

**DEPARTMENT OF LABOR****Wage and Hour Division****29 CFR Parts 1 and 4**

[RIN 1215-AB47]

**Service Contract Act Wage Determination OnLine Request Process**

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Labor (DOL) proposes amending two regulations to allow full implementation of the Wage Determinations OnLine (WDOL) Internet Web site (<http://www.wdol.gov>), reflect changes in a title and various statutory citations as well as update a list of Wage and Hour Division (WHD) Regional Offices. See

**SUPPLEMENTARY INFORMATION** for additional information about where the DOL makes this proposed rule available.

**DATES:** Submit comments on or before January 18, 2005.

**ADDRESSES:** You may mail or otherwise hand-deliver comments to Alfred B. Robinson, Jr., Acting Administrator, Wage and Hour Division (Attention: Office of Wage Determinations), Employment Standards Administration, U.S. Department of Labor, Room S-3028, 200 Constitution Avenue, NW., Washington, DC 20210. You should enclose a self-addressed, stamped post card, if you want notification that the DOL received your comments. See **SUPPLEMENTARY INFORMATION** for information about submitting comments electronically by mail, e-mail, facsimile ("FAX") machine or the <http://www.regulations.gov> Web site. The DOL encourages you to submit comments by mail early or to transmit them electronically, because security concerns continue to cause delays in delivering mail to the Washington, DC area.

**FOR FURTHER INFORMATION CONTACT:** William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3028, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693-0062. This is not a toll-free number.

You may direct questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice to the nearest WHD District Office. Locate the nearest office by calling the WHD toll-free help

line at 1-866-4US-WAGE (1-866-487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the agency Web site for a nationwide listing of WHD District and Area Offices at: <http://www.dol.gov/esa/contacts/whd/america2.htm>.

**SUPPLEMENTARY INFORMATION:****I. Electronic Access and Filing**

This proposed rule is available through the **Federal Register** and <http://www.regulations.gov> Web site—which will allow you to find, review and submit comments on Federal documents that are open for comment and published in the **Federal Register**. You may also access this proposed rule via the WHD home page at <http://www.dol.gov/esa/regs/fedreg/proposed/whdpro.htm>.

You may submit comments by mail, e-mail, "FAX" or the <http://www.regulations.gov> Web site. You may e-mail comments to [WHD-REG-1215-AB47@dol.gov](mailto:WHD-REG-1215-AB47@dol.gov) or "FAX" them to (202) 693-1302. This is not a toll-free number. Submit comments as an ASCII file, avoiding the use of special characters or encryption. You may also submit comments or attachments in Microsoft Word format. Identify all comments in electronic form by the docket number (1215-AB47). You should not submit comments on diskette or similar media, because security equipment may cause the loss or corruption of data.

**II. Paperwork Reduction Act**

This regulation is not subject to the Paperwork Reduction Act, because it contains no new information collection requirements and does not modify any existing requirements.

**III. Statutory and Regulatory Framework**

The McNamara-O'Hara Service Contract Act, as amended (SCA), 41 U.S.C. 351 *et seq.*, requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by the Secretary of Labor, or his authorized representative, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The DOL issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies.

SCA section 4, 41 U.S.C. 353, provides the Secretary of Labor with authority to enforce the Act, make rules and regulations, issue orders, hold hearings, make decisions based upon

findings of fact and take other appropriate action. Regulations 29 CFR part 4 contains the DOL rules relating to SCA administration. Regulation 29 CFR 4.4 requires any Federal contracting agency to file with the WHD its notice of intention to make a service contract (Form SF-98), if the agency believes the contract may be subject to the SCA. The WHD uses contracting agency filings to issue appropriate wage determinations.

Section 1 of the Davis-Bacon Act (DBA), as amended, 40 U.S.C. 3141 *et seq.*, requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. Under DBA provisions, contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character. The DBA directs the Secretary of Labor to determine such local prevailing wage rates and requires contractors to post the scale of wages to be paid in a prominent and easily accessible place at the site of the work.

In Reorganization Plan No. 14 of 1950 (5 U.S.C. App., effective May 24, 1950, 15 FR 3176, 64 Stat. 1267), Congress directed the DOL to prescribe appropriate standards, regulations and procedures to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts (DBRA) in order to assure coordination of administration and consistency of enforcement.

