimum monetary wages and fringe benefits to be paid or furnished to the classes of service employees performing on the contract.

RECORDS

§ 4.185 Recordkeeping requirements.

The records which a contractor or subcontractor is required to keep concerning employment of employees subject to the Act are specified in § 4.6(g) of subpart A of this part. They are required to be maintained for 3 years

from the completion of the work, and must be made available for inspection and transcription by authorized representatives of the Administrator. Such records must be kept for each service employee performing work under the contract, for each workweek during the performance of the contract. If the required records are not separately kept for the service employees performing on the contract, it will be presumed, in the absence of affirmative proof to the contrary, that all service employees in the department or establishment where the contract was performed were engaged in covered work during the period of performance. (See §4.179.)

§4.186 [Reserved]

Subpart E—Enforcement

§4.187 Recovery of underpayments.

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary or his or her authorized representatives, an Administrative Law Judge, or the Administrative Review Board, and are not paid directly to such employees by the contracting agency without the express prior consent of the Department of Labor. (See Decision of the Comptroller General, B–170784, February 17, 1971.) It is mandatory for a contracting officer to adhere to a request from the Department of Labor 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.) Contract funds which are or may become due a contractor under any contract with the United States may be withheld prior to the institution of administrative proceedings by the Secretary. (*McCasland* v. *U.S. Postal Service*, 82 CCH Labor Cases ¶33,607 (N.D. N.Y. 1977); *G & H Machinery Co.* v. *Donovan,* 96 CCH Labor Cases ¶34,354 (S.D. Ill. 1982).)

(b) *Priority to withheld funds.* The Comptroller General has afforded employee wage claims priority over an Internal Revenue Service levy for unpaid taxes. (See Decisions of the Comptroller General, B–170784, February 17, 1971; B–189137, August 1, 1977; 56 Comp. Gen. 499 (1977); 55 Comp. Gen. 744 (1976), arising under the Davis-Bacon Act; B–178198, August 30, 1973; B–161460, May 25, 1967.)

(1) As the Comptroller General has stated, ''[t]he legislative histories of these labor statutes [Service Contract Act and Contract Work Hours and Safety Standards Act, 41 U.S.C. 327, *et seq.*] disclose a progressive tendency to extend a more liberal interpretation and construction in successive enactments with regard to worker's benefits, recovery and repayment of wage underpayments. Further, as remedial legislation, it is axiomatic that they are to be liberally construed''. (Decision of the Comptroller General, B–170784, February 17, 1971.)

(2) Since section 3(a) of the Act provides that accrued contract funds withheld to pay employees wages must be held in a deposit fund, it is the position of the Department of Labor that monies so held may not be used or set aside for agency reprocurement costs. To hold otherwise would be inequitable

and contrary to public policy, since the employees have performed work from which the Government has received the benefit (see *National Surety Corporation* v. *U.S.*, 132 Ct. Cl. 724, 728, 135 F. Supp. 381 (1955), cert. denied, 350 U.S. 902), and to give contracting agency reprocurement claims priority would be to require employees to pay for the breach of contract between the employer and the agency. The Comptroller General has sanctioned priority being afforded wage underpayments over the reprocurement costs of the contracting agency following a contractor's default or termination for cause. Decision of the Comptroller General, B–167000, June 26, 1969; B–178198, August 30, 1973; and B–189137, August 1, 1977.

(3) Wage claims have priority over reprocurement costs and tax liens without regard to when the competing claims were raised. See Decisions of the Comptroller General, B–161460, May 25, 1967; B–189137, August 1, 1977.

(4) 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 U.S.C. 203, 41 U.S.C. 15, to funds withheld under the contract, since an assignee can acquire no greater rights to withheld funds than the assignor has in the absence of an assignment. See *Modern Industrial Bank* v. *U.S.*, 101 Ct. Cl. 808 (1944); *Royal Indemnity Co.* v. *United States*, 178 Ct. Cl. 46, 371 F. 2d 462 (1967), cert. denied, 389 U.S. 833; *Newark Insurance Co.* v. *U.S.*, 149 Ct. Cl. 170, 181 F. Supp. 246 (1960); *Henningsen* v. *United States Fidelity and Guaranty Company*, 208 U.S. 404 (1908). Where employees have been underpaid, the assignor has no right to assign funds since the assignor has no property rights to amounts withheld from the contract to cover underpayments of workers which constitute a violation of the law and the terms, conditions, and obligations under the contract. (Decision of the Comptroller General, B–164881, August 14, 1968; B–178198, August 30, 1973; 56 Comp. Gen. 499 (1977); 55 Comp. Gen. 744 (1976); *The National City Bank of Evansville* v. *United States*, 143 Ct. Cl. 154, 163 F. Supp. 846 (1958); *National Surety Corporation* v. *United States*, 132 Ct. Cl. 724, 135 F. Supp. 381 (1955), cert. denied, 350 U.S. 902.)

