

THE SERVICE CONTRACT ACT: A PRIMER FOR THE NEW DECADE

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The Service Contract Act (SCA), 41 U.S.C. §§ 351 et seq., and its implementing regulations, 29 C.F.R. §§ 4.0 et seq., govern the minimum wages and fringe benefits that contractors must pay employees that work on most government contracts for services. The minimum monetary wages and fringe benefits contractors must pay certain employees are set forth in wage determinations issued by the Department of Labor (DOL). Because of the DOL's recent increased enforcement of SCA requirements, if the SCA applies to a company's contracts and employees, it is important for the company to understand what it must do and what can happen if it fails to meet its obligations. This article provides general information for companies that provide services to the government and their counsel about the requirements of the SCA and the consequences for companies that fail to follow those requirements.

To Which Contracts and Employees Does the SCA Apply?

Covered Contracts

Contracts to which the Service Contract Act applies are called "covered contracts." A covered contract is a service contract for an amount exceeding \$2,500 whose principal purpose is to provide services to the U.S. government.

The DOL regulations provide that the SCA applies to contracts whose principal purpose is to provide services but not to those contracts for which services are only incidental to performance of the contract for another purpose.¹ The regulations provide a nonexhaustive list of 55 types of contracts that have the principal purpose of furnishing services through the use of service employees. Contracts for certain types of services are statutorily exempt from the SCA, including services for construction and repair of public buildings, public utility services, operation of U.S.

Postal Service contract stations, services of communication companies, contracts for individual services, and certain concession contracts.² The DOL created an additional exemption for contracts for the maintenance and repair of automated data processing equipment, scientific and medical equipment, and office and business machines if they are commercial items and meet other requirements.³

The act covers services provided to the U.S. government within the United States, the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories. Importantly, the SCA does not apply to a service contract performed in its entirety outside the United States and its territories. The regulations also provide guidance about the applicability of the SCA to situations in which part of the contract is performed in the United States and part is not.⁴

The Federal Acquisition Regulations System (FAR) prescribes contract clauses that must be incorporated into certain contracts for services. The principal contract clause implementing the SCA is FAR 52.222-41, Service Contract Act of 1965, as amended. Depending on the type of contract at issue, other clauses must also be included, including FAR 52.222-43 and 52.222-44, which provide the mechanisms for adjusting the price of the contract after a new wage determination has been issued.

Covered Employees

Section 357(b) of the Service Contract Act defines a service employee as any person engaged in the performance of a covered contract for services. The statute and its implementing regulations exempt bona fide executive, administrative, and professional employees and apprentices, student learners, and certain disabled or handicapped individuals from its requirements.

Contractors should take special care when classifying

certain employees as exempt under SCA-covered contracts. The DOL regulations at 29 C.F.R. § 541.0 et seq. provide detailed information on the classification of exempt employees and caution that an employee's status must be determined by whether the employee's salary and job duties meet the requirements of the regulations.

Subcontractors

The SCA's requirements apply with full force and effect to covered subcontracts and covered subcontract employees. In fact, the DOL regulations specifically note that the word "contractor" shall be deemed to include a subcontractor. Prime contractors are jointly and severally liable with their subcontractors for underpayments and any other violations of the SCA. Contractors are responsible for including all relevant contract clauses pertaining to the SCA and all relevant wage determinations in their covered subcontracts. Importantly, enforcement sanctions, discussed below, can be invoked against both prime contractors and subcontractors in the event that the subcontractor fails to follow the SCA's requirements.

If the SCA Is Applicable, What Are the Requirements?