Regulations, 29 CFR part 1, set forth the procedures for making and applying determinations of prevailing wage rates and fringe benefits pursuant to the DBA and any other Federal statute providing for determinations of such wages (Related Acts) by the DOL in accordance with the provisions of the DBA. Regulation 29 CFR 1.5 sets forth the procedure Federal agencies must use to request wage determinations. Regulation 29 CFR 1.6 explains their use and effectiveness.

The "Anti-Kickback" section of the Copeland Act, 40 U.S.C. 3145, precludes covered Federal construction contractors and subcontractors from in any way inducing an employee to give up any part of the compensation to which he or she is entitled under his or her contract of employment. The Copeland Act also requires covered Federal contractors and subcontractors to submit weekly statements of the

wages paid to each employee performing on covered work during the preceding payroll period.

Public Law 107–217 recodified Title 40 of the U.S. Code and changed the statutory citations for the DBRA and the Copeland Act.

#### IV. Discussion of the Proposed Rule

The DOL proposes to update its regulations to have contracting agencies use the WDOL Internet Web site to meet their obligation to obtain DBA general wage determinations from the WHD. Under the proposal, the WHD will publish wage determinations solely through WDOL and will no longer publish notice of changes in the **Federal Register** and the Government Printing Office (GPO) will no longer publish paper copies of general wage determinations. WDOL offers users the opportunity to request e-mail notice of future revisions to a wage determination they have selected for a specific period of time, or until a specific date. The term WDOL shall mean the Government Internet Web site for both DBA and SCA wage determinations or any other Internet Web site or electronic means that the Department of Labor may approve for these purposes.

For SCA wage determinations, the DOL proposes to eliminate the paper Form SF–98 and replace it with an electronic “e98,” process by which contracting agencies may continue to request SCA wage determinations from the WHD. The DOL also proposes to allow use of WDOL as an alternative means of obtaining SCA wage determinations.

The DOL further proposes to update the statutory citations for laws providing the authority for regulations 29 CFR part 1 and in the appendix that lists various acts to which the regulations apply. These last proposed changes simply reflect Public Law 107–217 that has recodified Title 40 of the U.S. Code. Finally, the proposed rule will update the title of the Assistant Secretary for Employment Standards in a definition, as well as addresses and other contact information in an appendix.

#### V. Background

The development of WDOL requires an update to existing regulations to allow contracting agencies fully to realize the process improvements and savings that WDOL provides. This proposed rule will also create a basis for updating related information in the Federal Acquisition Regulations (FAR) to be compatible with the DOL rule.

WDOL does not affect how the WHD determines prevailing wages under either the SCA or the DBA.

##### 29 CFR Part 1

Since 1985, the current regulations prescribing procedures for obtaining DBA wage determinations have not been revised. The current rules provide that DBA general wage determinations are published by the GPO in a series of volumes broken out by different geographic areas of the country. On a weekly basis, the WHD publishes a notice in the **Federal Register** of the wage determination updates that GPO would publish the following week. Users can subscribe to the GPO publication service and receive all weekly updates by mail. Subscription purchases can be limited to individual volumes or could be for all DBA general wage determinations.

Shortly after the publication of the current regulations, many contracting agencies began inquiring about the possibility of accessing electronic copies of the published general wage determinations. As a result, the WHD entered into an agreement with the Department of Commerce, National Technical Information Service (NTIS) to make the DBA general wage determinations available online through WDOL. However, because the paper volumes of the DBA general wage determinations were still published and because the wage determinations on the NTIS site were identical to those contained in the GPO publication, the DBA regulations were not revised to add a reference to the NTIS site.

In 2002, the GPO approached the WHD about the possibility of publishing DBA Wage determinations electronically. The GPO sought to decrease its printing workload and was willing to make DBA general wage determinations available electronically at no cost to the user. By providing free access to DBA general wage determinations, the GPO was hoping to decrease the number of paper subscriptions, thereby decreasing their printing workload. Again, because the printed wage determinations were still being published, the regulations were not changed.