(5) 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. 56 Comp. Gen. 499 (1977), citing *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132 (1962); *Hadden* v. *United States*, 132 Ct. Cl. 529 (1955), in which the courts gave priority to sureties who had paid unpaid laborers over the trustee in bankruptcy.

(c) Section 5(b) of the Act provides that if the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to the Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. The Service Contract Act is not subject to the statute of limitations in the Portal to Portal Act, 29 U.S.C. 255, and contains no prescribed period within which such an action must be instituted; it has therefore been held that the general period of six years prescribed by 28 U.S.C. 2415 applies to such actions, *United States of America* v. *Deluxe Cleaners and Laundry, Inc.*, 511 F. 2d 929 (C.A. 4, 1975). Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on the order of the Secretary, directly to the underpaid employees. Any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States as miscellaneous receipts.

(d) Releases or waivers executed by employees for unpaid wages and fringe benefits due them are without legal effect. As stated by the Supreme Court in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704, (1945), arising under the Fair Labor Standards Act:

> ''Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.''

See also *Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946); *United States* v. *Morley Construction Company*, 98 F. 2d 781 (C.A. 2, 1938), cert. denied, 305 U.S. 651.

Further, as noted above, monies not paid to employees to whom they are due because of violation are covered into the U.S. Treasury as provided by section 5(b) of the Act.

(e)(1) The term *party responsible* for violations in section 3(a) of the Act is the same term as contained in the Walsh-Healey Public Contracts Act, and therefore, the same principles are applied under both Acts. An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company (*S & G Coal Sales, Inc.*, Decision of the Hearing Examiner, PC–946, January 21, 1965, affirmed by the Administrator June 8, 1965; *Tennessee Processing Co., Inc.*, Decision of the Hearing Examiner, PC–790, September 28, 1965).

(2) The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty. *United States* v. *Sancolmar Industries, Inc.*, 347 F. Supp. 404, 408 (E.D. N.Y. 1972). Accordingly, it has been held by administrative decisions and by the courts that the term *party responsible*, as used in section 3(a) of the Act, imposes personal liability for violations of any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts. See, for example, *Waite, Inc.*, Decision of the ALJ, SCA 530–566, October 19, 1976, *Spruce-Up Corp.*, Decision of the Administrator SCA 368–370, August 19, 1976, *Ventilation and Cleaning Engineers, Inc.*, Decision of the ALJ, SCA 176, August 23, 1973, Assistant Secretary, May 17, 1974, Secretary, September 27, 1974; *Fred Van Elk*, Decision of the ALJ, SCA 254–58, May 28, 1974, Administrator, November 25, 1974; *Murcole, Inc.*, Decision of the ALJ, SCA 195–198, April 11, 1974; *Emile J. Bouchet*, Decision of the ALJ, SCA 38, February 24, 1970; *Darwyn L. Grover*, Decision of the ALJ, SCA 485, August 15, 1976; *United States* v. *Islip Machine Works, Inc.*, 179 F. Supp. 585 (E.D. N.Y. 1959); *United States* v. *Sancolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y. 1972).

(3) In essence, individual liability attaches to the corporate official who is responsible for, and therefore causes or permits, the violation of the contract stipulations required by the Act, i.e., corporate officers who control the day-to-day operations and management policy are personally liable for underpayments because they cause or permit violations of the Act.

(4) It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in §4.6, but includes all persons, irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached. *U.S.* v. *Islip Machine Works, Inc.*, 179 F. Supp. 585 (E.D. N.Y. 1959); *U.S.* v. *Sancolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y. 1972); *Oscar Hestrom Corp.*, Decision of the Administrator, PC–257, May 7, 1946, affirmed, *U.S.* v. *Hedstrom*, 8 Wage Hour Cases 302 (N.D. Ill. 1948); *Craddock-Terry Shoe Corp.*, Decision of the Administrator, PC–330, October 3, 1947; *Reynolds Research Corp.*, Decision of the Administrator, PC–381, October 24, 1951; *Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC–632, August 9, 1957, Decision of the Administrator, April 29, 1958; *Cardinal Fuel and Supply Co.*, Decision of the Hearing Examiner, PC–890, June 17, 1963.