The SCA requires contractors to pay covered service employees' wages and fringe benefits in accordance with the prevailing local labor rates. Every covered contract must contain, as an attachment, the relevant current DOL wage determination, which sets the minimum monetary wages and fringe benefits for the covered employees for the geographic area in which they are performing services. The regulations provide for two types of determinations that can specify the wages and benefits to be paid: (1) a determination with the wages and fringe benefit rates prevailing in the particular locality where the contract is being performed or (2) a determination setting forth the wages and fringe benefits, including accrued and prospective increases, specified in a collective bargaining agreement (CBA).⁵

In some instances, a proposed service contract will be a successor, or follow-on, to an incumbent service contract with services to be performed in the same locality as the incumbent contract. If the incumbent contractor has been furnishing services through the use of a CBA, the contracting agency may use that contractor's CBA to incorporate a wage determination into the successor contract for the same services in the locality. However, if the contracting agency has information indicating that the CBA was not entered into as a result of arm's length negotiations, or that the CBA uses wages or rates substantially at variance with those prevailing in the locality, the agency must so inform the DOL's Wage and Hour Division. Indeed, any affected or interested person, including the contracting agency, may request a hearing pursuant to 29 C.F.R. § 4.10, "Substantial Variance Proceedings," or § 4.11, "Arm's Length Proceedings." If a hearing is granted, and if DOL later determines that the CBA was not reached as a result of arm's length negotiations or is otherwise substantially at variance with locally prevailing rates, the DOL is not required to follow the incumbent's CBA and may amend the wage determination as appropriate for the affected services in the locality.⁶ The

regulations also require the contractor either to give the covered employees working on a covered contract notice of the compensation due or to provide the employee with a copy of the wage determination containing the minimum wages and fringe benefits to be paid.⁷

Multiple-year contracts, including those with option periods, require the contracting officer to issue a modification, at the time of option exercise, incorporating any new or revised wage determination that has been issued since the beginning of the previous contract period.⁸ Therefore, on a multiple-year contract 48 C.F.R. § 22.1007 requires the contracting agency to obtain any revised wage determination prior to the exercise of each option year and to incorporate the new or revised determination into the contract for the applicable option period.⁹

To obtain a wage determination, the contracting agency must notify DOL's Wage and Hour Division at least 60 days prior to the event causing the need for a new determination. Events that require new wage determinations include the following:

- an invitation for bids,
- a request for proposals,
- commencement of negotiations,
- exercise of an option or contract extension,
- the annual anniversary date of a multi-year contract subject to annual appropriations, or
- the biennial anniversary of a multi-year contract not subject to appropriations.

The notice to the DOL must include a listing of classes of service, employees expected to be employed, the number of employees in each class, and a specification of the wage rates and fringe benefit rates that would be paid to government employees if the service were performed by them. If a CBA applies to the incumbent contract, the agency must provide DOL with the corresponding wage and fringe benefit rates applicable to that agreement.¹⁰ It should be noted that, if a new wage determination is requested for an option exercise, contract extension, or anniversary date on a contract with a CBA in place, the contractor is the incumbent and its own CBA would be used as the basis for the new determination.

Even though it is the contracting agency's obligation to obtain and incorporate wage determinations into contracts, it is the responsibility of the contractors and subcontractors to maintain complete and accurate records demonstrating SCA compliance. As with most records related to government contracts, these records must be maintained for three years following completion of the contract and must be available for inspection by DOL upon request. Failure to keep and maintain records reflecting covered employees, job classifications, hours worked, and wages and fringe benefits paid, among other things, is a violation of the SCA in and of itself.¹¹

The contract clause prescribed by the FAR allows the contractor to seek an adjustment to the contract price or unit price labor rates to correspond to the actual increase in applicable wages and fringe benefits caused by a revised

wage determination.¹² To the extent a revised wage determination lowers wages or benefits, the contractor is not obligated to reduce its contract price unless it voluntarily reduces its wages or fringe benefits paid.

To facilitate an adjustment under the FAR clause, the contracting officer is required to issue a notice to the contractor prior to the expiration of the current contract period. The contractor, in turn, is required to notify the contracting officer within 30 days of receiving the new or revised wage determination from the contracting officer, and must provide a statement of the amount claimed, along with any relevant supporting data requested by the contracting officer. Because the regulations require a new wage determination at the time each option period is exercised, a request for an adjustment would reflect the required adjustment for the upcoming contract option period. Once the parties agree on the amount of the price adjustment, the contracting officer is required to modify the contract price in writing.¹³ Contractors should proactively monitor the incorporation of revised wage determinations into their contracts in order to maintain compliance with the SCA and to preserve their right to any corresponding price adjustments.