The proposed rule reflects the technological advances since 1985 and the wide use of electronic communication and information sharing, and adopts the WDOL Web site as the single source for DBA general wage determinations. The proposed rule will eliminate the notices currently published in the **Federal Register**. Notice of future modifications and supersedeas general wage

determinations will be posted on WDOL. The proposed rule will also eliminate references to GPO publication of general wage determinations, although GPO may continue, at their discretion, to publish general wage determinations. The proposed rule would retain the requirement in the current regulations under 29 CFR 1.5 that Federal contracting agencies request a wage determination by preparing and mailing Form SF–308 to the Department of Labor, for those infrequent situations when a DBA general wage determination is not available through WDOL. DOL processed fewer than 100 Forms SF–308 in FY 2004, and the Department does not believe providing Federal agencies with an electronic submission option in these rare cases warrants the considerable expense developing such a system would require.

##### 29 CFR Part 4

Since 1965, the SCA implementing regulations have required that a Federal contracting agency request SCA wage determinations for each contract. Form SF–98 was developed for this request and response process. In part, this individual request and response system was employed under the SCA because of the wide variety of service contracts covered under the Act. Unlike the DBA, which applied to contracts primarily from a single industry (*i.e.*, the construction industry), the SCA applied to contracts for a much broader range of industries and occupations. While Bureau of Labor Statistics cross-industry survey data were used to establish the wage determination rates for most SCA covered contracts, the unique requirements of some contracts demanded that more specialized and targeted wage determinations be issued. The SF–98 process gave the DOL the ability to consider the specific contract services and issue the SCA wage determination that was most appropriate for those services.

In 1972, the SCA was amended and a number of new provisions affecting the issuance of SCA wage determinations were added. Among the new provisions were requirements for issuing wage determinations based upon the predecessor contractor's collective bargaining agreement, giving due consideration to Federal wage rates when issuing SCA wage determinations and mandating the issuance of wage determinations for most covered contracts. The individualized SF–98 request and response process fit with these new statutory requirements and that process was retained when the regulations were revised to reflect the

1972 SCA amendments. The SF-98-A submission requirement was added to the regulations at that time to facilitate the communication of information pertaining to the new due consideration and mandatory issuance provisions of the amended SCA. (See 29 CFR 4.4(b).)

Although there have not been any major changes to the regulatory SF-98 request and response process since the regulations were revised following the 1972 amendments, the DOL has continued to work with contracting agencies to develop better and more efficient mechanisms for agencies to obtain SCA wage determinations. With the advent and expansion of the Internet in the mid-1990s, several contracting agencies approached the WHD requesting the ability to access and download SCA wage determinations. The vast majority of the covered service contracts awarded by these agencies were either options or renewals, and the applicable SCA wage determinations for these contracts were well established. By this time, the WHD had developed a standard set of SCA wage determinations that applied to most of these contracts. The NTIS had posted these wage determinations on the Internet for information purposes, and the agencies requested the ability to download and use these standard wage determinations in appropriate situations. After some discussion, the WHD entered into Memoranda of Understanding (MOUs) with several agencies to allow them to use these standard wage determinations without first submitting an SF-98. Under the MOUs, the agencies agreed to train their personnel in the proper selection and use of SCA wage determinations. The agencies also agreed to monitor the SCA wage determinations database and to use any subsequent revisions of the applicable wage determinations that were issued before the applicable procurement dates specified in the SCA regulations. After the agency selected an applicable SCA wage determination, it would notify the WHD of its selection by the submission of an SF-98 after the fact.

This MOU program greatly enhanced the remedial purpose of the SCA by requiring that participating agencies monitor the SCA wage determination database and use the latest revisions published in a timely manner before award or commencement of the contract. With the paper Form SF-98, the WHD had no mechanism to follow-up and advise contracting agencies when wage determinations were revised. For example, if a solicitation were issued in May and the WHD responded to the SF-98 with the then

current wage determination, the WHD would not have advised the agency of an update of the wage determination that occurred in July. As a result, the wage determination applied to the contract starting on October 1st would have been the wage determination current in May rather than the revised wage determination issued in July. The MOU program was proven to be quite successful, and it subsequently was expanded to numerous other agencies.