(5) Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act. *Standard Fabrication Ltd.*, Decision of the Secretary, PC–297, August 3, 1948; *Airport Machining Corp.*, Decision of the ALJ, PC–1177, June 15, 1973; *James D. West,* Decision of the ALJ, SCA 397–398, November 17, 1975; *Metropolitan Rehabilitation Corp.*, WAB Case No. 78–25, August 2, 1979; *Fry Brothers Corp.*, WAB Case No. 76–6, June 14, 1977.

(f) The procedures for a contractor or subcontractor to dispute findings regarding violations of the Act, including back wage liability or the disposition of funds withheld by the agency for such liability, are contained in parts 6 and 8 of this title. Appeals in such matters have not been delegated to the contracting agencies and such matters cannot be appealed under the disputes clause in the contractor's contract.

(g) While the Act provides that action may be brought against a surety to recover underpayments of compensation, there is no statutory provision requiring that contractors furnish either payment or performance bonds before an award can be made. The courts have held, however, that when such a bond has been given, including one denominated as a performance rather than payment bond, and such a bond guarantees that the principal shall fulfill ''all the undertakings, covenants, terms, conditions, and agreements'' of the contract, or similar words to the same effect, the surety-guarantor is jointly liable for underpayments by the contractor of the wages and fringe benefits required by the Act up to the amount of the bond. *U.S.* v. *Powers Building Maintenance Co.*, 366 F. Supp. 819 (W.D. Okla. 1972); *U.S.* v. *Gillespie*, 72 CCH Labor Cases ¶33,986 (C.D. Cal. 1973) *U.S.* v. *Glens Falls Insurance Co.*, 279 F. Supp. 236 (E.D. Tenn. 1967); *United States* v. *Hudgins-Dize Co.*, 83 F. Supp. 593 (E.D. Va. 1949); *U.S.* v. *Continental Casualty Company*, 85 F. Supp. 573 (E.D. Pa. 1949), affirmed per curiam, 182 F.2d 941 (3rd Cir. 1950).

§ 4.188 Ineligibility for further contracts when violations occur.

(a) Section 5 of the Act provides that any person or firm found by the Secretary or the Federal agencies to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances. It also directs the Comptroller General to distribute a list to all agencies of the Government giving the names of persons or firms that have been declared ineligible. No contract of the United States or the District of Columbia (whether or not subject to the Act) shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the names of such persons or firms. This prohibition against the award of a contract to an ineligible contractor applies to the contractor in its capacity as either a prime contractor or a subcontractor. Because the Act contains no provision authorizing removal from the list of the names of such persons or firms prior to the expiration of the three-year statutory period, the Secretary is without authority to accomplish such removal (other than in situations involving mistake or legal error). On the other hand, there may be situations in which persons or firms already on the list are found in a subsequent administrative proceeding to have again violated the Act and their debarment ordered. In such circumstances, a new, three-year debarment term will commence with the republication of such names on the list.

(b)(1) The term *unusual circumstances* is not defined in the Act. Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present. It is clear, however, that the effect of the 1972 Amendments is to limit the Secretary's discretion to relieve violators from the debarred list (H. Rept. 92–1251, 92d Cong., 2d Sess. 5; S. Rept. 92–1131, 92d Cong., 2d Sess. 3–4) and that the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the

debarment sanction, *Ventilation and Cleaning Engineers, Inc.*, SCA–176, Administrative Law Judge, August 23, 1973, Assistant Secretary, May 22, 1974, Secretary, October 2, 1974. It is also clear that unusual circumstances do not include any circumstances which would have been insufficient to relieve a contractor from the ineligible list prior to the 1972 amendments, or those circumstances which commonly exist in cases where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract, failure to keep necessary records and the like. *Emerald Maintenance Inc.*, Supplemental Decision of the ALJ, SCA–153, April 5, 1973.

(2) The Subcommittee report following the oversight hearings conducted just prior to the 1972 amendments makes it plain that the limitation of the Secretary's discretion through the unusual circumstances language was designed in part to prevent the Secretary from relieving a contractor from the ineligible list provisions merely because the contractor paid what he was required by his contract to pay in the first place and promised to comply with the Act in the future. See, House Committee on Education and Labor, Special Subcommittee on Labor, The Plight of Service Workers under Government Contracts 12–13 (Comm. Print 1971). As Congressman O'Hara stated: ''Restoration * * * [of wages and benefits] is not in and of itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts * * *. The authority [to relieve from blacklisting] was intended to be used in situations where the violation was a minor one, or an inadvertent one, or one in which disbarment * * * would have been wholly disproportionate to the offense.'' House Committee on Education and Labor, Special Subcommittee on Labor, Hearings on H.R. 6244 and H.R. 6245, 92d Cong., 1st Sess. 3 (1971).