What Are the Consequences of Violating the SCA?

The requirements of the SCA are implemented and enforced by the Wage and Hour Division of the Department of Labor. Cooperation with the division's investigators during any investigation undertaken by the DOL is mandatory. Section 22.1024 of the FAR requires contractors to permit examination of records and interviews of employees and to provide any information requested on itself, its subcontractors, their contracts, and the nature of the services provided.

If a DOL investigation results in unfavorable findings as to the contractor's practices and procedures governed by the SCA, an administrative action can be brought against the contractor. The DOL's regulations, 29 C.F.R. Part 6, Subpart B, provide detailed information and procedures related to enforcement proceedings for alleged SCA violations. In addition, the FAR provides that any contractor dispute over SCA and other labor standard requirements are handled under the SCA FAR clause, not under the standard contracts disputes clause, FAR 52.233-1.

The SCA and Part 4 of the DOL regulations provide for a number of penalties for violating the SCA if a contractor is not successful at an administrative proceeding. These penalties include withholding of payments and debarment from federal contracting and are applicable to any "party responsible." The contract can also be terminated for default. Importantly, a party responsible includes not only a contractor or subcontractor but also an officer of the corporation who actively directs and supervises the contract performance as well as all persons who exercise control, supervision, or management over the performance of the contract. A party responsible is individually and jointly liable with the company for SCA violations.

A contractor found to be in violation of the SCA is required to pay any underpayments resulting from failure to pay a proper wage or fringe benefit amount. This amount

may be set off from any other contract the contractor has with the federal government. In other words, if a contractor is owed money from the government on an entirely different contract, the DOL may direct the contracting officer for that separate contract to withhold payments in order to satisfy the underpayments caused by the SCA violation, even if the other contract is not subject to the SCA. If the withheld payments are not sufficient to satisfy the amount of the underpayment owed for SCA violations, the government may bring an action against the contractor in federal court to recover the remaining amount of the underpayments.

In addition to recovering underpayments, the government may also debar contractors or subcontractors from federal government contracting for violations of the SCA. The regulations provide that a contractor *shall* be declared ineligible to receive federal contracts for three years *unless* the secretary of labor recommends otherwise because of unusual circumstances. In order to obtain relief from a debarment penalty, the contractor must demonstrate a good compliance history, cooperation with any investigation, repayment of moneys owed, and sufficient assurances of future compliance. Several other factors will also be considered, including whether the contractor has been previously investigated for SCA violations, whether the contractor has committed record keeping violations that impede the investigations, the impact of the violations on unpaid employees, and whether the sums due were promptly paid. However, if a contractor's conduct that results in a violation of the SCA was willful, deliberate, or aggravated, or if the violations were the result of culpable neglect and disregard or of culpable failure to comply with record keeping requirements, then the contractor will receive no relief from debarment sanctions notwithstanding its steps to remedy the situation. As noted above, this sanction is applicable to certain officers and other individuals as well.

Finally, the contracting agency may cancel the contract after notice to the contractor. The contractor may then be liable for any additional procurement costs incurred by the agency to ensure completion of the original contract.

Conclusion

The current administration has taken a proactive approach to labor issues over the past two years through executive orders and an increased push for the "in-sourcing" of federal jobs. This has caused the Department of Labor to step up its enforcement of potential violations of the SCA and other regulations governing labor hours. In November 2009, the DOL announced plans to add 250 new investigators in the Wage and Hour Division, which investigates issues related to the Service Contract Act. The Department of Homeland Security's Office of Inspector General also issued a report in November 2009 noting that both government departments were not taking sufficient steps to ensure that required wages and fringe benefits were being paid under SCA-covered contracts and subcontracts.