Following the success of the MOU program, an interagency work group composed of representatives from the Office of Management and Budget, Department of the Army, Department of the Air Force, Department of the Navy, Army Corps of Engineers, General Services Administration, NTIS and the Department of Energy began development of a new online system designed to consolidate the best practices of agencies operating under the MOU program. The work group also looked at adding non-standard wage determinations to the online system. Principal objectives of the work group were the elimination of the paper Form SF-98 and the availability of wage determinations electronically.

At the same time, the WHD was developing an electronic request and response system to replace Form SF-98. The WHD began live tests of the "e98" system in FY 2003. During FY 2003, the WHD received and responded to more than 12,000 "e98" submissions. A computer responds to a significant number of the "e98" requests immediately while the requester is online. The remaining requests are referred to an analyst and the response is usually sent later the same day or the next day. For all requests, the "e98" system is designed to track individual requests by the procurement dates listed on the request, and when a wage determination that would affect a particular procurement is revised, an amended e-mail response is sent to the contracting agency.

The site developed by the WDOL work group integrates the "e98" process with the best practices developed under the MOU program. WDOL offers users a number of unique features in a web-based environment. The site includes: (1) Guidance to contracting officers on selecting the appropriate wage determination for each contract action; (2) access to the most current SCA and DBA wage determinations, as well as an alert service for notification of future revisions to particular wage determinations; and, (3) access to databases containing archived wage determinations under both the SCA and DBA.

To facilitate contracting officers selecting the appropriate SCA wage determination, the WDOL site leads the requester through a "decision tree" consisting of a series of questions. Based upon the responses to these questions, the WDOL site will either identify an SCA wage determination or direct the requester to submit an "e98." A link to the "e98" site is provided. In addition, the WDOL site gives the requester the option of going directly to the "e98" site without having to go through the "decision tree" selection process. If a contracting officer has any question regarding the selection of the proper SCA wage determination, the WDOL site directs the contracting officer to the "e98."

As clearly indicated on the WDOL Web site, compliance with the decision tree selection process and the guidance provided by the User's Guide does not relieve the contracting officer or other program user of the requirement to carefully review the contract or solicitation, the FAR and its Supplements, other Federal agency acquisition regulations or the DOL regulations related to these actions. If the DOL discovers and determines, whether before or after contract award, that the correct SCA wage determination was not included in a covered contract, the contracting officer, within 30 days of notification by the DOL, is required to include in the contract the applicable wage determination issued by the DOL. (See 29 CFR 4.5(c)(2).)

The proposed rule reflects the technological advances since 1972 and the wide use of electronic communication and information sharing, and replaces the paper SF-98 with an electronic "e98" and enables contracting agencies alternatively to use the WDOL Web site to obtain SCA wage determinations.

#### **VI. Regulatory Flexibility, Executive Order 12866; Small Business Regulatory Enforcement Fairness Act**

The proposed regulation affects Federal agency procurement procedures and will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The agency has certified to this effect to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

This proposed rule has been determined to be a significant rulemaking, although not economically significant or major, and has therefore been reviewed by OMB.

**VII. Unfunded Mandates Reform Act**

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any Federal mandate that may result in excess of \$100 million in expenditures by State, local and tribal governments in the aggregate or by the private sector.

**VIII. Executive Order 13132 (Federalism)**

The rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**IX. Executive Order 13175, Indian Tribal Governments**

This rule does not have "tribal implications" under Executive Order 13175 and does not require a tribal summary impact statement. The rule does not have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes."

**X. Effects on Families**

The undersigned hereby certifies that the rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

**XI. Executive Order 13045, Protection of Children**

This rule has no environmental health risk or safety risk that may disproportionately affect children.

**XII. Environmental Impact Assessment**

A review of this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicate the rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

**XIII. Executive Order 13211, Energy Supply**

This rule is not subject to Executive Order 13211. It will not have a

significant adverse effect on the supply, distribution or use of energy.

**XIV. Executive Order 12630, Constitutionally Protected Property Rights**

This rule is not subject to Executive Order 12630, because it does not involve implementation of a policy "that has takings implications" or that could impose limitations on private property use.