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. See, e.g., *Washington Moving & Storage Co.*, Decision of the Assistant Secretary, SCA 68, August 16, 1973, Secretary, March 12, 1974; *Quality Maintenance Co.*, Decision of the Assistant Secretary, SCA 119, January 11, 1974. Thus, where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

(4) A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor. *Murcole, Inc.*, Decision of the ALJ, SCA 195–198, April 10, 1974; *McLaughlin Storage, Inc.*, Decision of the ALJ, SCA 362–

365, November 5, 1975, Administrator, March 25, 1976; *Able Building & Maintenance & Service Co.*, Decision of the ALJ, SCA 389–390, May 29, 1975, Assistant Secretary, January 13, 1976; *Aarid Van Lines, Inc.*, Decision of the Administrator, SCA 423–425, May 13, 1977.

(5) Furthermore, a contractor cannot be relieved from debarment by attempting to shift his/her responsibility to subordinate employees. *Security Systems, Inc.*, Decision of the ALJ, SCA 774–775, April 10, 1978; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974; *Ernest Roman*, Decision of the Secretary, SCA 275, May 6, 1977. As the Comptroller General has stated in considering debarment under the Davis-Bacon Act, ''[n]egligence of the employer to instruct his employees as to the proper method of performing his work or to see that the employee obeys his instructions renders the employer liable for injuries to third parties resulting therefrom. * * * The employer will be liable for acts of his employee within the scope of the employment regardless of whether the acts were expressly or impliedly authorized. * * * Willful and malicious acts of the employee are imputable to the employer under the doctrine of respondeat superior although they might not have been consented to or expressly authorized or ratified by the employer.'' (Decision of the Comptroller General, B–145608, August 1, 1961.)

(6) Negligence per se does not constitute unusual circumstances. Relief on no basis other than negligence would render the effect of section 5(a) a nullity, since it was intended that only responsible bidders be awarded Government contracts. *Greenwood's Transfer & Storage, Inc.*, Decision of the Secretary, SCA 321–326, June 1, 1976; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974.

(c) Similarly, the term *substantial interest* is not defined in the Act. Accordingly, this determination, too, must be made on a case-by-case basis in light of the particular facts, and cognizant of the legislative intent ''to provide to service employees safeguards similar to those given to employees covered by the Walsh-Healey Public Contracts Act''. *Federal Food Services, Inc.*, Decision of the ALJ, SCA 585–592, November 22, 1977. Thus, guidance can be obtained from cases arising under the Walsh-Healey Act, which uses the concept ''controlling interest''. See *Regal Mfg. Co.*, Decision of the Administrator, PC–245, March 1, 1946; *Acme Sportswear Co.*, Decision of the Hearing Examiner, PC–275, May 8, 1946; *Gearcraft, Inc.*, Decision of the ALJ, PCX–1, May 3, 1972. In a supplemental decision of February 23, 1979, in *Federal Food Services, Inc.* the Judge ruled as a matter of law that the term ''does not preclude every employment or financial relationship between a party under sanction and another * * * [and that] it is necessary to look behind titles, payments, and arrangements and examine the existing circumstances before reaching a conclusion in this matter.''

(1) Where a person or firm has a direct or beneficial ownership or control of more than 5 percent of any firm, corporation, partnership, or association, a ''substantial interest'' will be deemed to exist. Similarly, where a person is an officer or director in a firm or the debarred firm shares common management with another firm, a ''substantial interest'' will be deemed to exist. Furthermore, wherever a firm is an affiliate as defined in § 4.1a(g) of subpart A, a ''substantial interest'' will be deemed to exist, or where a debarred person forms or participates in another firm in which he/she has comparable authority, he/she will be deemed to have a ''substantial interest'' in the new firm and such new firm would also be debarred (*Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC–632, August 9, 1957).