In addition, contractors and their counsel should be

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Cir. 2005). Whether a waiver is knowingly and intelligently agreed to “must be evaluated by reference to the totality of the circumstances.” *United States v. General*, 278 F.3d 389, 400 (4th Cir. 2002). However, two days before the Fourth Circuit decided *Lynn*, it held in *United States v. Manigan*, 592 F.3d 621, 628 (4th Cir. 2010), that an appellate waiver was unenforceable when the district court advised a defendant he had a right to appeal and the prosecution neglected to inform the court that the defendant had signed an appellate waiver in the case.

This opinion has caused considerable consternation among lawyers, prosecutors, and district judges. Given that a district court routinely reads appellate rights after a sentence, it is easy to foresee situations where the court might inadvertently read appellate rights to a defendant who has signed an appellate waiver. This inadvertent reading now has the effect of nullifying a district court’s previous finding that an appellate waiver was knowing and voluntary.

Attorneys should also be aware that even if a plea agreement is valid and enforceable the sentence could still be subject to collateral attack. For example, the U.S. Supreme Court recently decided that an attorney’s failure to advise his client about the ramifications of his immigration status could amount to ineffective assistance of counsel. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010). This case is critically important because an increasing number of district court cases involve defendants who are immigrants.

Continued Evolution of Sentencing

Since August 2010, the Fourth Circuit has published several cases that further clarify and expound on its holding in *Lynn* and similar cases. It is a virtual certainty that, by the time this article makes it from the computer screen to the printed page, another few dozen cases will have changed the sentencing landscape even more.

Most post-*Lynn* cases have focused on the procedural reasonableness of a sentence, especially the role of the § 3553(a) factors in making an individualized assessment in each case. The Fourth Circuit has not spent a great deal of time analyzing the substantive reasonableness of sentencing since the Supreme Court’s decisions in *Booker* and *Gall*. It is logical that the Fourth Circuit will soon begin examining this area of sentencing jurisprudence.

In order to keep abreast of this changing landscape, attorneys and judges must stay vigilant and remain adaptable. They should be aware that, when it comes to sentencing defendants, a new day is dawning in federal courts. **TFL**

Judge Anderson is a senior U.S. district judge in Anderson, S.C. Judge Anderson’s law clerks, Derek A. Shoemaker and Margaret E. Baker, contributed to this article. © 2010 Hon. G. Ross Anderson Jr. All rights reserved.



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aware that simply flowing down the SCA requirements to subcontractors may not be enough. As noted, the SCA applies with equal force and effect to subcontractors. The DOL has the right to audit subcontractors for SCA compliance, and prime contractors are directly liable for any violations by their subcontractors. As discussed above, contracting agencies are required to make offsets against a prime contractor’s contract payments to cover any such failures by their subcontractors, forcing the prime contractor to chase the subcontractor for reimbursement and also placing the prime contractor at risk of debarment. **TFL**

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fice of Patton Boggs, where she practices in the areas of business, regulatory, and employment law. © 2010 Robert K. Tompkins, Elizabeth M. Gill, and Lindsey D. Weber. All rights reserved.

Endnotes

- ¹29 C.F.R. § 4.111.
- ²41 U.S.C. § 356; 29 C.F.R. §§ 4.116-4.122; 29 C.F.R. § 4.133.
- ³29 C.F.R. § 4.123(e).
- ⁴29 C.F.R. § 4.112.
- ⁵29 C.F.R. § 4.3(b).
- ⁶29 C.F.R. § 4.4(b)(5), (c)(4).
- ⁷48 C.F.R. §§ 22.1018(b), 52.222-41(g).
- ⁸48 C.F.R. § 52.222-43(c).
- ⁹29 C.F.R. § 4.4(a)(1)(iv).
- ¹⁰29 C.F.R. § 4.4.
- ¹¹29 C.F.R. § 4.6(g)(3).
- ¹²48 C.F.R. § 52.222-43.
- ¹³48 C.F.R. § 52.222-43.