**XV. Executive Order 12988, Civil Justice Reform Analysis**

This rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**XVI. Request for Comments**

In accordance with rulemaking requirements found at 5 U.S.C. 553, the DOL is providing interested persons an opportunity to comment on these proposed rules.

**List of Subjects***29 CFR Part 1*

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Recordkeeping requirements, Reporting requirements, Wages.

*29 CFR Part 4*

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

Signed in Washington, DC, this 9th day of December, 2004.

**Alfred B. Robinson, Jr.,**

*Acting Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the DOL proposes to amend Title 29, parts 1 and 4 as set forth below:

**Title 29—Labor****PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES**

1. The authority citation for part 1 is proposed to be revised to read as follows:

**Authority:** 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 *et seq.*; 40 U.S.C. 3145; 40 U.S.C. 3148; and the laws listed in appendix A of this part.

2. Paragraph (e) is proposed to be added to § 1.2 to read as follows:

**§ 1.2 Definitions.<sup>1</sup>**

\* \* \* \* \*

(e) The term *Wage Determinations OnLine (WDOL)* shall mean 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. The term will also apply to any other Internet Web site or electronic means that the Department of Labor may approve for these purposes.

3. Paragraphs (a) and (b) of § 1.5 are proposed to be revised to read as follows:

**§ 1.5 Procedure for requesting wage determinations.**

(a) The Department of Labor publishes general wage determinations under the Davis-Bacon Act on the WDOL Internet Web site. If there is a general wage determination applicable to the project, the agency may use it without notifying the Department of Labor, *Provided*, That questions concerning its use shall be referred to the Department of Labor in accordance with § 1.6(b).

(b)(1) If a general wage determination is not available, the Federal agency shall request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting Form SF-308 to the Department of Labor at this address: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Branch of Construction Contract Wage Determination, Washington, DC 20210.

In preparing Form SF-308, the agency shall check only those classifications that will be needed in the performance of the work. Inserting a note such as "entire schedule" or "all applicable classifications" is not sufficient. Additional classifications needed that are not on the form may be typed in the blank spaces or on a separate list and attached to the form.

(2) In completing SF-308, the agency shall furnish:

(i) A sufficiently detailed description of the work to indicate the type of construction involved. Additional description or separate attachment, if necessary for identification of type of project, shall be furnished.

(ii) The county (or other civil subdivision) and State in which the proposed project is located.

(3) Such request for a wage determination shall be accompanied by any pertinent wage payment information that may be available.

When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency shall also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

4. Paragraphs (a)(2), (c)(3)(iv) and (c)(3)(v) of § 1.6 are proposed to be revised to read as follows:

§ 1.6 Use and effectiveness of wage determinations.

(a) \* \* \*

(2) General wage determinations issued pursuant to § 1.5(a), notice of which is published on WDOL, shall contain no expiration date.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(iv) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, or if under paragraph (c)(3)(ii) or (iii) of this section construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any modification, notice of which is published on WDOL prior to award of the contract or the beginning of construction, as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator. Such request shall be supported by a written finding, which shall include a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(v) A modification to a general wage determination is "published" within the meaning of this section on the date notice of a modification or a supersedeas wage determination is published on WDOL or on the date the agency receives actual written notice of the modification from the Department of Labor, whichever occurs first.

\* \* \* \* \*

5. Items 19 and 20 in Appendix A of part 1 are proposed to be revised to read as follows:

Appendix A to Part 1

\* \* \* \* \*

19. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat.).

Note: Section applying labor standards provisions of the Davis-Bacon Act repealed August 21, 2002, by 116 Stat. 1318, Pub. L. 107-217.

20. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. 14701).

\* \* \* \* \*

6. Appendix B of part 1 is proposed to be revised to read as follows:

Appendix B to Part 1

Northeast Region

For the States of Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, Virginia and West Virginia:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Curtis Center, 170 South Independence Mall West, Room 850 West, Philadelphia, PA 19106 (Telephone: (215) 861-5800, fax: (215) 861-5840).

Southeast Region

For the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 61 Forsyth Street, SW., Room 7M40, Atlanta, GA 30303 (Telephone (404) 893-4531, fax: (404) 893-4524).