(2) Nor is interest determined by ownership alone. A debarred person will also be deemed to have a ''substantial interest'' in a firm if such person has participated in contract negotiations, is a signatory to a contract, or has the authority to establish, control, or manage the contract performance and/or the labor policies of a firm. A ''substantial interest'' may also be deemed to exist, in other circumstances, after consideration of the facts of the individual case. Factors to be examined include, among others,

sharing of common premises or facilities, occupying any position such as manager, supervisor, or consultant to, any such entity, whether compensated on a salary, bonus, fee, dividend, profit-sharing, or other basis of remuneration, including indirect compensation by virtue of family relationships or otherwise. A firm will be particularly closely examined where there has been an attempt to sever an association with a debarred firm or where the firm was formed by a person previously affiliated with the debarred firm or a relative of the debarred person.

(3) Firms with such identity of interest with a debarred person or firm will be placed on the debarred bidders list after the determination is made pursuant to procedures in §4.12 and parts 6 and 8 of this title. Where a determination of such ''substantial interest'' is made after the initiation of the debarment period, contracting agencies are to terminate any contract with such firm entered into after the initiation of the original debarment period since all persons or firms in which the debarred person or firm has a substantial interest were also ineligible to receive Government contracts from the date of publication of the violating person's or firm's name on the debarred bidders list.

§4.189 Administrative proceedings relating to enforcement of labor standards.

The Secretary is authorized pursuant to the provisions of section 4(a) of the Act to hold hearings and make decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of the Act. Pursuant to section 4(a) of the Act, the Secretary's findings of fact after notice and hearing are conclusive upon all agencies of the United States and, if supported by the preponderance of the evidence, conclusive in any court of the United States, without a trial de novo. *United States* v. *Powers Building Maintenance Co.*, 336 F. Supp. 819 (W.D. Okla. 1972). Rules of practice for administrative proceedings are set forth in parts 6 and 8 of this title.

§4.190 Contract cancellation.

(a) As provided in section 3 of the Act, where a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency, whereupon the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

(b) Every contractor shall certify pursuant to §4.6(n) of subpart A that it is not disqualified for the award of a contract by virtue of its name appearing on the debarred bidders list or because any such currently listed person or firm has a substantial interest in said contractor, as described in §4.188. Upon discovery of such false certification or determination of substantial interest in a firm performing on a Government contract, as the case may be, the contract is similarly subject upon written notice to immediate cancellation by the contracting agency and any additional cost for the completion of the contract charged to the original contractor as specified in paragraph (a). Such contract is without warrant of law and has no force and effect and is void ab initio, 33 Comp Gen. 63; Decision of the Comptroller General, B–115051, August 6, 1953. Furthermore, any profit derived from said illegal contract is forfeited (*Paisner* v. *U.S.*, 138 Ct. Cl. 420, 150 F. Supp. 835 (1957), cert. denied, 355 U.S. 941).

§4.191 Complaints and compliance assistance.

(a) Any employer, employee, labor or trade organization, contracting agency, or other interested person or organization may report to any office of the Wage and Hour Division (or to any office of the Occupational Safety and Health Administration, in instances involving the safety and health provisions), a violation, or apparent violation, of the Act, or of any of the rules or regulations prescribed thereunder. Such offices are also available to assist or provide information to contractors or subcontractors desiring to insure that their practices are in compliance with the Act. Information furnished is treated confidentially. It is the policy of the Department of Labor to protect

the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a confidential written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal his identity, will not be disclosed without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the ''Freedom of Information Act'' (5 U.S.C. 552, see 29 CFR part 70) and the ''Privacy Act of 1974'' (5 U.S.C. 552a).

(b) A report of breach or violation relating solely to safety and health requirements may be in writing and addressed to the Regional Administrator of an Occupational Safety and Health Administration Regional Office, U.S. Department of Labor, or to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210.

(c) Any other report of breach or violation may be in writing and addressed to the Assistant Regional Administrator of a Wage and Hour Division's regional office, U.S. Department of Labor, or to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(d) In the event that an Assistant Regional Administrator for the Wage and Hour Division, is notified of a breach or violation which also involves safety and health standards, the Regional Administrator of the Wage and Hour Division shall notify the appropriate Regional Administrator of the Occupational Safety and Health Administration who shall with respect to the safety and health violations take action commensurate with his responsibilities pertaining to safety and health standards.

(e) Any report should contain the following:

(1) The full name and address of the person or organization reporting the breach or violations.

(2) The full name and address of the person against whom the report is made.

(3) A clear and concise statement of the facts constituting the alleged breach or violation of any of the provisions of the McNamara-O'Hara Service Contract Act, or of any of the rules or regulations prescribed thereunder.

[48 FR 49762, Oct. 27, 1983, as amended at 82 FR 2225, Jan. 9, 2017]

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

Sec.

Subpart B—Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act