Midwest Region

For the States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 230 South Dearborn Street, Room 530, Chicago, IL 60604-1591 (Telephone: (312) 596-7180, fax: (312) 596-7205).

Southwest Region

For the States of Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 525 South Griffin Street, Suite 800, Dallas, TX 75202-5007 (Telephone: (972) 850-2600, fax: (972) 850-2601).

Western Region

For the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon and Washington:

Regional Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 71 Stevenson Street, Suite 930, San Francisco, CA 94105. (Telephone: (415) 848-6600, fax: (415) 848-6655).

Appendix C to Part 1 [Removed]

7. Appendix C of part 1 is proposed to be deleted.

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

8. The authority citation for part 4 continues to read as follows:

Authority: 41 U.S.C. 351 et seq.; 41 U.S.C. 38 and 39; 5 U.S.C. 301.

Subpart A—Service Contract Labor Standards Provisions and Procedures

9. In § 4.1a, paragraph (b) is proposed to be revised and paragraphs (i) and (j) are proposed to be added to read as follows:

§ 4.1a Definitions and use of terms.

\* \* \* \* \*

(b) Secretary includes the Secretary of Labor, the Assistant Secretary for Employment Standards, and their authorized representatives.

\* \* \* \* \*

(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, 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.

10. In § 4.3, paragraphs (b) through (d) are proposed to be revised and paragraph (e) is proposed to be added to read as follows:

§ 4.3 Wage determinations.

\* \* \* \* \*

(b) As described in subpart B of this part, 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, 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, Employment Standards Administration, U.S. Department of Labor, Washington, DC, and copies will be made available on request at Regional Offices of the Wage and Hour Division.

In addition, most prevailing wage determinations are available online from WDOL.

11. Section 4.4 is proposed to be revised to read as follows:

**§ 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 which 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 WHD 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 e-mail 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 e-mail. 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 e-mail 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 e-mail, a

correct e-mail 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 e-mail address listed on the "e98" must be monitored during the full solicitation stage of the procurement. Communications sent to the e-mail address provided are deemed to be received by the contracting agency. A contracting agency must update the e-mail address through the "help" process identified on the "e98," if the agency no longer intends to monitor the e-mail 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 geographic area 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 geographic area as the predecessor contractor. (See § 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.

12. Section 4.5 is proposed to be amended by revising paragraphs (a), (c), and (d) to read as follows:

**§ 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 document referred to in paragraphs (a)(1) or (2) of this section;

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

(2) Any revision of a wage determination issued prior to the award of the contract or contracts which specifies minimum wage rates or fringe benefits for classes of service employees whose wages or fringe benefits were not previously covered by wage determinations, or which changes previously determined minimum wage rates and fringe benefits for service employees employed on covered contracts in the locality. 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. 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). If the contract does not specify a start of performance date which is within 30 days from the award, and/or if performance of such procurement does not commence within this 30-day period, the Department of Labor shall be notified and any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective. 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 a revised wage determination from the Department of Labor, whichever occurs first.

(b) \* \* \* \* \*

(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 telephone for guidance.

**Subpart B—Wage Determination Procedures**

13. Section 4.50 is proposed to be revised to read as follows:

**§ 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.)

14. Paragraph (b) of § 4.54 is proposed to be revised to read as follows:

**§ 4.54 Locality basis of wage and fringe benefit determinations.**

\* \* \* \* \*

(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).

\* \* \* \* \*

15. Paragraphs (a) and (b) of § 4.55 are proposed to be revised to read as follows:

**§ 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, of course, the same for all bidders so none will be placed at a competitive disadvantage.

\* \* \* \* \*

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

16. Paragraphs (e)(1)(iv)(A) and (e)(2)(iii)(A) of § 4.123 are proposed to be revised to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

(1) \* \* \*

(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.

\* \* \* \* \*

(2) \* \* \*

(iii)(A) If the Administrator determines after award of the prime contract that any of the requirements in paragraph (e)(2) 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.

\* \* \* \* \*

17. Section 4.144 is proposed to be revised to read as follows:

**§ 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.

[FR Doc. 04–27422 Filed 12–15–04; 8:45 am]

BILLING CODE 4510–27–P